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IN

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AND IN

**THE HIGH COURT OF JUSTICE,**

VIZ.

**Chancery; Queen's Bench; Common Pleas; Exchequer;  
 Probate, Divorce and Admiralty, Divisions;  
 And in other Divisional Courts.**

**MICHAELMAS, 1878, to MICHAELMAS, 1879.**

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# SUPREME COURT OF JUDICATURE.

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[IN THE COURT OF APPEAL.]

1878. } TWYECROSS (administratrix) v.  
Nov. 12. } GRANT AND OTHERS.\*

*Parties—Death of Plaintiff in Action for Damages—Survival of Cause of Action to Administratrix—Rules of Court, 1875, Order L. Rules 1, 4.*

*The plaintiff who had obtained a verdict in an action to recover money paid for shares which proved to be of no value, and which he had been induced to take on the faith of a fraudulent prospectus issued by the defendants, died pending an appeal, and his administratrix sought to be added as a party to the action in his place:—Held (affirming the decision of the Divisional Court), that the cause of action, being one which diminished the value of the personal estate in the hands of the administratrix, survived, and that the administratrix was rightly added as a party to the action under Order L.*

This was an appeal from an order of a Divisional Court, affirming an order of a Master, by which Ellen Twycross, the widow and administratrix of James Twycross deceased, the plaintiff in an action

of *Twycross v. Grant*, reported 46 Law J. Rep. C.P. 636, had been added as a party to carry on that action in the place of the deceased James Twycross.

James Twycross sued the defendants under the Companies Act, 1867, to recover money paid on shares taken by him in a company of which the defendants were promoters, on the ground that the prospectus issued by them contained fraudulent misrepresentations by which he had been induced to take the shares. The plaintiff averred in his declaration (delivered July, 1873)—“that he took the shares on the faith of the prospectus, and paid a large sum of money in respect of them, that the shares were and are of no value to the plaintiff, and that he had lost the moneys he so paid to the company.”

The jury found a verdict for the plaintiff, and assessed the damages at 700*l.* The defendants afterwards obtained a rule in the Common Pleas Division for a new trial which was discharged, and judgment given for the plaintiff. On appeal by the defendants to the Court of Appeal the decision of the Common Pleas Division was affirmed. The defendants then appealed to the House of Lords, and before this appeal was heard the plaintiff, James Twycross, died, and his

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\* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

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administratrix applied to be added as a party to carry on the action pursuant to the provisions of Order L. rule 4 of the rules of Court (1).

The Master made the order; and thereupon the defendant Grant took out a summons to rescind the order, which summons was referred to the Court.

The Divisional Court (Field, J., and Huddleston, B.) affirmed the order of the Master, and from that decision the defendant Grant now appealed.

*Pollard*, for the appellant.—The order to add the administratrix of the deceased as plaintiff in this action cannot be supported, for this is an action for damages for fraudulent misrepresentation, which is a personal action and dies with the person; nor is this case within the provisions of the statutes which have modified the common law rule, 4 Edw. 3. c. 7; 25 Edw. 3. c. 5; and 3 & 4 Will. 4. c. 42, which are collected in the notes to *Wheatley v. Lane* (2). It was held in *Peek v. Gurney* (3), in the House of Lords, that an action for damages for deceit did not survive. It may be that the administratrix could sue if she could allege special damage to the personal estate of the deceased; but these damages are only damages recoverable for a personal wrong. There must also be an allegation of such special damage on the record—*Chamberlain v. Williamson* (4); a right of action on a covenant may survive—

(1) Order L. rule 1.—“An action shall not become abated by reason of the marriage, death or bankruptcy of any of the parties, if the cause of action survive or continue.”

Rule 4. “Where by reason of marriage, death or bankruptcy, or any other event, occurring after the commencement of an action, and causing a change or transmission of interest or liability . . . it becomes necessary or desirable that any person not already a party to the action should be made a party thereto . . . an order that the proceedings in the action shall be carried on between the continuing parties to the action and such new party or parties, may be obtained *ex parte* on application to the Court or a Judge, upon an allegation of such change or transmission of interest or liability.”

(2) 1 Saunders' Reports, p. 216.

(3) 43 Law J. Rep. Chanc. 19; s. c. Law Rep. 6 H.L. 377.

(4) 2 M. & S. 408.

*Kingdon v. Nottle* (5), without any need of such an allegation, but a cause of action founded in tort will not. Even if the cause of action would survive to an executrix it will not survive to an administratrix.

*Sir H. James, M. Howard and Atkinson*, for the respondent, were not called on to argue; but as to the last point they referred to *Smith v. Vanger Colgay* (6).

BRAMWELL, L.J.—I am of opinion that this appeal must be dismissed. It is clear that at common law a personal action died with the person; it was then enacted by 4 Edw. 3. c. 7, that executors should have a right of action for trespasses done to the goods of their testators in like manner as they whose executors they are would have had if they were living. That Act and the Acts amending it, to which reference has been made, have received a very wide construction, and it has been considered that executors can sue in all matters on which their testator could have sued, except on such as relate to freeholds and to the personal character of the deceased, that is to say, in respect of matters where the wrong done affected the person only and not the property of the deceased. It has been held that an action will lie by executors for an escape and for a false return, and that is so, because the injury done was damage to the personal property, and not to the feelings only of the testator. The provisions of 3 & 4 Will. 4. c. 42, make the case even clearer, for administrators as well as executors are especially mentioned in section 2 of that statute. It has, however, been admitted in the argument for the appellant that this action would lie if there were an averment on the record of special damage caused to the personal estate of the deceased. I am, however, of opinion that that is not necessary, and that it is enough that the cause of action exists in respect of some detriment caused to the property or estate of the deceased. In *Peek v. Gurney* (3), Lord Chelmsford dwelt upon one ground on which an action might be maintained against

(5) 4 M. & S. 53.

(6) Cro. Eliz. 384.

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the executors of a wrong-doer, but he did not dwell on any of the other grounds, and he did not express any opinion on the authorities with which we have to deal here or on the point which arises in this case. I think that an executrix can sue on the averments contained in this record, and there is no difference as regards the right to sue between an administratrix and an executrix. This has been law for many years, as is proved by the case from *Croke's Elizabeth* which was cited to us, and it is strengthened by the enactment of 3 & 4 Will. 4, to which I have already referred. I am, therefore, of opinion that this appeal must be dismissed and that there is no difference between the right of action by an executrix and by an administratrix for damage to the real and the personal estate of a deceased person.

BRETT, L.J.—I am also of opinion that the order which is the subject of this appeal is right. In any action whether in contract or in tort, where injury to the estate in the hands of the executors is shewn to exist on the face of the proceedings, that action survives to the executor or administrator. Without, however, laying down any general rule it is abundantly clear, and indeed it has been averred, in this case, that money has been paid and that the shares for which it was paid have turned out worthless, and that the money has been lost, so that this allegation shews injury to the personal estate in the hands of the administrator. It is not, however, absolutely necessary that this should appear upon the record, for the averments which shew this injury might be made when the application to add a fresh party to the action came on for hearing, so long as it was clearly shewn that the estate of the deceased had been injured by the act or default of the defendants to this action.

COTTON, L.J.—The question which we have to consider arises on the construction of Order L. of the Rules of Court. The old rule of common law does not apply where there is a statement on the record of damage to the personal estate of the deceased. Now there is such a

statement in the present case. It is therefore right that the administratrix should be made a party to this action pursuant to the provisions of rule 4 of Order L. There is a clear distinction between a tort which diminishes the value of a personal estate and a tort for which damages may be recovered which may be added to and so may increase the value of a man's personal estate. I am of opinion that the order of the Divisional Court is right, and that this appeal must be dismissed.

*Judgment affirmed.*

Solicitors—Ridley, for appellant; Mercer & Mercer, for respondent.

[IN THE COURT OF APPEAL.]

1878. } DAVIES AND OTHERS v. FELIX  
Nov. 18. } AND OTHERS.\*

*Appeal—Judgment entered by Judge according to Finding of Jury—Jurisdiction of Court of Appeal—New Trial—Rules of Court of December, 1876, Order XXXIX. rule 1, Order XL. rule 4.*

*After a trial by jury and judgment entered pursuant to the finding of the jury, if it is desired to set aside the judgment, the application must be made to a Divisional Court, and not to the Court of Appeal.*

*Such an application is really an application to set aside the verdict, and for a new trial within Order XXXIX. rule 1, and does not come within the provisions of Order XL. rule 4.*

This was an action for the recovery of land, tried before Bramwell, L.J., with a jury. The plaintiffs claimed to be entitled as heirs-at-law.

At the close of the case for the plaintiffs, the counsel for the defendants submitted that the plaintiffs had not made out their case, and that there was no evidence to go to the jury in support of

\* *Coram* James, L.J.; Brett, L.J.; and Cotton, L.J.

*Davies v. Felix, App.*

their claim, and requested the learned Judge to direct the jury to find a verdict for the defendants. His Lordship declined to do this; and the jury, at the conclusion of the whole case, found a verdict, on the questions left to them, for the plaintiffs. The learned Judge then said that he would, with the consent of both parties, consider whether there was evidence to support the finding, and would give judgment on the following morning; and the next day, after consulting Cleasby, B., his Lordship gave judgment for the plaintiffs, in accordance with the finding of the jury.

*J. W. Bowen* and *K. Digby*, for the defendants, now moved the Court of Appeal against the judgment of the learned Judge.

*B. T. Williams* and *Cozon*, for the plaintiffs, took the preliminary objection that the application ought to be made to a Divisional Court in the first instance.—This is really an application for a new trial on the ground of misdirection; and if so, the application should be to a Divisional Court under the provisions of Order XXXIX. rule 1. of December, 1876 (1). If this were an application to enter judgment in some way other than that in which it has been entered the application would be rightly made to this Court

(1) Order XXXIX. rule 1.—“Where in an action in the Queen's Bench, Common Pleas or Exchequer Division, there has been a trial by a jury, any application for a new trial shall be to a Divisional Court. And where the trial has been by a Judge without a jury, the application for a new trial shall be to the Court of Appeal.”

Order XL. rule 4.—“Where, at or after the trial of an action by a jury, the Judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and enter any other judgment, on the ground that the judgment directed to be entered is wrong by reason of the Judge having caused the finding to be wrongly entered with reference to the finding of the jury upon the question or questions submitted to them.

“Where, at or after the trial of an action before a Judge, the Judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment, and to enter any other judgment upon the ground that upon the finding as entered the judgment so directed is wrong. An application under this rule shall be to the Court of Appeal.”

under Order XL. rule 4. of December, 1876 (1); but here the contention is that the verdict is wrong, and wrong because the learned Judge failed to direct the jury aright. *Yettes v. Foster* (2) and *Etty v. Wilson* (3) are in point.

*J. W. Bowen*, for the defendants.—This Court can enter judgment for the right party if the Judge at the trial has entered it wrongly, Order XL. rule 4 (1).

[JAMES, L.J.—Surely not here, for if the verdict is right the judgment is right, and rule 4 of Order XL. makes provision for cases where the judgment has been wrongly “entered with reference to the finding of the jury.”]

The verdict is founded on evidence wrongly admitted, and is therefore wrong.

[BRETT, L.J.—That is to say, the object is to go behind the verdict; and if the contention of the appellants succeeds, what order can be made save an order for a new trial on the ground of misdirection? and if so, then the application cannot be made to this Court.]

The learned Judge ought not to have entered the judgment for the plaintiffs, and it is desired to set aside that judgment as being wrong.

[BRETT, L.J.—Rule 4 of Order XL. applies to cases where the Judge at the trial puts certain questions to the jury, and then on the answers given makes a mistake as to the judgment to be entered. In all such cases the verdict stands, and the judgment is set aside; here the object is to set aside the verdict—that is, to have a new trial, when the defendants might possibly make a better case.]

JAMES, L.J.—It is not unnatural that misapprehensions should occur when new rules and new orders come into force under a new system of practice, and I think that this is a case in which there has been a misapprehension, and this misapprehension of the rights of the parties has led to a mistake which we cannot cure in this Court. The question is, whether this is an appeal which if successful would result in a new trial or in a final judgment; and I think that in this

(2) Law Rep. 3 C.P. D. 437.

(3) 47 Law J. Rep. Q.B. 664.

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case we could only order a new trial. It is not possible for us here to set aside the verdict and the findings of the jury, and while those stand it is plain that there is only one judgment which could properly be given. If the Judge ought to have said something to the jury which he did not say, then that is misdirection, and there must be a new trial; and if so, then this case comes within the provisions of Order XXXIX. (1), and the application should be made in the first instance to the Divisional Court.

BRETT, L.J.—We must take it that at the trial, after evidence had been given and laid before the jury, the Judge was asked to tell the jury to find a verdict for the defendants, and that he declined to do so; then, on the evidence before them, the jury found a particular fact on which the judgment is founded. Then the objection is taken that that fact cannot stand because it is founded on evidence which the Judge ought not to have left to the jury. If this be so, there has been in fact misdirection, and the consequence of that is that there must be a new trial, as would have been the case prior to the passing of the Judicature Act. That Act, however, does not make any difference as to this, for still if there has been misdirection there must be a new trial. Order XL. rule 4 (1), provides that where a Judge wrongly enters the judgment with reference to the finding of the jury, then the application may be made to the Court of Appeal to set it aside; but that applies to cases where the original finding of the jury is to stand; whereas the contention here is that the findings of the jury cannot stand, for as long as they stand the judgment is confessedly right, so that rule 4 of Order XL. does not apply. Then the case must come within Order XXXIX. rule 1, and that rule expressly enacts that the application for a new trial shall be made to a Divisional Court, unless the trial has been before a Judge without a jury. This application has been misconceived, and we cannot listen to it. The case of *Yetts v. Foster* (2), which has been cited, applies to this case, and in my opinion authority and principle and the provisions of the

Judicature Act, forbid our hearing this application.

COTTON, L.J.—It is clear that if the verdict was right then this judgment is right. The appellants desire to go behind the verdict, but then the application must be made elsewhere. Rule 4 of Order XL. does not apply to this case; it applies to cases where the judgment has been wrongly entered on the findings of the jury. I agree with the rest of the Court that this application must fail.

*Appeal dismissed.*

Solicitors—Paterson, Snow & Bloxam, agents for W. H. Thomas, Aberystwith, for appellants; Hayes, Twisden & Co., agents for Griffith Jones, Aberystwith, for respondents.

[IN THE QUEEN'S BENCH DIVISION.]  
1878. }  
Nov. 11. } THE QUEEN v. TURMINE.

*Quo Warranto—Elementary Education Act, 1870 (33 & 34 Vict. c. 75), Second Schedule, Part I. Rules 12 and 14—Disqualification of Member of School Board for Non-attendance—Re-election of Disqualified Member.*

*Where a member of a School Board having absented himself during six successive months from all meetings of the board, ceased by the operation of rule 14 of the first part of the second schedule of the Elementary Education Act, 1870, to be a member of the School Board, and his office thereupon became vacant, and was filled up by the election of another person,—Held, that he was not disqualified from being a candidate and being elected at the next triennial election of members of that School Board; the disqualification in rule 12 of the same schedule only attaching at most so as to preclude his being eligible for the intermediate vacancy which his own default had caused.*

This was a rule for a *quo warranto*, calling upon Captain Turmine to shew by what right he claimed to act as a member of the School Board for the parish of Minster in Sheppey.

It appeared that in December, 1874, Captain Turmine had been elected a

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member of that board at the general election of members. In 1875 he failed to attend any meeting of the board between the dates of February 24th and September 1st, whereupon, such absence not having arisen from any cause approved by the board, his office was declared vacant, and was filled up by the election of another person on the 3rd of January, 1876. In December, 1877, the triennial election took place, when Captain Turmine was a candidate, and was elected at the head of the poll, and since that date had regularly attended the board meetings.

The question was, whether Captain Turmine was rendered ineligible by reason of his having previously been deprived of his office for non-attendance. The Elementary Education Act, 1870 (33 & 34 Vict. c. 75), second schedule, part first, rule 12, enacts, "Any person who ceases to be a member of the School Board shall, unless disqualified as hereinafter mentioned, be re-eligible," and rule 14 says, "If a member of the School Board absents himself during six successive months from all meetings of the board, except from temporary illness or other cause to be approved by the board, or is punished with imprisonment for any crime, or is adjudged bankrupt, or enters into a composition or arrangement with his creditors, such person shall cease to be a member of the School Board, and his office shall thereupon be vacant."

*Winch* shewed cause against the rule. —The rule which makes a member of the School Board vacate his office for non-attendance during six successive months does not create a disqualification in the individual; it merely says that he shall cease to be a member of that board. Rule 12 cannot, therefore, refer to the occurrence of a vacancy under rule 14. As the rules in the schedule are to be read as if part of section 31 of the Act, the disqualification in rule 12 may refer to those in section 34 of the Act, which would thus be "hereinafter mentioned." But, upon any view of the Act, it cannot be so construed as to create a perpetual disqualification.

*Kemp* (*Scott* with him), in support of the rule.—The words are quite distinct in the rule as to certain disqualified persons not being re-eligible; and though the word disqualification is not used in rule 14, yet that rule is descriptive of certain disqualifications, and as there are none others subsequently mentioned, they must be those referred to in rule 12.

[*COCKBURN, L.C.J.*—Does it not mean ineligible for the vacancy he has created?]

No. Rule 12 clearly refers to the triennial elections, and contemplates the re-election of a retiring member for three years. This would not apply to filling up an intermediate vacancy.

*COCKBURN, L.C.J.*—I think that this rule should be discharged. The language of the Act of Parliament is possibly more or less ambiguous; but the application for this writ of *quo warranto* fails, because those who ask for it are in a dilemma. If, on the one hand, the view that I threw out during the argument be not the true one in interpreting this statute, then all I can gather from the language of the Act is that it was intended that there should be some disqualifications to be enumerated afterwards, which have been, however, omitted; and this seems not improbable, because all that is said in rule 14 is that a person shall vacate his office, and the rule does not go on to say that such vacation of the office shall constitute a disqualification. That being so, we cannot supply the terms of disqualification so omitted. Then there is the further difficulty that there is nothing to limit such disqualification, and if so created, it would exist for ever.

I think, therefore, that the alternative view of the construction of the statute is preferable, and it is one which will reconcile all the difficulties.

Six months' continuous absence will cause a member of the School Board to vacate his office, and this being the enactment, I can quite understand there being a provision that he shall not be re-eligible to the vacancy created by his own default. But afterwards, when a fresh election takes place of all the members at the triennial election, then it is reasonable that the persons who have the



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right of election should be permitted to elect the person who had previously vacated his office under those circumstances, if they choose to do so. Therefore, as I read the Act, six months' continuous absence by a member from the meetings of the School Board causes a vacancy in the office held by him, and disqualifies him from being elected to fill that vacancy. But, as I have said, if that be not the right construction of the schedule, then it is a case of defective legislation which cannot operate to the prejudice of the defendant.

MELLOR, J.—I think that on the whole I can come to no other conclusion than that arrived at by the Lord Chief Justice. If the granting of this rule could act in a summary way, perhaps I might be disposed to allow the Act to be more fully discussed; but as it would be a cumbersome and expensive method, I will not adopt it against the individual who would thus be made to suffer for the ambiguity of the Act of Parliament. Now the section is so far distinct that it does not use the word "disqualify," but says that the "person shall cease to be a member of the School Board, and his office shall be vacant;" and those words are satisfied by our holding that the vacancy shall be during the period for which such person was originally elected, that is, till the end of the three years. It is true that it is said also that a person disqualified shall be ineligible, and the words I have previously read may have intended to create a disqualification in the individual, though they did not expressly say so. But even then, I cannot think that it would be a disqualification which would render the person for ever after ineligible; and therefore I come, though with hesitation, to the conclusion that he was re-eligible at the general election, and that this rule should be discharged.

*Rule discharged.*

Solicitors—J. J. Peddell, for plaintiff; Thomas Simey, for defendant.

[IN THE EXCHEQUER DIVISION.]

1878. }  
Nov. 8, 15. } THOMAS AND OXLEY v. LEWIS.

*Shipping—Ship's Husband—Authority to bind Shipowner—Cancellation of Charter-party.*

*A ship's husband, as such, has no authority to bind the shipowner to pay money to the charterer in consideration of the cancellation of the charter-party.*

CASE stated on appeal by the Judge of the County Court of Monmouthshire, holden at Newport, for the opinion of the Court whether, under the circumstances stated, the plaintiffs were entitled to recover a sum of 24*l.* 0*s.* 6*d.*

At the dates of entering into and cancelling the charter-party presently referred to, the defendant was part-owner of the ship *Myvanwy*, of 162 tons register or thereabouts, and Thomas Robbin Rees was ship's husband of the vessel appointed by the defendant and other part-owners.

On the 9th of February, 1876, Rees, as such ship's husband, entered into a charter-party with the plaintiffs, whereby it was stipulated that the vessel being then at Amsterdam should proceed to Tobago, there load, and thence to the United Kingdom, earning freight at the rate of 47*s.* 6*d.* per ton. It was further stipulated by the charter-party that should the vessel not arrive at Tobago by the 1st of April, the charterers' agent was to have the option of cancelling or confirming the charter-party; and five per cent. commission on the amount of freight, primage and demurrage were expressed to be due on the execution of the charter-party, and to be paid to the plaintiffs.

Rees afterwards informed the plaintiffs' agent that the ship could not go to Tobago in time, and in the month of March, at the request of Rees, the plaintiffs agreed to cancel and did cancel the charter-party on the express agreement of Rees to pay the sum of 24*l.* 0*s.* 6*d.*, being five per cent. on 200 tons of sugar (which, it was estimated, her cargo would have been) at 47*s.* 6*d.* per ton, and 5*s.* 6*d.* for stamps.

On the 29th of July Rees gave his promissory note to pay this amount, but such note was not paid. The ship did

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not go to Tobago, and the cancellation of the charter-party was for the benefit of the owners.

The County Court Judge held that although Rees had, as ship's husband, authority to charter the vessel, he was not empowered to pledge his owner's credit for the payment of a sum of money for the cancellation of a charter-party without their express sanction, that being a matter quite unusual and out of ordinary course, however advantageous the compromise effected might have been to the interest of all the owners; and as no special authority was proved to have been given, the learned Judge nonsuited the plaintiffs.

*Anstie*, for the appellants.—It is conceded on the part of the defendant that the ship's husband had the right to cancel the charter-party, because he has acted on that assumption. If the ship's husband had a right to cancel he had authority to cancel for a sum of money. The defendant cannot take the benefit of the cancellation and repudiate the burden. If the defendant is right in his contention the charter-party is still in full force. It was only cancelled by the plaintiffs in consideration of receiving compensation, and if the defendant's agent had no authority to make a promise of compensation there has been no cancellation. The power of a ship's husband is rather bare of authority, but *Barker v. Highley* (1), *Thompson v. Finden* (2) and *Whitwell v. Perrin* (3), are in point. The giving of the promissory note does not prevent the plaintiffs from suing the principal—*Robinson v. Read* (4).

A. T. Lawrence, for the respondent.—A contract of this kind is not within the scope of the ship's husband's employment. In *Abbott on Shipping* (11th ed. p. 79) his powers are defined as follows: "He is to see that the ship is properly repaired, equipped and manned, to procure freights or charter-parties, to preserve the ship's papers, to make the necessary entries, ad-

just freights and averages, disburse and receive moneys, and keep and make up the accounts as between all parties interested." Similarly, in *Story on Agency* (§ 35) the ship's husband is said to be "entrusted with authority to direct all proper repairs and equipments and outfits for the ship; to enter into contracts for the freight or charter of the ship, if that is her usual employment, and to do all other acts necessary and proper to dispatch her for and on her intended voyage." *Bell's Commentaries on the Laws of Scotland* (p. 552, 7th ed.) are to the same effect. No authority has been produced to extend the power of a ship's husband to a case of this kind.

KELLY, C.B.—The question presented to us involves an entirely new point. Books of the highest authority, including Lord Tenterden's great work on Shipping, have been cited, but there is no decision or dictum to be found that the authority of a ship's husband extends beyond putting the ship into a proper state to proceed, and enabling it to proceed on its voyage. I should have much hesitation in holding for the first time that such authority exists as is contended for by the plaintiffs, when no case or dictum is produced to support the contention. The ship's husband, it is laid down, has power to procure a charter-party, and there authority ceases. It may be said that it is desirable where the owners and the ship are apart or in different countries that the ship's husband should have power to cancel a charter-party, but I cannot take upon myself to say that such power does exist seeing there is no authority for it. I think it is to be regretted that there is no law or usage clearly defining the authority of such persons. In the absence of authority I cannot hold for the first time that the defendant is liable.

CLEASBY, B.—I do not think it could be contended that if the owners had themselves entered into the charter-party, the ship's husband could have entered into such an engagement as this on their behalf, and I think perhaps he would not have had power to cancel it at all. *Story* lays down the extent of the authority of

(1) 15 Com. B. Rep. N.S. 27; s. c. 32 Law J. Rep. C.P. 270.

(2) 4 Car. & P. 158.

(3) 4 Com. B. Rep. N.S. 412.

(4) 9 B. & C. 449.

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a ship's husband, but the action taken by him in the present case does not come within the range of his class of duties. Entering into contracts for freight or charter is very different from putting an end to contracts. I wish I could have seen the charter-party in this case. If it was made with Rees personally, I think the cancellation would have been made with him personally.

*Judgment affirmed.*

Solicitors—Thos. White & Son, agents for J. D. Pain & Son, Newport, Monmouth, for appellants; Edmund Warriner, agent for Gibbs & Llewellyn, Newport, Monmouth, for respondent.

[IN THE COURT OF APPEAL.]

(Appeal from the Common Pleas Division.)

1878.

May 31. } KALTENBACH v. MACKENZIE.\*  
June 2, 3, 4. }

*Ship and Shipping—Marine Insurance—Constructive total Loss—Abandonment; Notice of, when necessary.*

Where the assured has received full information of a disaster having occurred to an insured vessel, of such a nature as to cause imminent danger of her becoming a total loss, he must at once make his election to treat the loss as constructively total; and must give notice of abandonment to the underwriters; and he is not excused from the necessity of giving such notice by the fact that the vessel has been subsequently sold, and that the sale as a matter of fact was the best course in the interests of all concerned, and that no advantage would, in the circumstances of the case, have accrued to the underwriters from such notice.

Rankin v. Potter (42 Law J. Rep. C.P. 169; s. c. Law Rep. 6 H.L. Cas. 83), explained.

This was an appeal from a judgment of the Common Pleas Division, making absolute an order for a new trial, and directing the verdict and judgment en-

\* *Coram* Brett, L.J.; Cotton, L.J.; and Thesiger, L.J.

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tered at the trial for the defendant to be set aside.

The action was brought on a marine policy of insurance to recover 94*l.* 11*s.* per cent. for a total loss on a time policy for 4,000*l.* on the vessel *Amiral Protet*, from the 4th of October, 1870, to the 4th of April, 1871.

A particular average loss of about 50*l.* per cent. was admitted by the defendant, and paid into Court.

The facts of the case were as follows:—

The plaintiff is a merchant, and partner in the firm of Kaltenbach, Engler & Co., carrying on business at Paris, Singapore and Saigon, and the registered owner of the *Amiral Protet*.

The policy in question was dated the 3rd of November, 1870, and was subscribed by the defendant, an underwriter, for 100*l.*

On the 14th of January, 1871, the *Amiral Protet* sailed from Saigon for Hongkong, with a cargo of rice. On the 22nd of January she struck on the Britto Bank or shoal, she was floated off the same day, and anchored the same evening off Cape St. James. On the 24th of January, she was towed into Saigon, and began to unload. On the 28th of January she was surveyed for the first time. She was then taken into dock. On the 3rd of February she was surveyed by Messrs. Waterson & Besley, who recommended a sale for the benefit of the underwriters. She was taken out of dock on the 7th of February, and floated in smooth water. No evidence was given as to the necessity of an immediate sale; and the vessel was finally condemned on the 11th of February. On the 23rd of February she was sold to a Chinaman for 1,600 dollars or 360*l.* She was patched up by him at an expense of something like 50*l.*, taken to Singapore and resold for 2,550 dollars, or about 557*l.* She was then completely repaired at an outlay of about 600*l.*, and on being surveyed at Singapore on the 15th of May was described as an A 1 insurance risk.

The material part of the correspondence, &c., was as follows:—

On the 22nd of January the master telegraphed to the representative of the plaintiff's firm at Singapore, announcing

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the accident. On the 23rd of January the news was forwarded from Saigon to the house at Singapore. On the 30th of January, the firm at Saigon wrote to the firm at Singapore, giving details of the disaster, and saying that the vessel would probably be condemned. On the same day the master of the vessel wrote to the firm at Singapore, announcing the disaster, reporting that a survey had shewn the vessel to be in very bad condition, and that a survey in dock had been recommended, and adding—"It is more than probable that a surveyor in dock will recommend that she should be condemned."

On the 31st of January, the Singapore firm forwarded the details to the plaintiff at Zurich, saying—"As the ship and freight are well insured, it would not be so very distasteful to us if the ship be condemned. If this should happen we would inform you by telegraph, as soon as we get particulars."

On the same day the Singapore firm wrote to J. C. Im Thurn, their insurance broker in London, announcing the loss, and saying, "We are afraid we shall have to come forward with an average claim very soon."

On the 3rd of February the master wrote from Saigon to the firm at Singapore, saying—"The *Amiral Protet* is in dock and the final survey was passed upon her this morning. The report of the surveyors is that such is the state of the vessel from injuries received, and the repairs required to put her in good condition are such, that it will cost at this port from 18,000 to 20,000 dollars to effect them, and it will take four months to finish her . . . . The surveyor recommends the vessel to be sold for the benefit of the underwriters; I may further state that the vessel in her present state is not in a fit state to leave this port to go to another."

On the 7th of February the Singapore firm replied to the above letter, saying—"I think it best when you follow the advice of the surveyors and let the vessel be sold" . . . . "When I could have any idea what the repairs of the *Amiral Protet* would cost here, I would telegraph to the insurance in England

and ask for their advices if we shall order the vessel down for their accounts and repair her here. But as you say she is not fit to go to sea, it is impossible to bring her down; it is much more in the interests of the insurers to sell her there."

On the 8th of February, the Singapore firm wrote to the plaintiff quoting the captain's letters of the 30th of January and the 3rd of February, and saying—"We would not be so very sorry if the vessel should be condemned and left for the account of the underwriters."

On the 11th of February, notice of the condemnation of the vessel was sent from Saigon to the firm at Singapore; and on the 24th an announcement of the sale.

On the 27th of February the firm at Singapore wrote to Mr. Im Thurn as follows:—

"We are sorry to inform you that at a survey held on the *Amiral Protet*, in the Government dock at Saigon, it has been found that the damages are so serious that it would cost from 18,000 to 20,000 dollars to repair the same, and that the repairs would take four months' time. As Government cannot place the dock at the ship's disposal for such a length of time, the same being more specially reserved for repairing men of war; considering also that in her present state she could not sail for some other port for repairs, and as the amount of repairs would have exceeded the amount insured on her, the surveyors recommended that the *Amiral Protet* should be sold for account of the underwriters, and the sale was to take place on the 23rd. We do not know as yet how the sale has turned out. Kindly inform the underwriters of the above facts, and tell them that we shall send in the average documents as soon as possible. P.S. We have just learnt from Saigon that the *Amiral Protet* has been sold at a public auction for 1,600 dollars."

On the receipt of this letter, Mr. Im Thurn communicated its contents to the plaintiff at Zurich. It was alleged that notice of abandonment was given to the underwriters on the 11th of March, but no evidence of this fact was given.

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At the trial, Lord Coleridge, C.J. directed judgment for the defendant on the grounds—

First, that notice of abandonment was essential in the circumstances of the case.

Second, that there was no evidence of such notice having been given.

A rule for a new trial was moved for in the Common Pleas Division on the ground of misdirection, it being argued on behalf of the plaintiff that it should have been left to the jury to say whether there had been a constructive total loss, and if so whether notice of abandonment could have been under the circumstances of any use to the underwriters, and that if it could not have been of use, the plaintiff was excused from the necessity of giving such notice.

The rule was argued first before Grove, J., and Lopes, J., and afterwards before Grove, J., Denman, J., and Lopes, J., by

*Butt, Cohen and Hollams*, for the defendant; and by

*Sir H. James, Watkin Williams and J. O. Matthew*, for the defendant.

THE COURT ordered a new trial on the ground that there was some evidence which should have been submitted to the jury.

The defendant now appealed.

*Cohen and Hollams*, for the defendant, cited—*King v. Walker* (1), *Farnworth v. Hyde* (2), *Proudfoot v. Montefiori* (3), *Rankin v. Potter* (4), and *The Oriental* (5).

*Watkin Williams and J. O. Matthew*, for the plaintiff, cited—*The Obequid Marine Insurance Company v. Barteaux* (6),

*King v. Walker* (1), *Roux v. Salvador* (7), and *Dent v. Smith* (8).

The arguments sufficiently appear from the judgments, which were delivered, on June 4, as follows:—

BRETT, L.J.—This case raises the question of abandonment and notice of abandonment on a policy of marine insurance. Before I enter upon the merits of the present case I think it desirable to state my view of the law.

I agree that there is a distinction between abandonment and notice of abandonment, and I concur in what has been said by Lord Blackburn in *Rankin v. Potter* (4), that abandonment is not peculiar to policies of marine insurance; abandonment is part of every contract of indemnity. Whenever, therefore, there is a contract of indemnity and a claim under it for an absolute indemnity, there must be an abandonment on the part of the person claiming indemnity of all his right in respect of that for which he receives indemnity. The doctrine of abandonment in cases of marine insurance arises where the assured claims for a total loss. There are two kinds of total loss; one which is called an actual total loss, another which in legal language is called a constructive total loss; but in both the assured claims as for a total loss. Abandonment, however, is applicable to the claim, whether it be for an actual total loss or for a constructive total loss. If there is anything to abandon, abandonment must take place; as, for instance, when the loss is an actual total loss, and that which remains of a ship is what has been called a congeries of planks, there must be an abandonment of the wreck. Or where goods have been totally lost, as in the case of *Roux v. Salvador* (7), but something has been produced by the loss, which would not be the goods themselves, if it were of any value at all, it must be abandoned. But that abandonment takes place at the time of the settlement of the claim; it need not take place before.

(7) 3 Bing. N.C. 266.

(8) 38 Law J. Rep. Q.B. 144; s.c. Law Rep. 4 Q.B. 414.

(1) 3 Hurl. & C. 209; s.c. 33 Law J. Rep. Exch. 325.

(2) 18 Com. B. Rep. N.S. 835; s.c. 34 Law J. Rep. C.P. 207; and 36 Law J. Rep. C.P. 33; s.c. Law Rep. 2 C.P. 104.

(3) 36 Law J. Rep. Q.B. 225; s.c. Law Rep. 2 Q.B. 511.

(4) 42 Law J. Rep. C.P. 169; s.c. Law Rep. 6 H.L. Cas. 83.

(5) 7 Moore P.C. 398.

(6) Law Rep. 6 P.C. 319

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With regard to the notice of abandonment, I am not aware that in any contract of indemnity, except in the case of contracts of marine insurance, a notice of abandonment is required. In the case of marine insurance where the loss is an actual total loss, no notice of abandonment is necessary; but in the case of a constructive total loss it is necessary, unless it be excused. How, then, did it arise that a notice of abandonment was imported into a contract of marine insurance? Some Judges have said it is a necessary equity that the insurer in the case of a constructive total loss should have the option of being able to take such steps as he may think best for the preservation of the thing abandoned from further deterioration. I doubt if that is the origin of the necessity of giving a notice of abandonment. It seems to me to have been introduced into contracts of marine insurance—as many other stipulations have been introduced—by the consent of shipowner and underwriter, and so to have become part of the contract, and a condition precedent to the validity of a claim for a constructive total loss. The reason why it was introduced by the shipowner and underwriter is on account of the peculiarity of marine losses. These losses do not occur under the immediate notice of all the parties concerned. A loss may occur in any part of the world. It may occur under such circumstances that the underwriter can have no opportunity of ascertaining whether the information he received from the assured is correct or incorrect. The assured, if not present, would receive notice of the disaster from his agent, the master of the ship. The underwriter in general can receive no notice of what has occurred, unless from the assured, who is the owner of the ship or the owner of the goods, and there would therefore be great danger if the owner of a ship or of goods—that is the assured—might take any time that he pleased to consider whether he would claim as for a constructive total loss or not—there would be great danger that he would be taking time to consider what the state of the market might be, or many other circumstances, and would throw upon the underwriter a loss if the market

were unfavourable, or take to himself the advantage if the market were favourable. These are the reasons why I think the assured and the underwriters came to the conclusion that it should be a part of the contract and a condition precedent that where the claim is for a constructive total loss there must be notice of abandonment, unless there were circumstances which excused it.

Notice of abandonment, therefore, being a part of the contract, questions arose as to the time when that notice should be given. The first question which arose was whether the notice must be given at the first moment that the assured heard of the loss, or at some subsequent period. It was, however, decided that it is not at the moment of the first hearing of the loss notice of abandonment must be given, but that the assured must have a reasonable time to ascertain the nature of the loss with which he is made acquainted; if he hears merely that his ship is damaged, that may not be enough to enable him to decide whether he ought to abandon or not; he must have certain and accurate information as to the nature of the damage. Now, sometimes the information which he receives discloses at once the imminent danger of the subject-matter of insurance becoming and continuing a total loss; as, for instance, if he hears his ship is captured in time of war, it must be obvious to everybody, unless the ship is re-captured, it would be a total loss; or if he hears that the ship is stranded, and her back is broken, although she retains her character as a ship, if he gets information upon which any reasonable man must conclude that there is very imminent danger of her being lost, the moment he gets that information he must immediately give notice of abandonment. The law that has been laid down is, that immediately the assured has reliable information of such damage to the subject-matter of insurance as that there is imminent danger of its becoming a total loss, then he must at once, unless there be some reason to the contrary, give notice of abandonment; but if the information which he first receives is not sufficient to enable him to say whether there is that imminent danger, then he

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has a reasonable time to acquire full information as to the state and nature of the damage done to the ship.

But then there arose another question. Ships, or goods, or the subject-matters of marine insurance, are liable to danger at various parts of the globe, where neither the assured nor the underwriter is present; and upon an emergency the master of the ship, being there alone, must act. Now, under those circumstances, masters have often sold either ship or goods; and masters have had to consider whether they would sell the ship or goods even in cases where such ship or goods are not insured. The general rule with regard to the propriety of a master selling the ship or the goods is, that he has no right to sell either the ship or the goods without the consent of the owner, but if necessity arises the master becomes what is called, from the necessity of the thing, the agent to bind his owner by a sale, or to bind the owner of goods by a sale. Now, the rule—I should say from the necessity of things, at all events from the justice of things—is this: that if the circumstances are such that any reasonable person having authority from the owner would sell, then the master is entitled to sell, although he has not such authority. The question, I think, as between the person to whom a master sells and the owner of the property, is whether the circumstances were those which would have caused a reasonable owner, had he been present, to sell. If that state of things exists, the master has authority to sell, and his act is binding upon the owner of the ship or goods. Where, therefore, there has been a constructive total loss of either ship or goods, circumstances may have arisen which would justify the master in selling, or they may not; there may be a constructive total loss without any sale, and there may also be a constructive total loss accompanied by a sale. If the first information which the assured, not being present, has of the damage which has occurred to his ship, or which the owner of goods has of the damage which has occurred to his goods, although they were not an actual total loss by reason of the perils of the seas, is accompanied also by information that the master has

sold, and if the circumstances of that sale were justifiable, so that the property passed to the vendee, that is the time when the assured would be bound to give notice of abandonment; and in some of the earlier cases it was considered that even then the assured must give notice of abandonment; but in others that doctrine seems to be questioned. In *Rankin v. Potter* (4) the law was established that where at the time when the assured receives information which would otherwise oblige him to give notice of abandonment, at the same time he hears that the subject-matter of the insurance had been sold so as to pass the property away, inasmuch as there was nothing of the subject-matter of the insurance which he could abandon, notice of abandonment was not necessary. No doubt the reason given for this was that notice at that time and under such circumstances would be a mere idle ceremony; it could be of no use. That was the point decided in *Rankin v. Potter* (4). In those particular circumstances it was held that notice of abandonment need not be given because there was nothing to abandon. That in one sense is true, but if the goods had been sold it is obvious there must be something to abandon, that is the proceeds of the sale; the money which is the proceeds of the sale, when the insurance is settled, is abandoned; but there is nothing of the subject-matter of insurance to abandon; there is no ship to abandon, there are no materials of the ship to abandon, there are no goods to abandon; therefore notice of abandonment under those circumstances was said to be futile. But *Rankin v. Potter* (4) went no further; it did not decide—because the point was not raised—that if at the time when the assured had to make up his mind and when otherwise he ought to abandon, there was no sale of the subject-matter of the insurance, that the assured would be excused from giving notice of abandonment if he was able to shew that had he given such notice, in the result it would have turned out to be of no use. It was argued before us that the necessary inference to be drawn from *Rankin v. Potter* (4) was, although there was no sale of the subject-matter of insurance when information of

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the disaster was received by the assured, yet if he could shew that before any notice of abandonment would reach the underwriter and before the underwriter's orders could reach the assured a sale had taken place, so that had the assured given notice of abandonment such notice would have been of no use to the underwriter, the assured would be excused from giving it. That point, however, is not raised here, and therefore it becomes unnecessary to decide it. I am not prepared to say that if it could be shewn that the subject-matter of insurance at the time when the assured has information upon which otherwise he would be bound to act, is in such a condition that it would absolutely perish and disappear, before notice could be given or any answer returned, that that might not excuse the assured from giving notice of abandonment, but I am prepared to say that nothing short of that would excuse him; and although I do not say what I have stated would excuse him, I am not prepared to say it would not; that is the limit to which I think the doctrine could be carried, and it seems to me that to go further than that would let in the danger to provide against which the doctrine of notice of abandonment was introduced into the contract and made a part of the contract.

Having stated my view of the law, I proceed to apply it. In the present case the ship was grievously injured, and, I think, in order to consider the ruling of Lord Coleridge, C.J., we must take it, for the purpose of the argument, that she was so much injured that there was imminent danger of her becoming a total loss, and I think we must take it she had sustained damage to this extent that she was what is called a constructive total loss, that is to say, that she was in such a condition that the assured would be, if he fulfilled all other conditions, in a position to claim for a constructive total loss. We must not forget that the ship must be in a condition to justify what was done afterwards, otherwise the fact of sale or the fact of giving notice of abandonment had no effect whatever. A sale cannot make a total loss; notice of abandonment cannot enable the assured to recover for a

total loss unless the sale was justifiable by the circumstances, and the circumstances were such as to justify a person in claiming for a total loss. The constructive total loss in other words must exist before either the sale or the notice of abandonment; the circumstances must be such as to justify it. I think we must take it the ship was in such a condition, that the assured was entitled to abandon, and to claim for a total loss, but for a constructive total loss only. The questions then are, first, whether the assured was excused from giving notice of abandonment, and, if not, whether he gave any notice of abandonment; and, secondly, if he did give notice of abandonment, whether he gave it within the legal time, because if he gave the notice, yet if he did not give it within the legal time, he cannot recover as for a total loss.

It was argued before us that this was an actual total loss. I do not stop to enter into that; it is clear that the ship was not an actual total loss; but I think we are bound to take it for the purpose of argument that she was a constructive total loss; that is, she was in imminent danger of becoming a total loss to her owner. She may become a total loss to her owner either by perishing, although she has not yet perished, or she may become a total loss by reason of the cost of the repairs being greater than the value of the ship when repaired; in either case she becomes a total loss to her owner. I think we must take it that the circumstances were such that the owner had a right to consider that in all probability the cost of repairing that ship would be greater than her value when repaired, and that she would become a total loss. Therefore, he was justified in assuming there was imminent danger of her becoming a total loss, and he would, according to the rule I have enunciated, the moment he received information which would lead any reasonable man to come to that conclusion, be bound to give notice of abandonment unless he was excused.

The owners who were in truth the real assured were a firm, some of whom were resident at Singapore, and the owners resident at Singapore were bound to act



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in the matter of this insurance and claim. On the 7th of February those owners at Singapore received certain information as to the condition of the ship, and they did not in fact receive any material additional information after that time, and upon that very information which they received they did eventually act, in resolving to abandon the ship and in giving notice of abandonment, if any notice was ever given. It is clear that, unless they were otherwise excused, on the 7th of February they had such information with regard to this ship as shewed that she was in imminent danger of becoming a total loss, and that at that time they were bound to act upon it, and to make up their minds whether they would abandon or not, and if they made up their minds to abandon, to give notice of abandonment. That being the state of things, on the 7th of February the ship was not sold. Therefore the case is not within the rule in *Rankin v. Potter* (4). They did not receive notice of such damage as made it imminent that the ship might become a total loss, and at the same time notice that the ship was sold, but they received the information of the damage that had happened to the ship before they received information that the ship was sold. But it is said that at that time the ship was in such a condition that before any answer to a notice of abandonment could be received from the underwriter, a reasonable man might have sold her. I do not enter into that consideration, because that is not the rule by which the case is governed. It was said that the assured ought to have sent forward the information by the telegraph. If the telegraph was in use and known by the majority of persons in business to be in use between Singapore and Europe, it is clear the information ought to have been telegraphed to the underwriter in London; but if that was not so, then it would be justifiable to send the information to Europe by letter; but however that may be, there is no evidence to justify a jury in saying that the ship would actually have perished as a ship before an answer could be returned. Therefore, it seems that that point which has been put to us

did not arise in this case. It would appear the owners had notice of the imminent danger of the ship on the 7th of February, and the case is not brought within *Rankin v. Potter* (4); therefore the owners ought to have given notice of abandonment immediately after the 7th of February. They ought to have sent forward that notice unless circumstances prevented them. When I say that they were bound to send notice immediately to the underwriters, it must be subject to this, that if there was no post for a fortnight, "immediately" then is extended into a fortnight; but they would have no right to let a post pass, neither would they have any right to do what they did; which was—not to send notice to the underwriters, not to send notice to an agent to inform the underwriters, not to send instructions to anybody to abandon the ship, but—to send forward a mere report stating the circumstances about their ship to their co-owner at Zurich, not telling him to abandon, but leaving it to him to consider whether he would abandon or not. The owners at Singapore might have intended to act in perfect good faith to the underwriters, but they made this mistake; instead of sending to the underwriters or to the agent of the underwriters notice of their intention to abandon, they did neither one or the other, but they only sent forward a communication to their co-owner, in order that he should determine whether he would abandon or not. They failed to send notice of abandonment, and the question does not arise of within what time notice of abandonment was given. It was assumed by Lord Coleridge, C.J., and therefore we must take it, either that on the 11th of March the underwriters received the notice, or that it was on the 11th of March the assured resolved to send and did send the notice; but even if the underwriters received it on the 11th of March, there is the fatal gap between the time when the owners at Singapore received that information and the time when the owner at Zurich made up his mind to act upon it. It was the owners at Singapore who ought to have acted, and they ought either on the 7th, or by the next post or the next

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telegraph, to have sent forward notice to the underwriters, or at all events instructions to some agent of theirs to give notice to the underwriters, because the only mode of abandonment in cases of marine insurance is to give notice of abandonment, and the assured is bound to give notice. It is the notice which is the symbol of the abandonment. That notice must be given within a particular time. In this case it is obvious it was not. Therefore, although it must be assumed there were circumstances which entitled the assured to treat the loss as a total loss; and although it must be taken that at some time or other he did give notice of abandonment, yet in my opinion the evidence was beyond dispute that he did not give notice of abandonment at the proper time, and the giving notice in proper time, unless some excuse exists, is a condition precedent. No such excuse existed in this case. Therefore Lord Coleridge was right in saying that the plaintiff could not recover. The judgment of the Common Pleas Division, with great deference, was wrong. The Court carried the words of Lord Blackburn in the opinion which he gave in *Rankin v. Potter* (4) too far. They carried them further than the decision required; and I cannot help thinking they carried them further than Lord Blackburn intended them to be carried. This appeal must therefore be allowed.

COTTON, L.J.—This is an action upon a policy of marine insurance, and the question we have to consider is, whether Lord Coleridge, C.J., was right in saying there was no question for the jury, and that the plaintiff could not recover for a constructive total loss, on the ground that he had not given notice of abandonment. The Common Pleas Division decided that the case ought to go down for a new trial, in order, as I understand their decision, that the jury might be asked whether or no if notice of abandonment had been given it would have been, in the result, of any use to the underwriters. Although the claim was for a total loss, yet the ship existed as a ship, notwithstanding the damage it had sustained. For the purpose of our

decision we must consider the damage was such that the shipowner was entitled to treat it as a constructive total loss, and on that footing to claim on the policy as for a total loss. A "constructive total loss" is when the damage is of such a character that the assured is entitled, if he thinks fit, to treat it as a total loss. When, as in the present case, the assured elects to treat the loss as a total loss, he is bound to transfer to the underwriters the subject-matter insured. The general rule is that he must, as soon as he has the information which enables him to make his election, give notice to the underwriters that he has so elected. That rule is founded upon two grounds: when the assured has once elected to treat the loss as a total loss, the underwriters can insist upon his abiding by the election, so as to enable them to take the benefit of any advantage which may arise from the thing insured. Therefore the object of notice, which is entirely different from abandonment, is that he may tell the underwriters at once what he has done, and not keep it secret in his mind, to see if there will be a change of circumstances. There is another reason: the thing in various ways may be profitably dealt with, as the ship was in this case. Therefore the second reason for requiring notice of abandonment to be given to the underwriters is, that they may do, if they think fit, what in their opinion is best, and make the most they can out of that which is abandoned to them as the consequence of the election which the assured has come to. How, then, can the plaintiff say that it was not necessary in the present case to give notice of abandonment?

It is suggested that if the jury should find that the notice would have been useless, that that excuses the assured from giving such notice. It is unnecessary to consider what would be the result if, at the time the assured received notice of those facts which led him to treat it as a constructive total loss, he also knew that the circumstances were such that if he communicated with the underwriters, and waited for their answer before taking any action, the thing insured would cease to exist, and be

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entirely lost. I think so, because although it was suggested that there was such stringent necessity in this case for the sale of the ship, that if it had not been sold it would have perished, there is no evidence to support the contention that the ship was in this imminent danger.

Therefore the question must be considered upon the assumption that there being no such stringent necessity for selling the ship to save her from being entirely lost, a jury might possibly find that communicating with the underwriters would have produced no useful result. It was suggested that it followed from *Rankin v. Potter* (4) that if the notice of abandonment was of no use to the underwriter, the assured was excused from giving it; but in my opinion nothing that was said by the learned Lord who moved the judgment of the House, or by any of the Judges, supports that contention. In that case the policy in question was a policy on freight, and at the time the assured received notice of the loss, he also received notice that it was impossible to earn the freight, and they decided that if at the time when the assured received information to enable him to claim for a total loss, he also hears that the thing has been sold or gone out of his power, that does excuse notice of abandonment, but they decided no more than that. There is nothing in the observations of Blackburn, J., which can possibly be construed to mean that where the assured has in his possession the thing insured at the time when he received notice of the facts, he then is excused from giving notice of abandonment to the underwriters.

On principle, ought we to carry what was laid down in *Rankin v. Potter* (4) further than that case has carried it? In my opinion, no. All the grounds upon which the rule requiring notice of abandonment to be given is based apply equally in this case, even although the jury might find that in the ultimate result notice of abandonment would have produced no good result to the underwriters. The object is, as I have pointed out before, to communicate to the underwriters that decision at which the assured

has arrived at the earliest possible moment, so as to render it impossible for him, having formed that decision, to retract it, and in order that he must not be allowed to run the chance of events, and to abstain from giving notice, and afterwards excuse himself by saying, "If I had given notice the underwriters would have got no benefit from it;" and from the other ground on which notice is required it equally follows that it must not be left to the jury to say whether or no notice would be useful. Suppose, for various reasons, the ship in this case had not been sold for two or three months, it is obvious, if there had been notice to the underwriters, they might have done something, and we must not depart from the general rule laid down for all cases, simply because in a particular case a jury might find that notice would have produced no good result. I think, that where the assured at the time he receives the information on which he is bound to make his election has the thing insured in his power or under his control, he is bound to give notice to the underwriters.

I give no opinion upon the question which arises when the state of the thing insured is such that before the communication could have reached the underwriters it must, so far as human probability goes, have ceased to be in specie.

In my opinion, therefore, it was necessary that due notice should be given to the underwriters. Was notice given? The facts are that one of the owners of this vessel was at Singapore, and had full authority to act for his co-owners. It is shewn that he, in a letter of the 7th of February to the master of the ship, does tell him to follow the advice of those who have surveyed the vessel, and sell. This owner being at Singapore, received, on the 7th of February, information of the survey which had then taken place, and that survey and the letter which he received on the 7th of February did give him, not only all the information necessary to enable him to make his election, but the information upon which, in fact, he did make his election to treat it as a constructive total loss. Then there follows some direction to get a surveyor's opinion whether the

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ship could or could not, without repairs, come down to Singapore; the captain stated he thought she could not, but the owner wished it to be put in the report. It is said that shewed he had not made his election to abandon, and wanted further information. That, however, is not so; for in that letter he is dealing with the vessel as one that was in future to be dealt with only for the benefit of the underwriters, and not by the owners for their own benefit.

There is no evidence as to what notice was given or when it was given, but it seems to have been conceded at the trial that notice was given on the 11th of March. If so, that was the first notice which was given by the assured to the underwriter. If the letter of the 30th of January gave all the necessary information to the owner at Singapore which enabled him to judge whether he would elect to abandon or not, then he ought at once, or within a reasonable time, to have given notice to the underwriters, and not simply to have sent that letter to Europe without any instructions, and to have left it to the agent to decide what he would do. But, at any rate, the letter of the 3rd of February, received on the 7th, was a letter which gave the full information. I am of opinion that notice given on the 11th of March would not be given in reasonable time after the 7th of February. I am of opinion that the judgment of Lord Coleridge, C.J., was right, and that the question which the Court of Common Pleas thought ought to have been left to the jury ought not to have been left to them.

THE SINGER, L.J.—I am of opinion that the judgment of Lord Coleridge, C.J., was right, and should be affirmed. The plaintiff seeks to recover in respect of a constructive total loss. It is impossible, upon the facts which have been admitted at the trial, for him to put his case higher, and, on the other hand, the underwriter, the defendant, does not contend that the facts admitted were not sufficient to entitle the assured to treat the loss which did occur as a constructive total loss. That being so, it was incumbent on the assured to prove one of two things;

either that he abandoned and gave notice of the abandonment immediately upon his receiving full information of the loss; that is to say, as soon as he had before him all the materials upon which he might properly be called upon to make his election; or that the circumstances of this particular case were such that they rendered the giving of notice of abandonment useless and unnecessary.

Now, at the trial before Lord Coleridge, C.J., the plaintiff adopted the latter alternative, and it was urged on his behalf that the sale of the vessel, which was the subject of the insurance, upon the 23rd of February, was a reasonable and prudent sale; that the communication of the fact of that sale being about to take place could not reach the underwriters in time to enable them to take any advantage of it or to give any orders in reference to the vessel, and that consequently the case was within the decision in *Rankin v. Potter* (4), and therefore that notice of abandonment was not necessary. Lord Coleridge, C.J., assumed, as he was bound for the purpose of the case to assume, that the sale was reasonable and prudent, but held, and I am of opinion rightly held, that notwithstanding that fact it was incumbent upon the assured to give notice of abandonment. Now, in the first place, it is to be observed that at the root of the contention of the assured lies the question of fact whether or not it was impossible for him to have communicated to the underwriters in time to enable them to take any advantage of the communication, and even upon that point it appears to me, and I should be perhaps prepared so to decide if it were necessary that the assured has failed to establish any such impossibility. Upon the 7th of February he received full materials upon which to exercise his election to abandon. A system of telegraphic communication existed, and as far as one can see had existed for some time between Singapore and London, and it was not unreasonable, or rather it was reasonable, that communication should be made under certain circumstances by the assured to the underwriters. This is made plain by the evidence of the plaintiffs themselves,

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because in the letter of the 7th of February, written by the firm at Singapore to the master of the vessel, they say in certain events which are mentioned in the letter, and to which I need not more particularly refer, they propose to telegraph to the underwriters. But it appears to me unnecessary to decide this case on that question of fact, and I will assume for the purpose of the further discussion of the case that it might reasonably be said that the question whether or not the assured ought to have used the telegraphic communication with the underwriters was a question of fact which ought to have been left to the jury. But then arises the question whether, assuming that to be the case, the facts proved at the trial bring this case within the decision of *Rankin v. Potter* (4). Now, in using the words, "within the decision," I do not wish to be misunderstood. I quite admit that this Court is equally bound by any principle of law clearly enunciated by the House of Lords and treated by them as the basis of their decision, but admitting that to the full, what is the principle which is to be collected from that case? Putting it as high as it can possibly be put in favour of the plaintiff, it seems to me to come to no more than this: that when at the time that the assured properly elects to treat a loss as a total loss, a constructive total loss, there is no possibility of the insurers deriving any advantage from the notice of abandonment, in that case the assured need not go through what has been termed the idle ceremony of giving such a notice. I say putting the principle as high as it can be put in favour of the plaintiff, because when the opinions of the learned law Lords in that case are considered I think it will be found clearly that the principle laid down did not even extend as far as I have suggested. I think it would be convenient, while I am upon that point, to refer to two or three passages of the opinions of the Lords as bearing out the view which I have propounded. Lord Chelmsford (at p. 157) says this: "In *Farnworth v. Hyde* (2), under similar circumstances of the loss of the ship insured, and of her sale having

reached the assured at the same time, it was held that the underwriters were liable for a total loss without notice of abandonment. This seems to place the rule as to notice of abandonment on a reasonable foundation. No prejudice can possibly arise to the underwriters from withholding a notice where it is wholly out of their power to take any steps to improve or alter their position." Stopping at that point of Lord Chelmsford's opinion, it is clear he is not laying down the principle as an absolute principle to be applied to all facts and circumstances, but is laying it down to be applied to the case when at the time the assured received notice of the loss, he also received notice that the subject-matter of the insurance was no longer in specie, and therefore, although there was something to abandon, that is to say, the produce of the sale, there was no part of the matter insured that could by any possibility be abandoned to the underwriters. Then, again, Lord Colonsay (at p. 161) says this: "I think that the reason of the thing tells us that where there is nothing substantially to abandon to the party to whom the notice of the abandonment is given, and he could gain nothing by it, then it is not necessary to give that notice." And Lord Hatherley (at p. 165), after dealing with the argument which had been urged on behalf of the underwriters to the effect that they were under all circumstances and all states of fact to be the judges whether notice of abandonment could or would not be of any service to them, says: "I apprehend that certainly no authority has been cited to shew that this notice of abandonment is to be considered necessary in a case where no such advantage could possibly accrue to the underwriters. If the vessel be not really wholly lost, if it be only a constructive total loss, as it is termed (though that, perhaps, is not a very happy phrase), occasioned by the impossibility of effecting repairs, the cost of which will not exceed the whole value of the ship when repaired, then there being something *in esse* to be handed over to the underwriters, it is necessary that they should be informed of this in order that they may have an opportu-

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nity of making the best use they can of what remains." Further on he says: "But in this case there is nothing suggested (except one single point which I will notice in a moment) as to any advantage that could have been derived by the underwriters from any such notice of a constructive total loss being given to them on the part of those who had insured." So much for the opinions of the learned Lords. Then it is said there is something to be collected from the language of Blackburn, J., in his opinion to the House of Lords, from which it may be inferred that the principle laid down can be further extended. Now, in the first place, it is to be observed that the opinion of Blackburn, J., delivered to the House of Lords is not a binding authority upon us, and although the opinion is very valuable for the purpose of guiding us, we have to look at the opinions of the Lords, and not the opinions of the Judges given to the Lords; but, at the same time, I think I may also say that when the whole opinion of Blackburn, J., is looked at, it does not justify the contention which has been raised on behalf of the plaintiff, and without taking up time by reading passages from that opinion, I would say that it goes no further than the opinions of the Lords themselves; that where at the time that the assured receives notice of the loss and has to exercise his election to abandon, there is no part of the subject-matter of the insurance to abandon, and therefore no possibility of an advantage to the underwriters if they did receive the notice; in that case the assured may be discharged from the *onus*, which otherwise would lie upon him, of giving a notice of abandonment; and when one considers the lengths to which the principle might be carried if the argument on the part of the plaintiff in this case could be supported, I think that, in the absence of authority, it is impossible to hold that it would be proper to find in favour of that contention. One can see that if at any moment an assured who is entitled to treat a loss as a constructive total loss may at the same time absolve himself from the necessity of giving notice of abandonment

by selling the vessel, which although a prudent course is not a necessary course, it would lead to the greatest danger of frauds upon the underwriters, and at all events to very considerable inconvenience in reference to policies of marine insurance.

Now what are the facts in this case? I have not heard any evidence whatever which has been put before Lord Coleridge, C.J., or which has been put before us, to the effect that there was any absolute necessity for the sale of this vessel, and although it is admitted that the vessel was a constructive total loss in this sense, that the cost of repairs to the vessel would be greater than the value of the vessel when repaired, I cannot trace any evidence to the effect, that if the sale of that vessel had been postponed even for two or three or four months, she would have ceased to exist in specie or that the loss from a constructive total loss would have become an actual total loss. If that be so, then upon principle and authority it appears to me that the plaintiff is not entitled to use the fact of that sale as a reason for excusing himself from giving a notice of abandonment.

Then the only remaining question which has also been argued before us, although it does not appear to have been raised before Lord Coleridge, C.J., at the trial, is, that the plaintiff did, as a matter of fact, elect to abandon within a reasonable time, and did give notice of abandonment to the underwriters also within a reasonable time.

Now, how stand the facts upon that question? For the purposes of the trial, and for the purposes of the judgment of Lord Coleridge, C.J., an imaginary date of giving notice of abandonment, namely, the date of the 11th of March, appears to have been taken by both parties as a datum, but in point of fact no notice was given at any such date, and both parties when arguing before us have gone behind that date; and while on the part of the plaintiff it has been contended that really notice of abandonment was given at an earlier date and immediately upon the receipt of full information of the loss, upon the part of the defendant it has been urged that no notice of abandon-

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ment was given by any earlier communication than the letter of the 27th of February, which was written by the plaintiff's firm at Singapore; and when the other letters, namely, those of the 31st of January and the 7th of February—which, be it observed, were not letters sent to the agents of the assured in London for the purpose of being communicated to the underwriters, but were letters sent to the plaintiff on the record at Zurich;—when the terms of those letters are read and considered it is obvious that so far from those being letters suggesting to him the giving notice of abandonment, they were only letters giving him such information as the plaintiff's firm at Singapore themselves had, with the statement that he would receive further information, as they themselves received it, and it appears to me clear that even if the letter of the 27th of February itself can be considered as a notice of abandonment, that at all events is the first notice which can be said to have been given to the underwriters.

Let us examine the matter further. On the 7th of February the plaintiff's firm at Singapore had full information as to the loss and all the materials upon which they might perhaps have relied to elect whether they would abandon, in other words, whether they would treat the loss which had been sustained as a partial loss or as a constructive total loss. I need not refer more in detail to the letter written by the Singapore firm to the master of the ship. I would merely say that the whole purport and scope of that letter shews that while they were considering the question of a complete condemnation of the vessel with reference to the further question, whether the vessel should be taken to Singapore and there repaired on behalf of the underwriters, so far as regards the question of constructive total loss, the plaintiff's firm themselves considered that they had full information as to the nature of the loss, and such information as they were prepared to act upon in treating that loss as a constructive total loss. If that be so, then the plaintiff is in this dilemma, either he elected to abandon on the 7th of February, or concurrently with the

order for sale, or the sale on the 23rd of February, or not till after that sale. If he elected to abandon on the 7th, then no facts have been proved on the part of the assured to account for the delay between the 7th of February, when the assured elected to abandon, and the 27th of February, when for the first time he sent forward the notice of abandonment. On the other hand, if we take the date of the 23rd of February as the date of the election to abandon, and *a fortiori* if we take any date after the sale on the 23rd of February, then the plaintiff is in this difficulty, the assumption is that he had full materials upon which to elect to abandon upon the 7th of February, therefore he was called upon to elect to abandon on that day, and if he did not elect to abandon till the 23rd, still more if he did not elect to abandon till a later day, then that election to abandon was too late, and if the election to abandon only took place after the sale, then it follows that the sale was a determination of their election as against the idea of the loss being treated as a constructive total loss.

For these reasons it appears to me that the *onus* of proof being upon the plaintiff, he failed to give any evidence to shew that he elected to abandon, or gave notice to abandon within a reasonable time, and as he gave no evidence to justify Lord Coleridge, C.J., in leaving the matter to the jury to decide, Lord Coleridge's judgment was right, and the Court below were wrong in holding that the matter should go down for a new trial.

*Judgment reversed.*

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Solicitors—Parker & Clarke, for plaintiff; Hollams, Son & Coward, for defendant.

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[IN THE HOUSE OF LORDS.]

1878. { EVERSHED (*respondent*) v. THE  
July 15. { LONDON AND NORTH WESTERN  
RAILWAY COMPANY (*appellants*).

*Carriers by Railway—Undue Preference—Advantages by rival Lines—8 & 9 Vict. c. 20. s. 90; 17 & 18 Vict. c. 51. s. 2.*

The respondent carried on business as a brewer at B., and employed the appellants to convey goods for him by their railway. The respondent's premises were not connected by sidings with any railway. The respondent was charged by the appellants a station to station rate for the carriage of goods to and from B. (inclusive of charge for station accommodation), and one shilling per ton for cartage. Three other firms at B. had premises connected with the Midland Railway by sidings, from which all goods forwarded or received were loaded and unloaded. The cost of cartage was thus saved, and in addition the Midland Railway Company allowed to these three firms a rebate of 9d. per ton, as representing the value of station accommodation, and other services which by reason of the connecting sidings were not required. The appellants, with the view to attract the custom of the three firms, carted goods for them gratuitously, and allowed to them also a rebate of 9d. per ton on the station to station rate. The result was that the respondent had to pay 1s. 9d. per ton more than the three firms for goods carried under the same circumstances:—Held (affirming the unanimous decisions of the Queen's Bench Division and of the Court of Appeal), that the transaction amounted to a breach of section 90 of the Railways Clauses Consolidation Act, 1845, as being a reduction of charges in favour of the three firms, and of section 2 of the Railway and Canal Traffic Act, 1854, as being an undue preference of the three firms, and that the respondent was entitled to recover back the 1s. 9d. per ton from the appellants.

This was an appeal from a decision of the Court of Appeal, reported 47 Law J. Rep. Q.B. 284; s. c. Law Rep. 3 Q.B. D. 135, affirming the decision of the Queen's Bench Division, reported 46 Law J. Rep. Q.B. 289; s. c. Law Rep. 2 Q.B. D. 254.

The action was brought by Evershed, the respondent, to recover the sum of 1,356l. 8s. 7d., in respect of overcharges by the appellants as carriers of goods by railway.

The action was entered for trial at the Summer Assizes, 1876, for the county of Derby, but it was agreed that a case should be stated, pursuant to the Common Law Procedure Act, 1852, for the opinion of the Court.

The material facts, as stated in the case, are as follows:—

The plaintiff is a brewer, and has, since the year 1853, carried on business at Burton-on-Trent.

There are three railway companies who have stations in, and carry goods to and from Burton, viz., the defendants, the Midland Railway Company, and the North Staffordshire Railway Company. The premises of the plaintiff are not connected by sidings with the stations or lines of railway of either of the three companies.

The three companies were in the habit of charging brewers whose premises were not connected with their stations or lines a station to station rate (inclusive of charge for station accommodation) on all goods carried to or from Burton. The railway companies also undertook, if required, to cart the goods between their stations and the premises of the brewers, and were in the habit of making for such cartage an additional charge of 1s. per ton beyond the station to station rate.

Among other brewers carrying on business at Burton there were three firms, Messrs. Truman, Hanbury & Buxton; Messrs. Ind, Coope & Co., and Messrs. Cooper & Co. The several premises of these three firms were connected by sidings with the goods station at Burton of the Midland Railway Company.

By the use of these sidings the costs of cartage, of loading and unloading goods, and of station accommodation was saved in respect of goods of these three firms forwarded by the Midland Railway.

In the case of these three firms, therefore, the Midland Railway made no charge for cartage, and allowed a rebate or reduction of 9d. per ton in respect of the other services dispensed with by rea-



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son of the sidings. This rebate fairly represented the cost thus saved to the company.

The defendants and the Midland Railway Company equally professed to carry to all towns in England, Scotland or Wales, and to most of these towns they had equal facilities of access, but in the case of some towns access was quicker by one than by the other of the two lines of railway.

The line of the defendants was not connected by sidings with the premises of either of the three firms, but from 1872, the defendants, with the view of securing a share of the traffic of the three firms, which was considerable, allowed to them a rebate at the rate of 9*d.* per ton on goods carried by them, and charged these firms nothing for cartage, although they carted, and loaded and unloaded their goods, and afforded in respect of such goods the ordinary accommodation of their goods station.

For several years the plaintiff and certain other brewers employed a man named Ball to manage their traffic business. Ball was aware of the terms on which the defendants carried goods for the three firms, but for his own purposes concealed such knowledge from his employers, and the plaintiff did not get reliable information of what was being done until September, 1874.

On the 7th of January, 1875, the plaintiff wrote to the defendants, complaining of the free cartage so done and the rebate so made by them to the three firms, and asking for the repayment of the various amounts which he had paid for carriage of goods at rates over and above those charged to the three firms, and on the 30th of January following he made application to the Railway Commissioners under the Regulation of Railways Act, 1873, "in which he complained of the terms on which the goods of the three firms were carried, and asked for an order that the defendants should desist from such practice, which he alleged to be an undue preference."

The Commissioners thereupon granted an injunction, and the defendants in pursuance thereof, ceased on the 31st of March, 1875, to cart gratuitously for the

three firms, and to make them the allowances before mentioned, and the consequence was that the defendants lost a great part of the traffic of the three firms.

The plaintiff then brought this action to recover the alleged overcharges, at the rate of 1*s.* 9*d.* per ton upon goods carried by the defendants for him under the circumstances described.

The question for the Court was whether the plaintiff was entitled to recover the whole or any part of the alleged overcharges.

The Court was to have power to draw inferences of fact.

The Special Case was heard in the Queen's Bench Division on the 19th of January, 1877, and on the 2nd of February following the Court gave judgment for the plaintiff.

The defendants appealed; and on the 29th of November the judgment was affirmed by the unanimous decision of the Court of Appeal, consisting of Bramwell, L.J., Brett, L.J., and Cotton, L.J.

The defendants then brought this appeal to the House of Lords.

*Mellor and J. S. Dugdale*, for the appellants.—The question in this case is whether there has been a violation by the appellants of the equality clause contained in section 90 of the Railways Clauses Consolidation Act, 1845, or an "undue preference" within the meaning of section 2 of the Railway and Canal Traffic Act, 1854. There is no suggestion that the rates charged for the carriage of the respondents' goods are in themselves unreasonable; and unless the case comes within the restrictions imposed by one or other of these statutes, the appellants would have a clear and undoubted right to levy those charges. It is contended, in the first place, that the equality clause of the Act of 1845 does not apply. The charge for cartage is clearly not within that clause. Section 90 provides that all "tolls" shall be charged equally under like circumstances; but section 3 says that "the word toll shall include any rate or charge or other payment payable under the special Act for any passenger . . .

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matters or things conveyed on the railway." And it has been decided that the word "toll" means only tolls in the proper sense of the word, that is, tolls paid for the use of the railway, and does not include charges for the conveyance by the company of goods as carriers—*Wallis v. The London and South Western Railway Company* (1). The sums of 1s. and of 9d. per ton were therefore not "tolls" for conveyance of the respondents' goods on the line of railway, but reasonable charges for the conveyance of goods to and from the defendants' premises for accommodation at the station and for loading the goods on the trucks for conveyance on the railway. These charges were therefore altogether outside section 90 of the Act of 1845.

It is contended, further, that the remission of these charges allowed to the three firms of brewers having their premises connected by sidings with the Midland Railway did not constitute an "undue preference" within section 2 of the Act of 1854. That section forbids a railway company to give to any person an "undue or unreasonable preference," or to subject any person to "an undue or unreasonable prejudice or disadvantage." It would therefore seem from the language of the section itself that a company may give to one customer a preference over another customer, but not an undue or unreasonable preference. In *Strick v. The Swansea Canal Company* (2) it was decided that the company might make a proportionably less charge per ton per mile for goods carried a greater than for goods carried a less distance, and also that they might carry at a lower rate for a particular individual in consideration of a large guaranteed minimum sum, in order to enable them to enter into successful competition with a rival line of railway. A large customer, as these firms were, may be charged at a lower rate than customers generally, even though he may thereby incidentally oust his competitors from the market. Many decisions shew that the interest of the

company may fairly and properly be taken by them into consideration in graduating their scale of charges—*Ransome v. The Eastern Counties Railway Company* (3); *Baxendale v. The Great Western Railway Company* (4); and *Nicholson v. The Great Western Railway Company* (5). It is no undue preference for a company to tempt, by a lower rate of charges, a customer who, unless so tempted, will forward his goods by the line of a rival company. It may be that a mere probability or threat that a rival line might be constructed which would divert traffic from the company would not enable them to give a preference to particular customers—See *Harris v. The Cockermouth and Workington Railway Company* (6). But in the present case the difference of accommodation actually existed, and must necessarily divert the custom of the three firms from the appellants' line, unless the exemptions and rebates in question were allowed. In fact, the result of the decisions of the Courts below had been not to benefit the respondent in any way, but merely to cause the three firms to send all their goods by the Midland Railway to the detriment of the appellants. It cannot have been the intention of the Legislature to oblige a company to treat on the same terms customers who had premises adjoining a rival line, or who had perhaps by considerable expenditure put themselves in connection therewith, and customers whose premises were at a distance from any line of railway. If a man has acquired such a situation for his warehouse as to command access to the rival line, the company, in order to secure his custom, which must otherwise go elsewhere, may carry his goods at a cheaper rate.

In the present case the respondent is subjected to no "undue or unreasonable prejudice or disadvantage." The deci-

(3) 1 Com. B. Rep. N.S. 437; s. c. 26 Law J. Rep. C.P. 91.

(4) 5 Com. B. Rep. N.S. 326; s. c. 28 Law J. Rep. C.P. 81.

(5) 5 Com. B. Rep. N.S. 366; s. c. 28 Law J. Rep. C.P. 89.

(6) 3 Com. B. Rep. N.S. 698; s. c. 27 Law J. Rep. C.P. 162.

(1) 39 Law J. Rep. Exch. 57; s. c. Law Rep. 5 Exch. 62.

(2) 16 Com. B. Rep. N.S. 245; s. c. 33 Law J. Rep. C.B. 240.

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sion has in no way benefited him, as he pays the same rates as before, and the three firms send their goods by the Midland Railway at a lower rate than the respondent can all over England; the only result has been to benefit the Midland Railway at the expense of the appellants.

The proper remedy of the respondent, even assuming him to be prejudiced, is not by action, but by application to the Railway Commissioners—*Garton v. The Bristol and Exeter Railway Company* (7).

Moreover, the knowledge of the agent White must be taken to be the knowledge of his principal, the respondent, so as to disentitle the latter from maintaining an action to recover the alleged overcharge. In *The Great Western Railway Company v. Sutton* (8) the payments were made under compulsion; but here the respondent voluntarily paid at the full rates charged, even after he had personal knowledge of the circumstances.

*Wills and C. Gould*, for the respondent, were not called upon to argue.

THE LORD CHANCELLOR.—This is an appeal from the unanimous decisions of the Queen's Bench Division and of the Court of Appeal, and I cannot think that your Lordships have heard anything in the argument for the appellants which can raise any doubt as to the correctness of those decisions.

It appears to me that the question in cases like the present must be simply this: Is the plaintiff obliged to pay one sort of remuneration for services which the railway company performs for him, while the company performs the same services for other traders either for less remuneration or for no remuneration at all? In my opinion the railway company is, and that indeed is not disputed, in the collecting, loading and delivering of goods, performing identically the same services for the plaintiff in this action as for the other two firms of brewers whose names have been referred to. As a matter of policy and expediency it may well be

that the appellants have good reason for treating those firms as they do. It may be, that if they do not so treat them, those other firms, from the natural advantages of the situation which they have been able to occupy, will send their goods by another railway, and not by the railway of the appellants. But with these considerations the plaintiff in the action has nothing to do.

That is exactly one of those things which Parliament has not left open to railway companies to judge of, whether in that way they will equalise their capacity for competing with other lines or not. The one clear and undoubted right to my mind of a public trader is to see that he is receiving from a railway company equal treatment with other traders of the same kind, doing the same business and supplying the same traffic. In my opinion that is not the case with regard to this plaintiff, and therefore I think he is entitled to recover the moneys he has paid under protest.

I therefore move that the judgment of the Court below be affirmed, and the appeal dismissed with costs.

LORD HATHERLEY.—I have come to the same conclusion. I have been unable to see, since the beginning of the argument, in a case where there was this difference in the charge against the respondent, how it could possibly be said that the case comes within the well-established construction of the provision of the 90th section of the Railways Clauses Consolidation Act.

It was said indeed that in the 17th paragraph of the case which has been stated for the opinion of the Court below, the appellants are stated to perform gratuitously the cartage which they perform for the three firms; and it was argued that the plaintiff in the present case could have no reason to complain because they were bountiful to others whilst to him they made this charge, and still less (it was said) could he recover from them what he has so paid as money obtained from him unduly and for which he could sue in an action for money had and received. I apprehend that the real state of the facts appears clearly from the

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(7) 6 Com. B. Rep. N.S. 669; s. c. 28 Law J. Rep. C.P. 158.

(8) 38 Law J. Rep. Exch. 177; s. c. Law Rep. 4 H.L. 226.

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special case, and however the word "gratuitously" may be applied (and it seems to me to be applied perhaps not unnaturally), the result is that in making the total charge for the total work, done in exactly the same circumstances in every respect, except that the one class of people happen to be near to a rival railway, and therefore might be tempted by some offer to hand over their business to that railway, the one person is charged 1s. 9d. more than the others. If that be so, surely he has the right to sue for it, in whatever form the arrangement may have been made as between the company and the others, the favoured individuals, because that arrangement comes simply to this: we charge other people a lower sum of money, and we charge you a higher sum of money. But according to the strict meaning of the Acts of Parliament, as interpreted by the decisions, from the very moment that the company charges A. a given sum, when B., another person (a mere stranger up to that time, if you will), comes to the company to have the same services rendered under the same circumstances, he cannot be charged one farthing more than has been charged to A.; he can only be charged precisely what the Act authorises the company to charge, namely, that which has been charged to others; and the moment the directors take on themselves to charge less to another person, they must charge less to him too. The charge must be the same to all for the same services performed in the same manner, for carrying the goods for the same distance and for similar services rendered in every other way; it not being a case of a wholesale charge compared with a retail charge and the like, which would be a difference of circumstances which has been decided to be essential.

In the case before us there is really no essential difference in circumstances; the only difference is that the two firms of brewers are more favourably situated for dealing with another railway company than the other brewer is. Therefore I apprehend that your Lordships cannot possibly say that the appellants are entitled to make this distinctive charge and give to other traders a rebate without giving the respondent a return of the

money which he has paid in excess of the charge made to others. I think the money he has so paid under protest can now be recovered by him.

Lord BLACKBURN.—I am of the same opinion. The 90th section of the Railways Clauses Consolidation Act says, in what seem to me very clear terms, that "all such tolls" shall "be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect of all persons, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine passing over the same portion of the line of railway under the same circumstances." I can hardly conceive clearer words than those to express the intention of the Legislature that there should be equality of charge in respect of all goods carried upon the same railway under the same circumstances. It may very well be that peculiar circumstances, as in some of the cases which have been referred to, make some difference. There may be the difference between wholesale and retail; a large quantity of goods may be carried cheaper than a smaller quantity of goods; that would be a difference of circumstances. And many other cases may be pointed out in which the circumstances would not be the same.

But the argument here has been almost entirely this, that because the two firms of brewers who have been mentioned happen to be so situated as to the Midland Railway that they can get cheap carriage by the Midland Railway Company, and consequently will not go to the North-Western Railway Company if the North-Western Company charges them the ordinary rate, therefore, because there is that difference in the persons, the North-Western Railway Company may reduce the price to them in order to tempt them to bring their traffic to that company. I quite agree that this is not done with any view of injuring, or intention to injure, Mr. Evershed. It is done with a view to coax some of the traffic, which would otherwise go upon the Midland Railway, to come to the North-Western Railway. It may be (but I do not give any opinion as to that) that it would have been provident and proper on the part

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of the Legislature, in making the enactment, to say that there should be an exception in such cases, and that there might be a different rate given in order to coax and induce traffic to go by a different route from that by which it would otherwise have gone. However, whether that would have been a prudent and proper thing for the Legislature to say or not, it is not what the Legislature has said, and it is very likely that it was the intention of the Legislature not to say it, because it was thought that if equality of charge is to be disregarded under *any* circumstances, that might be made a cloak for making inequalities of charge under unjustifiable circumstances. I do not know whether that was the motive and intention of the Legislature or not, and I do not enquire. What the Legislature has clearly said is that the tolls must be charged equally to all persons under the same circumstances. I think that means under similar circumstances as to the goods, not as to the person. I do not think the person comes into the question at all.

There is one more argument, and one more only, which has been used. It was said that the word "tolls" in the interpretation clause is confined to a charge authorised by the Act of Parliament for carrying goods on the railway, from the time the goods are put on the railway—that is to say, from the time they are brought to the railway station—to the time when they are delivered, and that the shilling which has here been paid for the cartage outside is not a "toll" within the meaning of the Act. I do not think it is in the least degree necessary to consider whether that is so or not. I think it is quite clear that when the charge from station to station, and a shilling, are, both together, paid by one person for the whole service performed by the railway company, including the cartage, when the amount of the tolls (supposing them to be exclusive of the cartage) and an added shilling are charged to one person, and to another person the same tolls (again treating them as exclusive of the cartage) are charged, and a shilling's worth of cartage is thrown in gratis, and not charged for, this latter person gets his goods carried upon the railway at a

cheaper rate. Whether the shilling is part of the "toll" or not, I do not care. In that case there is an inequality; there is a difference in the amount charged for carriage upon the railway, which is what the Legislature intended to prevent.

As regards the only remaining question, namely, whether an action for money had and received is the proper remedy in such a case, I apprehend that that question was settled by the decision in *The Great Western Railway Company v. Sutton* (8) and *The Lancashire, &c., Railway Company v. Gidlow* (9), where it was determined, as I understand it, that money extorted by inequality of charge was to be recovered in exactly the same way as if it had been money extorted by making an unreasonable charge; that is to say, by an action for money had and received.

LORD GORDON.—I am of the same opinion. This Act, the Railways Clauses Act of 1845, has given rise to a good deal of discussion and litigation, and I do not wonder at it altogether, considering the peculiarity of the terms which are used in what is called the equality clause, the 90th section. The words in the section, "under the same circumstances," are certainly words calculated to give rise to a good deal of litigation in their construction; but we see how very carefully the learned Judges in the Queen's Bench Division and in the Court of Appeal applied their minds to it, and we find that they are unanimous upon the point. I listened with every attention to the arguments submitted to us by the appellants' counsel, but I must say they failed to bring before my mind distinctly any good grounds of complaint against the judgments of the Courts below. I therefore think that the judgment ought to be affirmed.

*Judgment appealed from affirmed, and appeal dismissed with costs.*

Solicitors—R. F. Roberts, for appellants; Geare & Son, agents for J. & W. J. Drewry, Burton-on-Trent, for respondent.

(9) 45 Law J. Rep. Exch. 625; s.c. Law Rep. H.L. 517.

[IN THE COMMON PLEAS DIVISION.]

1878. } WILBERFORCE (appellant) v.  
Nov. 29. } SOWTON (respondent).

*Appeal from County Court; Time for—  
Appeal within Eight Days—County Courts  
Act, 1875 (38 & 39 Vict. c. 50), s. 6.*

*In order to enable the plaintiff to appeal within the eight days prescribed by section 6 of the County Courts Act, 1875, the County Court Judge allowed his judgment, delivered the 18th of April, to be treated as delivered a fortnight later, namely, on the 2nd of May; and such judgment was accordingly entered and dated the 2nd of May. The plaintiff having appealed within eight days of the 2nd of May,—*

*Held, that such appeal was not brought within eight days of the "ruling, order, direction or decision of the Judge," as prescribed by section 6 of the County Courts Act, 1875.*

Appeal from the County Court under section 6 of the County Courts Act, 1875. The action was brought by the plaintiff, the purchaser of certain property, against the defendant, the vendor, for misrepresentation. The case was heard in the County Court on the 14th of February, and adjourned till the 18th of April, when the County Court Judge delivered a written judgment in favour of the plaintiff for 8*l.* and costs. The plaintiff's counsel, therefore, applied to the County Court Judge to further adjourn the case for a fortnight, in order to throw the case over the Easter recess, which had then commenced, and enable the motion for appeal to be brought in the Easter sittings. The County Court Judge assented, and appended to the end of his judgment: "If I have power to do so, I will allow the judgment to be treated as delivered on this day fortnight, so as to give the plaintiff more time to appeal by motion." Judgment was accordingly entered on the rolls of the County Court as dated the 2nd of May for 8*l.* and costs. Motion by way of appeal was made by the plaintiff within eight days of the 2nd of May under section 6 of the County Courts Act, 1875, and leave obtained accordingly.

*Anstie*, for the respondent, raised a preliminary objection that the motion to the Court had not been made within the eight days prescribed by section 6.

*Little* (*Edward M. Wood* with him), for the appellant, contended that the appeal was properly brought within the time prescribed by the statute; that there was no legislative enactment to prevent the County Court Judge protracting his judgment, and the plaintiff not being in default, ought not to be prejudiced thereby.

LORD COLERIDGE, C.J.—I am of opinion that the preliminary objection must prevail. This appeal is brought before us under the procedure enacted by section 6 of the County Courts Act, 1875 (38 & 39 Vict. c. 50), which enacts that, "In any cause, suit or proceeding, other than a proceeding in bankruptcy, tried or heard in any County Court, and in which any person aggrieved has a right of appeal, it shall be lawful for any person aggrieved by the ruling, order, direction or decision of the Judge, at any time within eight days after the same shall have been made or given, to appeal against such ruling, order, direction or decision by motion," &c. Nothing is said about judgment or date of judgment or entry in book, because the section points out that the appeal lies not from formal judgment in the case, but from the ruling, order, direction or decision of the Judge, shewing that the section is dealing with substance and not with form.

Here we have a case furnished by the County Court Judge, on which the last date appearing is the 18th of April; that being so all that follows must be taken to have taken place on that date. The judgment is given on the 18th of April, and I understand the County Court Judge to have said that if he had the power he would allow the judgment to be dated as if delivered on a subsequent day, but he could not by such proceeding repeal the Act of Parliament under which this appeal is brought. It was competent to the plaintiff to have come to the Court or Judge and ask for leave to extend the time, but as leave to extend the

*Wilberforce v. Sowton, C.P.*

time has not been applied for or granted by the Court or a Judge, and the appeal has not been brought within the eight days prescribed by the Act, it is clear we have no power to hear this appeal.

GROVE, J.—I am of the same opinion. Had it been a matter of mistake under which both parties had been misled, I should have been glad under any power we possess to have re-opened the appeal, though I should have expressly guarded against any precedent being thereby established. But that is not the case here. The judgment appears to have been delivered on the 18th of April, and as it appears that the Judge accompanied his act of post-dating with the remark, "If I have the power," the appellants took such indulgence at their peril. Application might have been made to a Judge at Chambers, or to the Court, to extend the time, but the plaintiff has assumed that the County Court Judge had the power to extend the time, but the County Court Judge had not such power, for to do so would really place it in his power to repeal the Act.

*Appeal dismissed without costs.*

Solicitors—Senior, Attree & Johnson, agents for H. G. Brydone, for appellant; Crowder & Co., agents for Greene & Malin, Chichester, for respondent.

[IN THE QUEEN'S BENCH DIVISION.]

1878. { *Ex parte* HUTCHINGS AND ROMER;  
Nov. 25. { *In re* THE SONG "KATHLEEN  
                  MAVOURNEEN."

*Copyright*—5 & 6 Vict. c. 45. ss. 2, 4, 14, 20 and 22—*Musical Composition*—*Exclusive Right of Performance*—*Rights of Composer of Song published before the Act*—*Expunging Entries in Registry*—*Person aggrieved*.

Where a song had been published by the composer before the passing of 5 & 6 Vict. c. 45, and subsequently to the Act he assigned his copyright to A., and the sole liberty of representing or performing the song to B., the Court, on the application of A., under section 14, expunged the en-

tries made at Stationers' Hall by B. of his right, notwithstanding B.'s assignment from the composer, on the ground that until that Act no such exclusive right of performance or representation existed as was capable of being reserved by the composer for himself or assigned by him to another; and, as the Act was not retrospective quâ such exclusive right, the publication of the song had for ever deprived the composer of any control over its performance.

Held further that, as assignee of the copyright, A. was a person aggrieved within the meaning of section 14, although equally with B. without title as regards any exclusive right of representation or performance.

This was an application to the Court under section 14 of 5 & 6 Vict. c. 45 (an Act to amend the law of copyright), on the part of the publishers of two songs, called "Kathleen Mavourneen" and "Dermot Asthore," to order certain entries in the register at Stationers' Hall in reference to those songs to be expunged. The applicants claimed to be the owners of the copyright in the songs, and a Mr. Adams by the entries in question claimed the exclusive right of representation or performance of the songs. It appeared that the songs were composed by a Mr. Crouch who, before the passing of the Act, 5 & 6 Vict. c. 45, had them published. That Act which extended the protection of copyright to musical compositions having been passed in 1842, Mr. Crouch, in 1843, assigned by deed to Messrs. D'Almaine & Co., through whom the present applicants claimed, "all his present and future vested and contingent copyright" in the songs. Mr. Crouch also by deed assigned to Mr. Adams the exclusive right of representing or performing the same songs, and it was under this assignment that the entries corresponding with the rights so assigned were made at Stationers' Hall. Mr. Adams was in the habit of requiring the payment of a fee by everyone who sang either of these songs in public.

Raikes, for the applicants.—The assignment to D'Almaine & Co. passed every right which the composer had in the songs, and he could not afterwards sever

*Ex parte Hutchings, Q.B.*

the right of performance and assign that to some one else. Mr. Adams can therefore acquire no title as against the applicants. The songs having been published before the Act the composer could only assign such copyright as he had; and therefore when he assigned the copyright, that included the right of representation, as that word would do previously to the Act of 5 & 6 Vict. c. 45. Section 22, therefore, of that Act does not affect this assignment so as to require any express and separate assignment of the right to represent—*Lacy v. Rhys* (1) and *Cumberland v. Planché* (2).

[COCKBURN, L.C.J.—There was no copyright in the songs previous to the Act 5 & 6 Vict. c. 45. Does that Act have a retrospective operation so as to include songs published before the Act?]

It does by section 4 (3) preserve a subsisting copyright, and that is what has here been assigned to the applicants, including, as is contended, all the composer's rights. Then the applicants are aggrieved by this entry because, as music sellers, the fee charged by Mr. Adams checks the sale of the songs, and having the copyright our property is rendered less valuable.

*O. H. Turner, contra.*—Admitting that the applicants have a copyright in these songs, notwithstanding their having been published before the Act, yet copyright must be limited to the exclusive right of multiplying and publishing copies. The same Act which creates the copyright in a musical composition also creates the distinction between copyright and the right of representing or performing that musical composition. The rights of the composer are just the same as if the songs had been published after the Act;

(1) 4 B. & S. 873; s. c. 33 Law J. Rep. Q.B. 157.

(2) 1 Ad. & E. 580; s. c. 3 Law J. Rep. K.B. 104.

(3) 5 & 6 Vict. c. 45. s. 4. "And whereas it is just to extend the benefits of this Act to authors of books published before the passing thereof, and in which copyright still subsists; be it enacted that the copyright which at the time of passing this Act shall subsist in any book theretofore published, shall be extended and endure for the full term provided by this Act in cases of books thereafter published, and shall be the property of the person who at the time of passing of this Act shall be the proprietor of such copyright."

and as he is authorised to assign the copyright, so also is he authorised to assign the right to perform. Section 2 (4) enacts that "book" shall include "sheet of music," and section 4 extends the benefits of the Act to authors of books published before the passing of it (3).

[COCKBURN, L.C.J.—It is only those books in which copyright subsists.]

That is so, but section 20 (5) extends to musical compositions, the provisions of the Act of Will. 4., and makes copyright apply to the liberty of performing musical compositions; and thus the composer having all the benefits of both Acts in terms extended to him, has the same rights as if he had published after the later Act. Then section 22 (6) expressly

(4) Section 2. "That in the construction of this Act the word 'book' shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart or plan separately published."

(5) Section 20. "And whereas an Act was passed in the third year of the reign of his late Majesty to amend the law relating to dramatic literary property, and it is expedient to extend the term of the sole liberty of representing dramatic pieces given by that Act to the full time by this Act provided for the continuance of copyright. And whereas it is expedient to extend to musical compositions the benefit of that Act and also of this Act, be it therefore enacted that the provisions of the said Act of his late Majesty and of this Act shall apply to musical compositions, and that the sole liberty of representing, or performing, or causing or permitting to be represented or performed any dramatic piece or musical composition, shall endure and be the property of the author thereof and his assigns for the term in this Act provided for the duration of copyright in books; and the provisions hereinbefore enacted in respect of the property of such copyright, and of registering the same shall apply to the liberty of representing or performing any dramatic piece or musical composition, as if the same were herein expressly re-enacted and applied thereto, save and except that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent in the construction of this Act to the first publication of any book."

(6) Section 22. "That no assignment of the copyright of any book consisting of or containing a dramatic piece or musical composition shall be holden to convey to the assignee the right of representing or performing such dramatic piece or musical composition, unless an entry in the said registry book shall be made of such assignment, wherein shall be expressed the intention of the parties that such right should pass by such assignment."



*Ex parte Hutchings, Q.B.*

provides that the assignment of copyright shall not convey the right of representation.

[COCKBURN, L.C.J.—Before the Act, when a song had been published, the composer could not prevent any one who bought it from singing it in public.]

He had the copyright in the music at the passing of the Act; it was subsisting.

[COCKBURN, L.C.J.—But he had not the exclusive right of performance; that right was given by the statute, and unless the statute has a retrospective operation, it will not give back to the composer what he parted with on the original publication.]

The contention is that the copyright which was subsisting included the right of representation. Then the applicants are not persons aggrieved within the meaning of the Act (7). It is a question of title, for they also have made an entry of their exclusive right of performance. The Court will not exercise their power under section 14 (7) unless the applicants have a title vested in them—*Ex parte Davidson* (8), and *Ex parte Davidson* (9). Not having proved their title they are not persons aggrieved—*Graves' Case* (10).

COCKBURN, L.C.J.—I am of opinion that the rule which has been asked for should be granted. There are two questions: first, whether the party who had caused an entry to be made at Stationers' Hall of his right of exclusive representation of the songs in question had a right to make the entry; and secondly, whether, assuming that against him, the applicants here are persons aggrieved.

With regard to the first point, I am of

(7) Section 13. "After the passing of this Act it shall be lawful for the proprietor of copyright in any book heretofore published, or in any book hereafter to be published to make entry in the registry book of the Stationers' Company of the title of such book, &c." Section 14. "If any person shall deem himself aggrieved by any entry made under colour of this Act in the said book of registry, it shall be lawful for such person to apply by motion to the Court . . . for an order that such entry may be expunged or varied."

(8) 2 E. & B. 577.

(9) 18 Com. B. Rep. 297; s. c. 25 Law J. Rep. C.P. 237.

(10) 39 Law J. Rep. Q.B. 31; s. c. Law Rep. 4 Q.B. 715.

opinion that it was not competent to Mr. Adams to cause this entry to be made, for the reason that he had not at the time the right to the exclusive representation or performance of the songs. Copyright in books was established by previous Acts of Parliament, and copyright in books was extended so as to include musical compositions by the Act of 5 & 6 Vict. c. 45. But there was no such thing known to the law as the right to represent or perform a musical composition as distinct from the copyright in it, at the time of the passing of that Act. There was, therefore, nothing then, a song having been published, to prevent a man buying it at a shop and then singing or performing it in public.

That right of representation was created by the statute, and that statute has no retrospective operation in reference to that right. If, therefore, a song had been published previously to the Act, then the Act did indeed preserve the copyright in it by section 4, but as there was no right of representation subsisting, none such could be preserved, and the author could not reclaim the liberty of performance from the public to whom it had been given. The result is as to Mr. Adams, that the thing which he had not before the statute, the statute did not give to him, and it follows that he had no right to have this entry made.

Then comes the second question: are the parties applying aggrieved? I think so, and that their grievance is not a shadowy but a substantial one, which entitles them to ask the Court to interfere. For although I quite agree that if a question of title is in dispute the Court will not interfere under the summary powers of section 14, and expunge an entry which cannot be replaced, yet if the facts are undisputed, and the Court think that the entry has been unjustifiably made, then they will act, if applied to and if the person applying be aggrieved.

Now the applicants here have the copyright of these songs vested in them. The value of that copyright to them consists in the number of copies they can sell; and will not the sale be interfered with by a person in the position of Mr. Adams interposing to prevent or check the per-

*Ex parte Hutchings, Q.B.*

formance of the songs by purchasers of the music? Obviously it will: the more the songs are sung the more copies will be sold, and the immediate effect of Mr. Adams's proceedings is to lessen the number of copies sold by the publishers. Therefore the Court will exercise its powers and direct these entries, which ought never to have been made, to be expunged.

MELLOR, J., concurred.

*Rule absolute.*

Solicitors—H. S. Russell, for applicant; Walter Jarvis & Triscott, for defendant.

[IN THE COURT OF APPEAL.]

(*Appeal from the Exchequer Division.*)

1878. }  
June 24. }

FISHER v. DREWETT.\*

*Principal and Agent—Procurement of Loan—Commission "on any Money received"—Non-receipt through Default of Principal.*

The defendant entered into the following contract with the plaintiff—"In the event of your procuring me the sum of 2,000*l.*, or such other as I shall accept, I agree to pay you a commission of 2½ per cent. on any money received." The plaintiff procured a party willing to lend 1,625*l.* if the defendant shewed a sufficient title to his security. The defendant accepted the offer, but failed to shew a sufficient title. The negotiations consequently went off, and no money was in fact received by the defendant:—

Held, that the plaintiff was notwithstanding entitled to his commission on the 1,625*l.*, as it was owing to the defendant's own default that he never received the sum, and the plaintiff had performed all his part of the contract.

Semble—*per* BRAMWELL, L.J., that those who bargain to receive commission for intro-

ductions have a right to their commission as soon as they have completed their portion of the bargain, irrespective of what may take place subsequently between the parties introduced.

Appeal from the judgment of the Exchequer Division (Kelly, C.B., and Pollock, B.) discharging a rule for a new trial.

The plaintiff was a mortgage broker, and the defendant being anxious to raise a loan on the security of house property entered into the following agreement with him:—

Sept. 21st, 1876.

Dear Sir,—In the event of your procuring me the sum of 2,000*l.* or such other as I shall accept, I agree to pay you a commission of 2½ per cent. on any money received:—

Yours truly,

Mr. Fisher.

E. Drewett.

A good deal of work was done by the plaintiff in endeavouring to procure the loan, and ultimately he discovered and introduced the Temperance Building Society to the defendant, who agreed to advance such a sum on the defendant's property as their surveyor should certify to. The surveyor fixed the sum at 1,625*l.*, and the society offered that amount to the defendant subject to his shewing a good title to his property, and that offer was accepted by the defendant. When the title came to be investigated the defendant furnished an abstract of title which the society's solicitors were not satisfied with, and required a further abstract. This the defendant declined to furnish on the ground of expense, and the matter went off and no loan was effected.

The defendant having refused the plaintiff his commission on the 1,625*l.* on the ground that he had never received that sum, the latter commenced an action in the Exchequer Division. The case was remitted to the Greenwich County Court for trial under 19 & 20 Vict. c. 108. s. 26. The County Court Judge after hearing the plaintiff's case gave a verdict for the defendant.

The plaintiff obtained a new trial, and the Judge then gave him the verdict. The

\* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Thesiger, L.J.

*Fisher v. Drouett (App.), Exch.*

defendant then obtained a rule for a new trial, which was subsequently discharged.

The defendant now appealed.

*H. F. Dickens*, for the defendant.—The contract was to pay commission upon the money being actually received by the defendant. It is clear some meaning must be given to the word “received,” and if the construction contended for by the plaintiff is the correct one, the result will be that the word must be cut out altogether. The true construction is this—“If I receive the money you shall receive the commission; if I do not receive the money you are to receive nothing.” It is quite competent to parties to make such a contract as that, and what clearer words to denote such a contract could have been used than those made use of in this agreement? The receipt of the money is clearly a condition precedent to the right to commission. There were no such protecting words in the case of *Green v. Lucas* (1). There the contract was to procure a loan which the Court held was satisfied by procuring a tender. But then it is said that the plaintiff did all that he had contracted to do, and as the defendant had by his own act prevented the completion of the contract, the plaintiff is entitled to the whole amount of his commission, on the authority of *Pricket v. Badger* (2), and that class of cases. But it is clear from the remarks of Erle, C.J., in *Simpson v. Lamb* (3), that such a doctrine must depend upon and be subservient to the contract itself. If parties definitely contract one thing you cannot imply another. The words “on any money received” must have been inserted for some purpose. Was it to guard the defendant in case the contract went off by the fault of the lenders of the money? That could hardly have been necessary.

[BRAMWELL, L.J.—I am not so sure of that.]

The doctrine relied on only applies where the contract with the lender goes

off by the fault of the principal, the borrower. The obvious inference then is, that the words were inserted to entitle the defendant to refuse to complete if he thought fit; at any rate if he had a reasonable excuse. At least they would protect the defendant in the event of the contract with the building society going off by their default. That being so, he is entitled to a new trial, as the County Court Judge did not decide whether his excuse was reasonable, or whether the company or the defendant were in default. He cited *Read v. Rann* (4), *Moffat v. Lawrie* (5) and *Bull v. Price* (6).

*J. Smalman Smith*, for the plaintiff, was not called on.

BRAMWELL, L.J.—In spite of the argument that has been so well addressed to us, we must in this case decide against Mr. Dickens' contention. There are of course many things which may have been in the contemplation of the parties when they drew up this agreement. One may have been that the defendant should pay to the plaintiff  $2\frac{1}{2}$  per cent. on such money as he might receive, having the right to refuse capriciously to receive any money whatever; another would be that the defendant should have a right to refuse to receive, and not having received, should be entitled to refuse the commission, if he had a good reason for refusing to receive; or they might have contemplated that the plaintiff should not earn his commission if the non-receipt of the money by the defendant was due to the fault of the lenders; and, fourthly, it may be that the word “receive” is really equivalent to the word “accept,” used before in the document, which, taken as a whole, means, “If you get me such a sum as I shall agree to, I will pay you a commission of  $2\frac{1}{2}$  per cent. on the sum agreed to be lent.”

Now the current of modern opinion is to the effect that those who bargain to receive commission for introductions have a right to their commission as soon as

(1) 33 Law Times, 584.

(2) 1 Com. B. Rep. N.S. 296; s. c. 26 Law J. Rep. C.P. 33.

(3) 17 Com. B. Rep. 603; s. c. 25 Law J. Rep. C.P. 113.

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(4) 10 B. & C. 438.

(5) 15 Com. B. Rep. 583; s. c. 24 Law J. Rep. C.P. 56.

(6) 2 Bing. 237; s. c. 9 Law J. Rep. (o.s.) C.P. 28.

*Fisher v. Drewett (App.), Excn.*

they have completed their portion of the bargain, irrespective of what may take place subsequently between the parties introduced. And it is reasonable that it should be so. Why should the right to be paid for work depend on what takes place between other parties outside the contract?

However, even if the rule that the agent is entitled to his commission when he has done his part, whatever may happen subsequently to prevent his work having effect, is confined to the case where the failure has arisen through the default of the employer, the defendant will not profit, for he has given no evidence of the default being in anyone but himself. He would not give an abstract of title, and so could not get the money. The plaintiff has procured him a contract which would enable him to "receive" the 1,625*l.*, and it is by his own default that he has not received it.

BAGGALLAY, L.J.—I am of the same opinion. The words of the agreement indicate on what the commission is payable: it is to be 2½ per cent. on 2,000*l.*, or such other sum as the plaintiff would accept, on a party being procured willing to lend that amount. The meaning to be put upon the word "receive" is that it is equivalent to "procured" or "accepted," and I cannot think that the plaintiff is disentitled to succeed because the money has not been actually "received," and that too through the defendant's default.

THESIGER, L.J.—I am of the same opinion. The contract divides itself into two parts, the consideration and the payment. If the two are looked at separately the whole thing becomes clear. The consideration is: "In the event of your procuring me the sum of 2,000*l.* or such other as I shall accept." The payment is: "I agree to pay you 2½ per cent. on any money received." The agent binds himself to procure the "2,000*l.* or such other sum, etc.," and to do no more; and as soon as the Building Society agreed to advance the 1,625*l.*, and the defendant accepted their offer, the plaintiff had no more to do, and the whole consideration was performed. Then

comes the payment, which is, as the 1,625*l.* has been accepted, to be 2½ per cent. on the 1,625*l.* The limitation, "on any money received," is, to my mind, put in to carry out the words, "or such other sum as I shall accept." As the defendant might accept a less sum if he chose, the defendant was not to receive 2½ per cent. on the 2,000*l.* if only 1,000*l.* was taken, but upon the lesser sum. The position in this case was the same as in *Green v. Lucas* (1). It was through the defendant's default in not furnishing a further abstract of title, a default which would have rendered him liable in an action for non-completion, that the money was never received. The plaintiff is clearly entitled to his commission.

*Appeal dismissed.*

Solicitors—Donague, for plaintiff; Scard & Sons, for defendant.

[IN THE COURT OF APPEAL.]

JAMES, L.J.	} ALLHUSEN v. LABOUCHERE.
BRETT, L.J.	
COTTON, L.J.	
1878.	
August 8.	

*Practice — Interrogatories — Order XXXI. rule 5 — Procedure — Onus of Proof.*

*When a party takes out a summons under Order XXXI. rule 5, objecting to answer interrogatories, his summons should state whether the objection goes to the whole of the interrogatories, or to any, and which of them, specifying in the latter case, by their numbers, the particular interrogatories objected to. He may take both objections at the same time.*

*In such a case, it is the duty of the Judge to consider the interrogatories, either as a whole, or as the particular interrogatories objected to, as the case may be, and to decide accordingly; and the onus is on the party who objects to the interrogatories to shew that they are bad.*

*If the summons merely objects to the*

*Allhusen v. Labouchere (App.).*

interrogatories generally, and the Judge finds, on looking at them, that some are relevant and some irrelevant, he is not bound to go through them, to separate the bad from the good, but is entitled to require the party objecting to point out the particular interrogatories that are objectionable.

*Fisher v. Owen* (47 Law J. Rep. Chanc. 681; s. c. Law Rep. 8 Ch. D. 645) approved.

[This case is reported, 47 Law J. Rep. Chanc., page 819.]

[IN THE COURT OF APPEAL]

1878. } THE SHEFFIELD WAGGON COMPANY  
Nov. 29. } v. STRATTON AND OTHERS.\*

*Bankruptcy Act, 1869* (32 & 33 Vict. c. 71), s. 23—*Bankruptcy Rules, 1871*, rule 28—*Disclaimer by Trustee*—"Leasehold Interest"—*Lease of Chattels*.

*A lease of chattels is not a "leasehold interest" within the meaning of rule 28 of the Bankruptcy Rules, 1871; and therefore a trustee in bankruptcy may disclaim a lease of chattels under section 23 of the Bankruptcy Act, 1869, without the leave of the Court.*

This was an action to recover 603*l.* for the hire of certain railway waggons, and damages for their detention.

In November, 1871, one William Sneezum let to the defendants ten coal waggons for a term of five years from the 21st of January, 1872; and in October, 1872, the same person let to the defendants twenty coal waggons for a term of six years from the 28th of September, 1872. In October, 1872, Sneezum sold to the plaintiffs his stock of waggons, including the thirty let to the defendants; and by two agreements, dated the 6th of November, 1872, and the 25th of November, 1872, respectively, the plaintiffs let the stock of waggons to

Sneezum on "purchase leases," i.e., on the terms that after a certain number of yearly payments the waggons should again become the property of Sneezum.

In February, 1873, Sneezum became a bankrupt. His trustees continued to pay rent for the waggons under the agreements of the 9th of November and the 25th of November, 1872, until the 25th of June, 1875; and on the 7th of October, 1875, they, by writing under their hands, disclaimed the contracts of the 6th of November and the 25th of November, 1872, without obtaining the leave of the Court under rule 28 of the Bankruptcy Rules, 1871.

The plaintiffs now sued the defendants for the rent of the waggons.

The case came on for trial before Pollock, B., at the York Assizes, when the learned Baron, on further consideration, gave judgment for the defendants, on the ground that the disclaimer by the trustees was invalid without the leave of the Court, the interest of the bankrupt Sneezum being a leasehold interest within the meaning of rule 28 of the Bankruptcy Rules, 1871.

The plaintiffs now appealed.

*Cave and Forbes*, for the plaintiffs.

*Wills and Bremner*, for the defendants.

BRAMWELL, L.J.—I cannot agree with the construction the learned Baron has put on this rule. Admitting as I do that "a lease of the chattels" is an accurate expression, and agreeing that if a man who had a lease of a chattel were asked what interest he had in it, he might, not inappropriately, reply that he had a leasehold interest, it seems to me that the intention of rule 28 was to limit the expression to that which in popular language is called leasehold, that is to say lands and houses, and possibly such things as tithes, but at all events as a general rule to things which have the true incidents of leaseholds—rent and reversion. I think so because the twenty-third section of the Bankruptcy Act, 1869 (1), deals

(1) By 32 & 33 Vict. c. 71. s. 23, where any property of the bankrupt acquired by the trustee under this Act consists of land of any tenure bur-

\* *Coram* Bramwell, L.J. Brett, L.J.; and Cotton, L.J.

*Sheffield Waggon Co. v. Stratton (App.).*

with landed property, "land of any tenure" being one of its special objects, and I cannot help thinking that the 28th rule is directed to that sort of property which is the ordinary subject of leasing.

Leaseholds, in the proper acceptation of the word, are a likely subject for a rule like rule 28; but a termor's interest in a chattel is not a thing likely to be provided for by such a rule; and I also think that the term "leasehold interest" is not properly applicable to a chattel. The proper phrase when a man has such an interest in a chattel is to say that "he has hired it." If you treat the phrase in the rule as a popular expression, "leaseholds" is not the word you would expect to find. If you take the words in their technical sense, then there is no such thing as a "holding" in a chattel.

On these grounds I think that the learned Baron's judgment was erroneous and must be reversed.

As to the further point, whether in cases under the rule the leave of the Court is a condition precedent to a valid disclaimer, it is not necessary and perhaps not advisable for us to decide.

BRETT, L.J.—I should think that rule 28 was intended to refer to one of the

denied with owner's covenants, of unmarketable shares in companies, of unprofitable contracts, or of any other property, which is unsaleable or not readily saleable, the trustee, notwithstanding he has endeavoured to sell or has taken possession of such property or exercised any right of ownership in relation thereto, may, by writing under his hand, disclaim such property; and upon the execution of such disclaimer the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication; and if the same is a lease be deemed to have been surrendered on the same date, and if the same be shares in any company be deemed to be forfeited from that date.

By rule 28 of the Bankruptcy Rules, 1871, where any property of a bankrupt acquired by a trustee under the Bankruptcy Act, 1869, shall consist of a leasehold interest, the trustee shall not execute a disclaimer of the same without the leave of the Court first obtained for that purpose, and upon any application to the Court for such leave, notice of the desire of the trustee to disclaim such interest shall be given to such person or persons as the Court shall direct, and such order shall be made thereon as the Court shall think fit.

descriptions of property mentioned in the 23rd section. It clearly does not apply to them all. The disclaimer referred to in section 23 is the creature of statute. That section gives the right of disclaimer in several cases, the first being the case of property in "land of any tenure." Now it is true that another subject of disclaimer is unprofitable contracts. But when we find that one of the specified subjects is "land of any tenure," and when we bear in mind that the rule is drawn by persons who would use words in the sense they bear in legal parlance, and not in their popular sense, and find that they have used the term "leaseholds," I cannot help agreeing that as "land of any tenure" includes "leaseholds," the word "leasehold" must be intended to refer to that branch of the section; and that, unless we stretch the words beyond their proper meaning, they could not be made to refer to anything else, although a document like that in the present case might very well be called the "lease" of a chattel.

COTTON, L.J.—The object of this rule is to direct how certain provisions in the Act are to be carried into execution. [His Lordship here read the rule.] Now the ordinary meaning of leasehold interest is an interest in land of leasehold tenure. Then if we look at the section, the execution of which is regulated by the rule, we find that it refers to various things, and among them "to land of any tenure." It seems to me, therefore, that on a fair construction of the section and rule, the words "leasehold interest" in the rule are equivalent to "interest in land of leasehold tenure," and in my opinion they must be confined to that signification.

*Judgment reversed.*

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Solicitors—Bell, Brodrick & Bell, agents for Rodgers, Thomas & Co., Sheffield, for plaintiffs  
Anderson & Sons, for defendants.

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1878. }  
Nov. 30. }

WILKINSON v. ALSTON.

*Sale of Ship—Commission—Introduction of Purchaser.*

Defendant being owner of several vessels and being about to retire from business consented, at the request of the plaintiff, to allow him to look out for purchasers, and agreed to pay a stipulated commission to plaintiff if he should be the means of introducing a purchaser. In February, 1876, plaintiff introduced a person who had been recommended to buy one of defendant's ships by one A., and defendant agreed that if this resulted in a sale, plaintiff and A. should share commission. No sale did result; but in March A. mentioned the defendant's same vessel to B., who chanced to call upon him in reference to a ship of another owner. Plaintiff hearing of this, informed defendant of B.'s call, and suggested his seeing B. on the subject. Defendant did nothing in the matter, and B. at that time had no intention of purchasing defendant's ship and made no communication about it to anyone.

Defendant then told plaintiff that it was no use doing anything until the ship returned home, and plaintiff thenceforward took no further steps to find a purchaser.

A., however, in April, again reminded B. of the vessel, but B. took no notice of his letters, and neither defendant nor plaintiff were aware of A.'s having written. In May B. wrote, as broker, direct to defendant in reference to the vessel, and after some negotiation, on the 13th of June disclosed the name of the principal for whom he was acting and the sale was effected.

Plaintiff on hearing afterwards of the sale claimed his commission on the ground that the purchaser had been introduced through the medium of his original negotiations with A.

The jury having found on questions left to them, first, that plaintiff was authorised to find a buyer for defendant's vessel, and, second, that B. was induced to enter upon the negotiation for the purchase by the information he received from A.,—

LUSH, J., on further consideration, gave judgment for the defendant: holding that even assuming A. to have mentioned the vessel to B. in the first instance as

plaintiff's agent, yet inasmuch as B. did not buy and defendant then revoked plaintiff's authority to look out for another purchaser, the subsequent transaction between B., acting as broker for the ultimate purchaser, and the defendant, was not an introduction of a purchaser by plaintiff or plaintiff's agent.

This was an action by the plaintiff to recover a sum of 390l. 4s 8d. commission alleged to be due to him upon the sale of a ship of the defendant's called the *Madras*. The trial took place before Lush, J., at the Guildhall during the Trinity Sittings, when the learned Judge reserved judgment until after argument before him upon the effect of the findings of the jury.

On the 5th of November the case was argued by

J. C. F. S. Day and A. L. Smith, for the plaintiff, and

W. Willis and R. E. Webster, for the defendant.

His Lordship delivered the following considered judgment (in which all the facts and circumstances of the case sufficiently appear) on the 30th of November:—

LUSH, J.—This action is in its circumstances peculiar. It was sent down for trial in February last before the Lord Chief Justice, when the jury were unable to agree upon the questions submitted to them. It was again tried before me at Guildhall in June last, when the jury answered the two questions which I put to them, and I then reserved for further consideration the question what judgment ought to be given upon these findings.

The case was argued on the 5th day of this month, and I am now to deliver my judgment upon the whole case. Most of the material facts appear upon the correspondence.

The action is brought for commission upon the sale of the defendant's interest in a vessel called the *Madras*, that interest being 37/64ths. The defendant was the owner or part owner of several vessels, and amongst them the *Stamford* and the *Madras*. The plaintiff was a shipbroker. He was on terms of in-

*Wilkinson v. Alston.*

timacy with the defendant, and for a portion of the time when the transaction in question took place, namely from March to June, 1876, both parties occupied the same office.

The plaintiff having become aware in August, 1875, of the defendant's intention to retire from business, began to look out for purchasers, with the view of earning a commission. And the defendant, though he did not put the ships in his hands or give him any authority to sell, agreed to pay a stipulated commission if he should be the means of introducing a person who should actually become the purchaser. The *Stamford* was sold by his instrumentality, and the stipulated commission was paid him.

The plaintiff named several persons as likely to become purchasers of the *Madras*, but none of them came to terms. The following letters, amongst others, passed between him and the defendant:—

“ 24th of February, 1876, plaintiff to defendant.

“ Mr. James Turpin, of North Shields, has gone over to Stockton to see Mr. Blair with reference to the engine of the *Madras*, and as he knows the price you want, it rather looks as though he meant business. He is a friend of Mr. White, who has recommended him strongly to buy. In case business should result, please to reserve the nominal  $2\frac{1}{2}$  per cent. for me and White.”

“ 25th of February, defendant to plaintiff.

“ There is no chance of business herein if White is to finger one cent of it. I would keep the boat for years before I would allow one farthing to go into his pocket out of the sale of her. If you can bring Turpin to business I will arrange for a commission for you out of it of one per cent. say.”

“ 2nd of March, plaintiff to defendant.

“ I fear Master White won't be licked off so easily. If I get one per cent. and he ditto, I don't think either of us will take any harm. You need not care who you do your business through so long as you get your price. Practical money-making people like you should not allow theoretical trifles to stand in your way.”

“ 4th of March, 1876, defendant to plaintiff.

“ I agree with you, and think if you can bring this to business I will be able to swallow my annoyance with White and pay the two per cent.”

The negotiation with Turpin also went off; no other person was afterwards mentioned by the plaintiff. On the 9th of March a Mr. Wise, jun., a member of the firm of Wise & Son, ship owners of Hartlepool, called upon White in reference to another vessel called the *Northumberland*, belonging to another owner which Wise, jun., contemplated buying in conjunction with one *Leauroyd*, when White mentioned to Wise that if that purchase went off he had another vessel, the *Madras*, which he could equally recommend. Wise took no notice of this conversation, and on the 10th of March, White, in a letter to the firm relating to the *Northumberland*, referred to his mention of the *Madras* to the son, and enclosed particulars of her, advising, “ Please keep this matter private.”

On the 11th, Wise & Son answered the letter as far as it treated of the *Northumberland*, but took no notice of the *Madras*.

On the same day the plaintiff wrote to defendant:—

“ Young Wise was up here on business with White; the latter named the *Madras* to him. Wise thought 25,000*l.*, but White told him that there was not a shadow of chance under 28,000*l.*, and that it was useless approaching you at less. He promised to crack the matter over with his father when he returned. They have 5,000*l.*, or 6,000*l.* cash ready for any investment they may go into. Adams, of Adams & Co., Aberdeen, entertain the *Madras*.

“ If you are at Aberdeen or West Hartlepool, you know whether it would be advisable to see them. If you do, keep us a commission. In case of need I will get White to let you down easy, as I want to see business result, and would not myself be hard.”

It does not appear that Wise ever entertained the proposal to purchase the *Madras*, nor did the defendant go to



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Aberdeen or Hartlepool, or have any communication on the subject with either Wise or Adams. But on the 13th of March he wrote to the plaintiff as follows:—

“*Madras.*

“There is no use doing anything herein until the return home. No one will buy a ship at sea unless they know her thoroughly, such as Porteus & Senior.”

Porteus & Senior were the persons who had bought the *Stamford*, and whom the plaintiff had named as probable buyers of the *Madras*, but whose treaty for that vessel had gone off.

From the date of the last-mentioned letter no correspondence took place between the plaintiff and the defendant respecting the *Madras* until after the sale of the vessel, as hereinafter mentioned, and although the parties then occupied the same office neither of them mentioned the subject of the *Madras* to the other, nor did the plaintiff after that letter take any further steps to find a purchaser.

On the 18th of March White wrote to Wise & Son that, as they had missed the *Northumberland*, he should be glad to hear whether they entertained the purchase of the *Madras*, &c.

And on the 22nd of April he wrote again:—

“The *Madras*, the management portion of which I proposed to you for sale, left Bombay some days since for the Continent, and may be expected home about the middle of next month. I shall be glad to hear whether you are disposed to arrange and purchase subject to confirmation on inspection as already advised you. The management is exceptional, and the terms of payment very easy.”

No notice was taken of these letters by Wise & Son, nor was either the defendant or the plaintiff aware that White was in correspondence with them, or was taking any steps to sell the *Madras*.

On the 25th of April Wise, jun., wrote to the defendant:—

“I can introduce a buyer for 33/64th *Madras* S.S. What will you accept?”

“26th April, defendant to Wise:—

“I am favoured with your memoran-

dum of to-day, and in reply my lowest price for 37/64 of the *Madras* (my present interest) is at the rate of 28,000*l.* for the vessel, equal to 16,187*l.* 10*s.* for 37/64 payment on the basis of  $\frac{1}{2}$  cash and  $\frac{1}{2}$  at six months.”

“The credit portion I would not object to extend over a longer period to an approved buyer. I would require security on the shares sold for any portion of the price on credit.

“Interest at the rate of 5 per cent. per annum would be charged on any credit beyond six months.

“Mr. Blair will tell you the condition of the vessel, and what she got in the Tyne in January last. I may mention for your guidance that I will not take one farthing less than the price named, so you need not bother with her if you cannot offer the price, as I refused in December last the same price, less 2*½* per cent. and I can shew you the offer if you like.

“*Madras* is at present on the way from Bombay to Marseilles, and I expect her in this country (all being well) in June. She is not yet chartered from Marseilles, and I might arrange to give delivery there, otherwise she would be sold on her arrival in this country subject to her bottom and engines being found sound and in good order to the approval of Mr. Blair.”

This was accompanied with another letter marked “private,” dated the same day, in which the defendant says:—

“I hand you offer of my interest in *Madras*, so that you may have a chance of working it. I have not put one farthing in to take off again, so you must be good enough to understand this.

“I cannot afford any commission off the figures named, so to give you some encouragement to work it I will in the event of a sale pay you the odd money as commission—say, 187*l.* 10*s.* With kind regards to Mr. Wise, sen., and his home circle, I am,” &c.

“7th May, Wise, jun., to defendant.

“I have your esteemed favour re *Madras*, and hope to give you a definite answer in a day or two.”

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"30th May. Wise, jun., to defendant.

"You last wrote me on the 8th asking a bid against 16,000*l.* for 37/64 of *Madras*, and now with terms I can get 15,000*l.*, or at the rate of 26,000*l.*, having made great exertions to get up to this figure.

"There is 5,000*l.* ready; the remainder will be wanted to stay on for two years at five per cent. He is a younger son of a wealthy parent, and it would be right. I have said nothing about half six months or this 200*l.* you would send me as commission. I have instructions from him to go to another boat where similar terms are offered failing your acceptance, so beg your decision by 'wire.'"

"1st of June. Defendant to Wise, jun.

"I was going from home the day when I sent my telegram to you, and on my return to-day I find yours in reply waiting me.

"I am very reluctant to concede the matter as to modification of cash payment, but if your client is such a good man I will accept 5,000*l.* cash, and remainder spread over two years, bearing interest at five per cent per annum.

"The instalments would be quarterly, so that there must be eight equal payments of the credit portion. Of course I would require to be secured, and I propose that I be registered owner of the shares and transfer them *pro rata* as the instalments are paid, granting a mutual trust deed, to be left in the hands, say, of E. Turnbull, embodying the conditions of sale, &c. This seems to me a suitable arrangement, and I have found it answer well in the case of the *Stamford*, on which vessel I had 52/64ths, and sold them last January on similar conditions. *Madras* is now on her way from Sulina to Antwerp. 37/64ths at 2,700*l.* will be 15,609*l.* 7*..* 6*d.* If you carry this through I will allow 159*l.* 7*s.* 6*d.* commission, not more. This will leave me only 15,450*l.*, which means a heavy loss for me."

"10th June. Wise, jun., to defendant.

"A very slight concession on your part will bring business. It is, first, this—that buyer does not wish to be bound to particular dates for payment, but to pay

over the two years as may be convenient. You would be well enough off with the security and interest. If you will let me know that you agree to this, and that my commission is to be 200*l.*, I will disclose the principal, and business will be almost certain."

Telegram. June 13. Wise to defendant.

"Learoyd, Huddersfield, give your price. Five down; remainder over two years; interest five. Wire acceptance. Can build, less money."

Telegram. Same day. Defendant to Wise, jun.

"I confirm sale of 37/64 of *Madras*, per my offer. Write you fully."

And on the same day the defendant wrote, after referring to the telegrams:—

"Your letter of 10th came duly to hand, but it not being accepted I did not reply to it. But as your client and yourself have come to my terms the case is altered. As I understand the bargain, the price of 37/64 at 27,000*l.* for the steamer *Madras* is 15,609*l.* 7*s.* 6*d.*, less your commission, 159*l.* 7*s.* 6*d.* 15,450*l.*, payable as follows: 5,000*l.* down, and balance in equal instalments of 3, 6, 9, 12, 15, 18, 21 and 24 months, bearing interest at five per cent. per annum. 37/64ths to be registered in my name as at present; transferred as the credit portion is paid off *pro rata*. A Lloyd's policy in my name for amount of purchase price to be taken out and a protecting ditto. A trust deed to be executed and deposited in the hands of a trustworthy party, to our mutual satisfaction, setting forth the nature and conditions of the sale. Mr. Learoyd's references to be satisfactory to me. Delivery in Tyne or Cardiff, or at Antwerp on completion of present voyage."

15th June. Wise to defendant.

"The offer was made to you on the terms I wrote you, and I have authority to close them, but on no other, and Mr. Learoyd has gone away. Of course, it is subject to his stability being satisfactory, but if you have inquired you will find it right. He will not bind himself to dates, but will pay over two years as convenient,

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and I know if he wants 5,000*l.* or 6,000*l.* he can get it if he should not have it. As it is a fancy price I cannot get any other terms. You can either transfer the shares paid for, or take a mortgage of the whole. The insurance would be date policies and would be in your name. I am now in a position to lay before him a boat built in 1872, carries 2,300 tons, 150 h.p., 21,500*l.*, so that your prompt wire will be required to make business.

"We have two boats of the same dimensions and are about contracting for another, and I think myself 27,000*l.* is a price you will not get offered again from any one who knows enough." On the 16th of June Wise, jun., writes, that he would be in London, at Wood's Hotel, on a Saturday, wishing defendant to meet him there. The defendant did so and terms were ultimately agreed, and the defendant's shares in the *Madras* sold to Learoyd.

It appeared that White had received information from Hull that Wise was coming to town, and he also called upon him and pressed the purchase of the *Madras*. Wise led him to believe that he had declined the purchase and was looking out for another vessel. It also appeared that after the treaty for the *Northumberland* had gone off, Wise left the firm of Wise & Son to carry on business on his own behalf as a shipbroker, and opened negotiations with Learoyd for a partnership. Learoyd was the person whom he referred to as the "buyer." The arrangement between them was that Learoyd was to bring in 5,000*l.* as his share of the partnership capital, and that this was to be invested in the purchase of shares in a vessel, an ordinary means of securing a source of income to a firm of shipbrokers.

I have recited the foregoing correspondence between Wise and the defendant at length, because of the imputation which was made and pressed on the jury at the trial that the defendant colluded with Wise to bring about a sale behind the back of the plaintiff, and to disguise it as a sale to a third party, in order to cheat the plaintiff of his commission. I am unable to discover any evidence whatever to support this sugges-

tion. And although the imputation was freely made, Mr. Day did not ask or suggest that this point should be put to the jury. It appears to me that the defendant acted in the matter with perfect good faith.

But to proceed. On the 2nd of August the plaintiff wrote to defendant: "As I find the sale of the *Madras* has been completed I beg herewith to enclose you account for commission, and will thank you for a cheque." The claim enclosed was 390*l.* 4*s.* 8*d.*, being commission at 2½ per cent. on 15,609*l.* 7*s.* 6*d.* The following correspondence then passed:—

3rd of August, defendant to plaintiff, inquiring his grounds for making such a claim, as he had nothing to do with the sale so far as the defendant was concerned.

5th of August, plaintiff to defendant.

"In the correspondence between Wise, jun., and White, the former said that if a boat had been bought it would be for the account of himself and Mr. Percy Learoyd, of Huddersfield, and that they were prepared to pay 5,000*l.* or 6,000*l.* cash, and the value to be spread over a couple of years at five per cent. or six per cent. interest. Although Mr. Learoyd is the registered owner it is well known and can be proved that Mr. Wise, jun., is the manager, and that he has done certain acts and deeds beyond the usual province of a ship's husband. With these few words and referring you to my letter of 11th of March and your reply on the 13th, I return you the account and beg for cheque in course."

These being the grounds of the claim, the defendant denied his liability, but as proceedings were threatened, he required from Wise a guarantee, and the latter gave an undertaking that he had negotiated the sale and made the introduction between buyer and seller without the assistance of any third party, and that his undertaking to substantiate that was the basis of receiving payment of the 200*l.* commission.

I declined at the end of the plaintiff's case to direct a nonsuit, thinking it safer to hear all the evidence on both sides.

Mr. Day proposed two questions to the jury:—

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1. Was Wilkinson authorised to find a buyer? and

2. Was a buyer found through Wilkinson?

The latter question involving, according to the contention of the defendant's counsel, and as I thought, matter of law, as well as of fact, I put the questions in the following form:

1. Was the plaintiff employed by the defendant to find a purchaser for the *Madras*?

2. Was Wise induced to enter upon the negotiations by any information given him by White, or did he act upon his own knowledge previously or subsequently acquired from other sources?

The latter question had reference to the evidence which Wise and other witnesses had given, but the finding of the jury makes it unnecessary to go into that evidence. The jury found, in answer to the first question, that the plaintiff was fully authorised to find a buyer for the defendant's interest in the *Madras*, if not employed according to my definition of that word. And in answer to the second question, that Wise was induced to enter upon the negotiation for the purchase of the *Madras* by the information he received from White.

It occurred to me at the time with reference to the letter of the 13th of March, that there might be a distinction between the case of an agent who had been employed to look out for a buyer and one who had merely at his own request obtained authority to do so. For the purpose of this case I do not think it needful to consider whether there is any such distinction or not. It must, of course, be taken upon the finding of the jury, that Wise acted upon the information White gave him, what the vessel was, and that it was for sale. And the question is, assuming that to be so, did Wilkinson procure the buyer? Now it is clear that the buyer was Learoyd and not Wise. The articles of partnership fully confirm what Wise stated, that Learoyd's contribution to the partnership capital was 5,000*l.*, which he was to provide in cash. How the partners invested the money was a matter which concerned themselves only. They did agree to

invest it in the *Madras* and to the extent of 5,000*l.* the shares in the vessel became by Learoyd's act the property of the firm. But all beyond that was and remains the separate property of Learoyd. The instalments which he subsequently paid were paid with his money. Did Wilkinson then procure Learoyd to become the purchaser? He never had any communication with Learoyd, and never heard his name till after the purchase. Nor did White introduce Learoyd. He knew nothing of such a person, until after he wrote the letter of the 10th of March.

He mentioned the vessel to Wise as to a purchaser, not as to an agent, to look out for a purchaser for him, and Wise never thought of acting in any such capacity. And as far as appears, and as I believe, Wise at the time had no thought of treating for the purchase of the *Madras*, either as buyer or broker. Moreover, White was no agent of the defendant's. The latter at first expressly refused to sanction White's sharing the commission which he had agreed to pay Wilkinson, and he never went beyond merely withdrawing that prohibition. But White's authority, whatever it was, was derived solely from Wilkinson, and if ever it was within his competence to propose the vessel as one which he had, at all events that authority ceased when Wilkinson's authority ceased, and the letter of the 13th of March was, I think, a revocation of that authority, or suspension of it till the vessel should arrive home.

Such was the view taken of that letter by both parties, for Wilkinson made no endeavour afterwards to dispose of the vessel.

The case, therefore, stands thus. White mentions the vessel to Wise with the view of his buying it, and let it be assumed that he does so as Wilkinson's agent. Wise declined to buy. Wilkinson's authority to look out for another purchaser is revoked, and the whole transaction as between Wilkinson and the defendant is at an end. Afterwards, Wise having to find a vessel as broker for Learoyd, makes use in that capacity of the information he had before received from White, and treats with the defendant as an independent broker, stipulating

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for commission to himself. The defendant, in perfect good faith, treats with Wise as such broker acting on his own behalf, and undoubtedly he became liable to him for commission. It cannot be said, I think, under these circumstances, that Wilkinson by his agent procured Learoyd to become the buyer. The chain of continuity was broken. Even supposing White's act was Wilkinson's act when he proposed the vessel to Wise, Wise's act in proposing it afterwards to Learoyd was not Wilkinson's act. It was his own act. In no sense was he agent to Wilkinson. Wilkinson's information to Wise must be taken to have been only the *causa causans*, and that is not enough. If a year had elapsed, and Wise having then become broker, and calling to mind the information he had received a twelvemonth before that this ship was for sale, had written to the defendant to enquire if it was still for sale, and had upon hearing that it was, negotiated as broker or purchaser for a customer, could it be then said that Wilkinson would be entitled to commission? Or supposing he had not undertaken brokerage business, but had casually mentioned to a broker who was looking out for a ship for his customer that this one was for sale a twelvemonth before, and this had led up to a bargain between the broker and the defendant, could Wilkinson be heard to say that he had found that purchaser? I apprehend not; and if not, I do not know where else the line is to be drawn than at the point where the action of the broker ceases and the buyer comes in under another who stands in no relation of privity to that broker.

The conclusion that I come to is, that Learoyd was not in fact introduced either by Wilkinson or by any agent of his, and I am therefore of opinion that, notwithstanding the finding of the jury, judgment must be entered for the defendant, which will of course be with costs.

*Judgment for defendant with costs.*

Solicitors—Ingledew, Ince & Greening, for plaintiff; Lumley & Lumley, for defendant.

[IN THE COURT OF APPEAL.]

1878. } MEYERHOF AND ANOTHER v.  
Nov. 12. } FROELICH.\*

*Limitations, Statute of—Acknowledgment, taking Debt out of the Statute—Promise to pay—Conditional Promise—9 Geo. 4. c. 14. s. 1.*

*The defendant having owed the plaintiffs money since 1865, and having paid no instalments since 1870, in May, 1874, wrote to them as follows:—"Believe me that I shall never lose out of sight my obligations towards you; and I shall be glad, as soon as my position becomes somewhat better, to begin again and continue my instalments."*

*It was proved that in one year, and one year only, since 1874, the defendant's income exceeded its amount at the date of the promise by 14l. :—*

*Held, that the letter contained, not an unconditional acknowledgment of the debt from which a promise to pay could be implied, but an acknowledgment coupled with a promise conditional on the defendant's position becoming somewhat better, and that such condition had not been fulfilled.*

This was an appeal from a judgment of Denman, J., on motion for judgment after trial.

The plaintiffs are merchants at Aix la Chapelle, in Germany, and the defendant lives in Manchester. Before the year 1865 the plaintiffs lent to the defendant several sums of money, and on June 30th, 1865, there was a balance due from the defendant to the plaintiffs of 7,218 German thalers, 23 silber-groschen. This amount was admitted by the defendant, who promised to pay. Between the 30th of June, 1865, and the 13th of January, 1870, the defendant paid to the plaintiffs, by instalments, the sum of 1,510 thalers, 7 silber-groschen, on account of his debt, the last payment being made on the 13th of January, 1870.

On the 23rd of May, 1874, the plaintiffs wrote to the defendant, demanding a renewal of the payment of instalments, and threatening proceedings.

\* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

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On the 29th of May the defendant wrote a long letter in answer, explaining that he was unable, through poverty, to pay any further instalments at present, and concluding thus:—

"Believe me that I shall never lose sight of my obligations towards you, and that I shall be glad, as soon as my position becomes somewhat better, to begin again and continue my instalments."

Several further communications were made by the plaintiffs to the defendant, asking for payment, the last on the 7th of September, 1876; to which the defendant replied on the 15th of September, 1876, by a letter, of which the material part is as follows:—"My considerations for you are unchanged; and if I cannot prove them practically, the reason of it is that I have spent seven, eight valuable years with vain hopes and promises. Since the present year I have found myself in a more hopeful sphere, which, as soon as the general commercial crisis gives way, will render to me more than necessary for living."

The plaintiffs relied on the above letters to take the case out of the statute of limitations, and further contended that if the promises contained in them were conditional the conditions had been fulfilled.

It was admitted that the defendant owed the amount endorsed on the writ. It was also admitted that at the date of the letter of the 29th of May, 1876, the defendant was in receipt of an income of 200*l.* for commission, and that in one year after that date he had received 214*l.*

The motion for judgment came on for hearing upon the 15th of November, 1876, when Denman, J., gave judgment for the defendant, holding, first, that the letters of the defendant contained no such acknowledgment of the debt, as that a promise to pay could be inferred; and secondly, that if there was an actual promise to pay it was conditional on the defendant's position "becoming somewhat better," which could not be regarded as fulfilled by the increase of the defendant's earnings to the extent of 14*l.* in one particular year.

Against this decision the plaintiffs now appealed.

*O. Crompton*, for the plaintiffs, contended, first, that the promise was not conditional, for which proposition he cited *Cornforth v. Smithard* (1), *Lee v. Wilmot* (2), *Sidwell v. Mason* (3), *Bird v. Gammon* (4), *Ohasmore v. Turner* (5), and *Collis v. Stack* (6); secondly, that if the promise was conditional, the condition had been fulfilled by the extra 14*l.* earned since the promise.

[BRAMWELL, L.J., referred to *Tanner v. Smart* (7).]

*Hopwood*, for the defendant, was not called upon to argue.

BRAMWELL, L.J.—I cannot help repeating what I said something like twenty years ago—that the law on this point is not in a satisfactory condition, and I really wish some one would take it in hand and legislate about it. In all these cases, the principle seems to be that actions are taken "out of the statute," as it is called, by an acknowledgment of the debt, and a promise to pay. Now I do not see why a promise should be necessary at all. If a man says, "I owe a certain sum," I do not see why he should not be made to pay, even if he says that he will not pay. I think there must have been some difficulty in the mind of Lord Tenterden when he drew this Bill, which I think is very singularly worded. It runs thus: "In all actions of debt or upon the case grounded upon any simple contract, no acknowledgment by word only shall be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the operation of the said enactments or either of them (8), or to deprive any party of the benefit thereof unless such acknowledgment or promise

(1) 5 Hurl. & N. 13; s. c. 29 Law J. Rep. Exch. 223.

(2) 35 Law J. Rep. Exch. 178; s. c. Law Rep. 1 Exch. 364.

(3) 2 Hurl. & N. 306; s. c. 26 Law J. Rep. Exch. 407.

(4) 3 Bing. N.C. 883; s. c. 6 Law J. Rep. C.P. 258.

(5) 45 Law J. Rep. Q.B. 66; s. c. Law Rep. 10 Q.B. 500.

(6) 1 Hurl. & N. 605; s. c. 26 Law J. Rep. Exch. 138.

(7) 6 B. & C. 603.

(8) 21 Jac. 1. c. 16, & 10 Car. 1, sess. 2. c. 6 (Ireland).

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shall be made or contained by or in some writing to be signed by the party chargeable thereby."

I cannot help thinking that both the Act of Parliament and the law based upon it are obscure and doubtful. But as I understand the law as laid down by *Tanner v. Smart* (7) before that statute, and the law as laid down in cases which have been decided since, a mere acknowledgment will not avail if it is accompanied by a statement that the person acknowledging the debt will not pay at all, or not till a certain event has taken place, or a certain time elapsed, unless that event is proved to have happened, or that time to have elapsed; that is to say, the acknowledgment will not avail if an intention is shewn not to pay immediately.

Now we can hardly find anything in the particular cases to direct our judgment; we cannot construe one careless and inaccurate letter from another. We must endeavour to extract some principle from the cases taken together, and the principle seems to me to be that which I have already mentioned.

Believing that to be the state of the law, I cannot think these letters sufficient. They clearly acknowledge a debt, but clearly add, "I shall not pay you now." The defendant says, "I shall be glad, as soon as my position becomes somewhat better, to begin again and continue my instalments."

Is that consistent with the defendant's saying or meaning, "I will pay you presently"? Surely it cannot be. Then it is said, if that is so, it is a conditional promise, and the condition has not been fulfilled. The only doubt that arises in my mind on this point is whether this is not really a statement of an expectation or hope rather than a promise. But suppose it is really a promise, I agree with Mr. Justice Denman that the condition has not been fulfilled. The question arises, would 5s. per annum be a sufficient improvement in the man's circumstances? Clearly not. Then would 1l. or 5l.? Clearly not; it must mean something that can reasonably be construed as a substantial improvement, and I agree that there is no evidence of the

defendant's having become in reality any better off, even if the letter contains a promise. Then comes the last letter. If anything is plainer than another it is that this letter does not contain any promise to pay at all. He only hopes that as soon as the commercial crisis gives way he will have more than is necessary for living, and even if this is a conditional promise it was not contended that the end of the "financial crisis" was proved to have occurred.

It is clear that the defendant has acknowledged the debt, but it is clear also that he did not contemplate paying.

My doubt is whether there was any promise to pay, but if there was it was conditional, and the condition has not been fulfilled.

BRETT, L.J.—I am of opinion that whatever was the original obscurity of the statute, it has now been made clear by authority and decisions. And the rule is that there must be in the writing relied on to take the case out of the statute an acknowledgment importing a promise to pay, or coupled with an actual promise to pay. If there is a simple acknowledgment that imports a promise to pay at once. But if there is an acknowledgment and also a promise to pay, the promise must be found in the words which assume to state what that promise is. If the promise is to pay immediately, then the action may be brought immediately. But if the promise is conditional, then the person relying on it must not only prove the writing and the promise contained in it, but must shew that the condition has been fulfilled.

The authorities are clear on the point, and the law is no longer doubtful. The doubt in these cases consists in the different forms in which people express themselves. The phraseology used in one case is hardly any authority for the construction of the phraseology in another. Here it seems to me that the letter amounts not merely to a simple acknowledgment, but that the phraseology also assumes to make a promise. That is the utmost that can be said in favour of the plaintiffs.

When a man states that his present

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position is such that he cannot pay, and that as soon as his circumstances are better he will, beyond all doubt that is a conditional promise only—to pay when his position is better. Therefore this is not a simple acknowledgment: it is an acknowledgment and a promise to pay; but its construction must depend upon the view we take of the debtor's position, and the promise being that he will pay when his circumstances become better, the plaintiff must shew that, within the meaning of that phrase, the defendant's circumstances have become better. The evidence is merely that in one year since that promise the defendant received 14*l.* more than he did before, and on that evidence alone Mr. Justice Denman found that he could not say that within the meaning of the form of words used in the letter the defendant was in a better position. I not only see no reason to differ from him, but I heartily agree with him, and I think it would be very strange if any man on this evidence could find that the defendant was in a better position. As to the last letter it is obvious and clear that no promise was really thought of. How could a promise be implied from a man saying he thought he should soon be "in a more hopeful sphere"?

COTTON, L.J.—The only question here is whether there is a sufficient acknowledgment and promise to take the case out of the statute 9 Geo. 4. It is conceded that cases have given authority to a certain principle, and that it is only left for us to see what is that principle, and apply it to the present case. It is conceded that in order to take the case out of the statute there must be a promise, either express or implied. A mere acknowledgment is not enough, but from a simple acknowledgment a promise may be implied. If there is an actual promise it is either unconditional or conditional, and if the latter, the plaintiff must shew that the condition has been fulfilled. Here, then, are two letters. Is there contained in them a promise to pay? In both there is clearly an acknowledgment of the debt. That leaves the question whether there is an express promise to pay; and if there is

an express promise no other promise can be raised by implication, so that if the whole tenour of the letter is contrary to that which is sought to be implied, the desired implication cannot be made. In this case there was, with the acknowledgment in both letters, a statement that it was beyond the defendant's power to pay. Beyond that, there was what was relied on as a promise; and in my opinion the first letter contained a promise with a condition—that he would pay as soon as his position was somewhat better. No other promise therefore can be implied. Then has that condition been fulfilled? I think the learned Judge was right in saying that it had not. The only evidence is that in one particular year he received 21*l.* instead of 20*l.* That is 14*l.* more no doubt, but if we look at his letter in which he says that his salary is so small that he cannot possibly pay, we can hardly say that that single sum of 14*l.* so altered his position as to render him able to pay. As to the other letter, it is obvious that it is an acknowledgment of the debt under such circumstances that no promise to pay could be implied. It contains no promise at all. And even if it did it would be conditional on the "commercial crisis" being at an end, which certainty has not been shewn.

*Judgment affirmed.*

Solicitors—Pritchard, Englefield & Co., agents for Edwin Storer, Manchester, for plaintiffs; W. & J. Gibson, agents for John Farrington, Manchester, for defendant.

[IN THE COMMON PLEAS DIVISION.]

1878. }  
Nov. 22. } REDDISH v. HITCHINOR.

*Justice of the Peace—Fees to Clerk; Liability to pay—Municipal Corporation Act, 5 & 6 Will. 4. c. 76—Conviction under the Vagrant Act.*

[For the report of the above case, see 48 Law J. Rep. M.C. 31.]



[IN THE EXCHEQUER DIVISION.]

1878.	}	LORD RIVERS v. ADAMS. THE SAME v. ISAACS. THE SAME v. FERRETT.
May 15, 16, 17,		
20, 21.		
August 8.		

*Right by User—Custom—Prescription—Lost Grant—Grant from Crown to Inhabitants—Claim by Inhabitants to a Profit à prendre—Prescriptive Claim upon User in another Character than the Character in the Claim.*

*Defendants to an action for taking underwood for fuel from the waste of the plaintiff's manor of T. F. justified as inhabitants of the parish of T. F., and proved immemorial user by some inhabitants as such, but they did not prove user by the inhabitants generally as such, and exclusive right was claimed by the tenants of the manor:—Held, that the justification could not stand either upon custom, as the custom would be for the inhabitants to have a profit à prendre in the soil of another, or upon a lost grant from a private person, inhabitants being incapable of taking under a grant which does not incorporate them, or upon a lost grant from the Crown, user by the inhabitants generally as such being necessary for supposing a grant to the inhabitants, other considerations against supposing the grant being the absence of evidence of even a de facto corporation of the inhabitants, the claim by the tenants of the manor, and the unreasonableness and repugnancy to law of the supposed right.*

*The defendants justified also as occupiers of certain cottages, relying upon user by the occupiers as inhabitants of the parish:—Held, that a prescriptive claim as occupier of a certain house or the like could not be founded upon user in a different character such as inhabitant of a parish.*

*The result of the decisions in the year books upon the effect of a royal grant to the inhabitants of a parish or village appears to be that, if the grant is for a specified purpose, the grant incorporates the inhabitants so as to effectuate that purpose, but otherwise is inoperative. Therefore, when a Court or jury is called upon to presume a lost royal grant to inhabitants, it has to*

*presume a royal grant such as to incorporate them.*

*Willingale v. Maitland (36 Law J. Rep. Chanc. 64; s. c. Law Rep. 3 Eq. 103) considered.*

These were actions for taking underwood for fuel from land which the plaintiff, who was lord of the manor of Tollard Farnham, in Dorsetshire, had inclosed from Tollard Farnham Common, part of the waste of the manor. The defendants, who were inhabitants of cottages in the parish of Tollard Farnham, justified, first, as inhabitants of the parish, alleging immemorial user by the inhabitants of the parish; secondly, as inhabitants of the particular cottages occupied by them, in virtue of user by the occupiers of those cottages.

A Special Case, with power to draw inferences of fact, was stated for the opinion of the Court, in pursuance of a Judge's order, made by consent. The contents of the Special Case, which extended to more than 170 pages, appear from the judgment sufficiently to render it unnecessary to add more than the following paragraphs:—

Paragraph 2 of the Special Case was as follows:—The right claimed, as stated by the witnesses called on behalf of the defendants, is for all the inhabitants of the parish of Tollard Farnham to cut baskets [meaning, according to paragraph 1, fag-gots of underwood] on Tollard Farnham Common, from old Michaelmas Day till old Lady Day, and to cut furze there all the year round, for use as fuel in their own houses or elsewhere in the parish, but not for sale or use out of the parish.

Paragraph 50 contained the following (besides other) statements:—It was proved that from the commencement of legal memory down to the date of the inclosure [made by the lord in the year 1856] there had been user [defined in effect, in paragraph 49, as meaning the practice referred to in paragraph 2, apart from the character of the persons using it] on the common by a very large number of persons. Such user was exercised continuously, openly and as of right, but the nature of the right in respect of which it was exercised is one of the ques-

*Rivers v. Adams, Exch.*

tions for the determination of the Court. . . . It was proved that no person not living in the parish of Tollard Farnham had been permitted to exercise such user. There was no evidence either, first, that any inhabitant of the parish living in any house other than one of certain houses marked with an asterisk in Schedule IX. [as to which schedule see the judgment] had exercised such user; or, secondly, that any person living in any house in the parish had ever been prevented from exercising such user [and, as stated in another part of this paragraph, it was proved that many persons not specified, and whose place of dwelling was not specified, had exercised such user]. The user has in every case been proved to be uninterrupted down to the time of the inclosure. No evidence has been adduced by the plaintiff of any permission or license given by him under which the user took place, and there is no reference to any such permission or license on the Court rolls of the manor. [For the rest of the statements in the case, and of the evidence therein, as to the user, including the claim of the tenants of the manor as such, see the judgment.]

Paragraphs 6-20 and others, relating *inter alia* to the history of the manor, honour and chase of Cranbourne and of the manor of Tollard Farnham, were contended, on the part of the defendants, to afford evidence that the land in question in the case belonged at various times previous to the reign of Charles I to the Crown.

*C. S. C. Bowen (R. S. Wright with him), for the plaintiff.*

*Edward Clarke (Mac Clymont with him), for the defendants.*

The arguments appear sufficiently from the judgment.

KELLY, C.B. (on August 8) read the judgment of the Court (1), written by Cleasby, B.—The question argued before us in this case has been, whether the inhabitants of the parish of Tollard Farnham, in the county of Dorset, have the right to cut and take faggots or haskets of

the underwood growing upon a part of the common which has been inclosed by the plaintiff.

Some argument was raised before us upon the right of the defendants, in case they failed to establish any right in the inhabitants, to fall back upon a prescriptive right to take the haskets in respect of the cottages occupied by them respectively. This part of the case will be dealt with hereafter.

At present we deal with the question which was fully argued before us, namely, the right of the inhabitants as inhabitants.

The user and the extent of user is stated in the case. It is stated to have been as of right, but (see paragraph 50) the nature of the right in respect of which it was exercised is one of the questions to be decided by us. There cannot, we think, be a doubt upon the evidence that the user was, in fact, upon the right of inhabitants as stated in paragraph 2 of the case. The defendant in the first action, Adams, says in his evidence, p. 150, the common was free to everybody in the parish. So that, as far as the user goes, it agrees with the claim set up, and, notwithstanding some expressions to be found in the evidence, there is no ground for regarding this as a case in which a particular provision has been made by royal grant or otherwise for the poor of the parish.

If such a right could be claimed by custom there is evidence of user which, coupled with the evidence of reputation, might raise a question whether the custom did not exist.

But the right claimed is a *profit à prendre* in the soil of another, and the authorities are uniform, from *Gateward's Case* (2) to *Ohlton v. The Corporation of London* (3), that such a custom is bad in law. See *Selby v. Robinson* (4) and *Constable v. Nicholson* (5), where other authorities are given. Many sound reasons are given in the authorities for this conclusion. It is only necessary to advert

(2) 6 Coke's Rep. 596.

(3) 47 Law J. Rep. Chanc. 433; s. c. Law Rep. 7 Ch. D. 735.

(4) 2 Term Rep. 758.

(5) 14 Com. B. Rep. N.S. 230; s. c. 32 Law J. Rep. C.P. 240.

(1) Kelly, C.B.; Cleasby, B.; and Pollock, B.

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to some of those given in *Gateward's Case* (2), because they may be applicable to another view of the present case.

That was not a case in which the inhabitants of a certain village generally claimed a *profit à prendre*, but the plea alleged that, by custom, all persons inhabiting any ancient messuages should, by virtue of their inhabitancy, have a certain right of common. It was adjudged by all the justices that such custom was against law for several reasons. Among others, secondly, what estate shall he have who is inhabitant only in the common, when it appears he hath no estate or interest in the house but a mere habitation and dwelling; and, thirdly, such common will be transitory and altogether uncertain, for it will follow the person, and for no certain time or estate, but only during his inhabitancy, and such manner of interest the law will not suffer, for custom ought to extend to that which hath certainty and continuance. Fourthly. It would be against the nature and quality of a common, for every common may be suspended or extinguished, but such a common will be so incident to the person that no person can extinguish it, but as soon as he that releases, &c., removes, the new inhabitant shall have it.

It might also be added in relation to such a right as is claimed in the present case, namely, to be provided with fuel from the common, that mere inhabitancy is capable of an increase almost indefinite, and if the right existed in a body which might be increased to any number it would necessarily lead to the destruction of the subject-matter of the custom.

There cannot, therefore, be such a custom. And for the same reasons, and for other reasons, there cannot be a prescription, and there could not be a valid grant unto so fluctuating a body, and a body so incapable of succession, in any reasonable sense of the word, so as to confer a right upon each succeeding inhabitant.

The judgment in *Constable v. Nicholson* (5) is correctly given in the head note in the "Law Journal Reports" (except in the use by mistake of the word easement for right). It is as follows:—"The right of the inhabitants of a township to take

stones from the land of another for the purpose of repairing the highways is a *profit à prendre*, and cannot, therefore, be claimed by custom. Neither can it be claimed by prescription, as inhabitants are incapable of taking by that description such an easement (right) unless under a grant which incorporates them."

The following are the words of Willes, J., in his judgment, as regards the prescription or supposed grant, after disposing of the question of custom. "The prescriptive right is not claimed for a corporation or persons taking by succession, but only for a fluctuating body of inhabitants. The prescription pleaded is a grant to that body, but not so as to have the effect of incorporating them. It is clear that such a right cannot exist."

See also the decision of the Master of the Rolls to the same effect in the case of *Chilton v. The Corporation of London* (3).

The claim, then, can only be supported as resting upon a supposed grant by the Crown to the inhabitants of the right in question, as such a grant alone would have the effect of incorporating them; and the argument addressed to us was upon the propriety, and, indeed, necessity, of presuming such a grant from the user set out in the case. But, in dealing with this question, we shall have to bear in mind that there is a difference between a corporate body and the persons who for the time being compose it, and that the members for the time in their own individual right take nothing by the grant to the corporation.

There was a considerable argument before us upon the effect of a grant by the Crown to the inhabitants of a parish or village. The question seems to have arisen frequently in early times, and there are several decisions in the year books on the subject, which are to be found in all the abridgments under the title corporation. They are given in *Rolls's Abridgment*, and copied into the other abridgments. The effect of them appears to be that where there is a grant by the Crown to the inhabitants of a particular parish or village, if the grant is made for a specified purpose, it has the effect of incorporating them so as to carry that

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purpose into effect, but otherwise is inoperative.

Thus it is said, F. pl. 2, "In ancient times the inhabitants of a village were incorporated when the king granted them to have a trade guild (*guilda mercatoria*). Pl. 4, If the king grant land to the men or inhabitants of D., their heirs and successors, rendering rent, for anything touching this land, it is a corporation, but not for any other purpose." (And it is said in Dyer, 100, pl. 70, though not as a decision but as an opinion, that if the rent be released the corporation is *ipso facto* dissolved, because the rent was the cause of the incorporation.) "Pl. 5, But if the king grant lands to the men or inhabitants of D., unless they be incorporated before, the grant is void if nothing be reserved for rent. Pl. 6, If the king grant to the men of Islington to be discharged of toll it is a good corporation to this intent but not to purchase." And the reason is given: "This is matter of discharge. Pl. 7, If the king grant lands to the inhabitants of Islington and their successors, if they were not a corporation before, this is a void grant, for the king is deceived." In other words, the inhabitants of a place cannot be said to have successors capable of taking unless they be a corporation.

The case, therefore, stands thus. We are called upon to say, because there has been user in the inhabitants individually of this right, not that there has been merely a grant to the same persons who exercise the right (which would be the proper inference in ordinary cases without regard to the probability of its actually taking place, but which would in this case be inoperative), but that there has been a grant in such a form as to make them into a body corporate, having perpetual succession. It appears to us that we ought not to make this presumption, not because it is improbable, but because it is inconsistent with the past and existing state of things. We are to presume that a corporation has been formed many hundred years ago, when there is no trace at any time of its ever having existed. If the inhabitants had held meetings in reference to this right, or appointed any officer to look to

the right, or done any act collectively of that description, the case would be different. We should then have the inhabitants acting in a corporate capacity in reference to this right, and from their doing so, and for their existence *de facto* as a corporation, we might, according to the ordinary rule, find a legal origin by a grant from the Crown; but to say that a corporation was created which has never existed would be carrying the fiction of a grant further than has ever been done, or than is consistent with reason. And the presumption is made wholly unreasonable when we have, as in the present case, while the supposed corporation is existing and entitled to take the haskets, another body actually existing and legally existing, namely, the tenants of the manor, who are exercising inconsistent rights and publicly asserting their entire control over the underwood on the common.

There is also another reason against making this presumption, which was strongly and properly pressed by the learned counsel for the plaintiff, and which is not applicable to any of the cases in which similar presumptions have been made, namely, that we are asked to presume the action of the Crown in favour of a right in the inhabitants which could not exist as a custom because it is unreasonable and contrary to law, and that the Crown, because this could not be done otherwise, got over the difficulty several hundred years ago by making them into a corporation.

We cannot make this presumption, not because it is improbable, but because it is most unreasonable.

We were much pressed on behalf of the defendants with the case of *Willington v. Mailland* (6); but when that case is examined it has no bearing upon the exact question which is raised in the present case.

It was a demurrer to a bill for want of equity. The bill alleged that Queen Elizabeth, being lady of the manor of Loughton, which was within her royal forest of Waltham, had, by her royal charter, granted to the inhabitants of the parish

(6) 36 Law J. Rep. Chanc. 64; s. c. Law Rep. 3 Eq. 103.

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of Loughton that the labouring or poor people inhabiting the said parish, and having families, might at certain times of the year cut certain underwood, and that the rightful disposition of the wood so cut should be for their own consumption and for sale for their own relief to other inhabitants of the parish for their consumption. The bill being demurred to, the facts were admitted as stated, and it was therefore admitted that there was a grant in the very precise terms stated, which, it will be contended, had the effect of incorporating the inhabitants for the purpose of carrying into effect the specified charitable object.

Accordingly Lord Romilly, M.R., says (7): "It should be observed that though it is true, as stated in *Sheppard's Touchstone*, that a grant cannot be made beneficially to the inhabitants of the parish as grantees, yet it is certain that a grant may be made by a private individual in the shape of a charity in trust for the poor inhabitants. And that such a trust is perfectly good." He afterwards adds: "The books are full of cases in which grants of this description have been supported and established, and the Court has carried the trusts into execution." He afterwards refers to the Act of 14 & 15 Vict. c. 43, by which Hainault Forest was disafforested, and in which a certain privilege of widows residing within a certain district was recognised as a ground for compensation, and eventually decides that as it stands on the bill, if the whole bill be taken as true, there was a case for relief.

It is to be noticed that nothing whatever was granted to the inhabitants, neither land nor privilege of any sort; the only grant to the inhabitants was that the labouring poor should have the privilege as alleged, and under a grant from the Crown they may become a corporation, and ought to act as such for the purpose of performing this charitable trust.

In the present case we are not dealing with a trust to be performed for the benefit of a limited body, but with the

right of the inhabitants generally, and the case renders no assistance in considering without a grant to the inhabitants generally what ought to be presumed from user.

The subsequent case of *Chilton v. The Corporation of London* (3) before the present Master of the Rolls should be read in connection with the above case.

A passage in the 4th Inst., p. 297, was referred to, because it was said that Tollard Farnham was within the forest of Cranbourne. Coke is treating of the Courts of the Forest, and says: "And concerning claims" (meaning claims in the Court of the Forest) "it is especially to be observed that by the Forest Law a grant made of a privilege within the forest to all the inhabitants being freeholders within the forest or such other commonalties not incorporated is good."

The answer given to this was that it has reference to claims made in the Court of the Forest, the claim being for what is called a privilege, which involves more the idea of exemption from the forest law than the acquisition of property; and, further, that although we have abundant proof that Cranbourne was a chase, there is no proof that it was ever a forest in the proper sense of the word, and, still further, that we are not dealing with privileges under the law of the forest, but with property under the common law.

We are, therefore, engaged in a different Court from the Court of the Forest, upon a different subject, namely, property, and not privilege, and there is an absence of proof of there being a forest, so that the passage in Coke is inapplicable.

It was impossible to pass over these matters, which were so fully argued before us, but there is another reason why we cannot be called upon to find a grant from the Crown in the present case. In most cases where a grant is presumed from user in favour of an individual, the proof of user is definite and complete, but in the present case we are called upon to infer a grant, not to an individual, but to a class, namely, the inhabitants of a parish, and therefore, in order to found it, there must be proof of user, not by some inhabitants, but by the class

(7) 26 Law J. Rep. p. 66; s. c. Law Rep. 3 Eq. 109.

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—that is, by inhabitants generally. Now for the purpose of making this out, reference was made to many schedules annexed to the case.

Schedule IX. was the most important, giving a list of all the tenements in the parish, and shewing in a tabular form in respect of which of them user had been proved, how far their title was derived from the lord, and by which of the persons either claiming title to or occupying the tenements their presentments had been made in the Manor Courts restricting the right to take haskets to the tenants of the manor.

We had also in another schedule (V.) presentments taken from the Court Rolls of the manor relating to the right to cut fuel from the year 1748. Also extracts from the parish books (schedule XVI.), one effect of which appeared to be that the poorer inhabitants had taken fuel from the common, and been assisted by the overseers in getting it home.

We had also presentments extracted from the chase rolls of Cranbourne chase and the other schedules enumerated in page 15 of the case.

Now we are dealing with the right to take fuel from the waste of the manor, in which *prima facie* the tenants of the manor exercised the right as tenants of the manor. The fact that other inhabitants of the parish exercised the right would only prove a right in those other inhabitants as inhabitants, and would not prove the right in the inhabitants generally.

And in this way the case fails. We cannot go into a detailed examination of the schedules to shew what the effect is, but the conclusion which we arrive at is that the statements in the case and the schedules entirely fail to prove the user by the inhabitants generally as inhabitants such as to justify the presumption of a grant by the Crown. We were not asked, and could not be asked, to presume a grant to such of the inhabitants as were not tenants of the manor.

We now go back to the title of the defendants by prescription. As regards the defendant Ferrett, as his house was a new one, this claim clearly could not be sustained. As regards the defendant

Isaacs, the same objection really applied, because his house was also a new one, and although it was built near to an old house, and upon a small garden belonging to it, the old house remained and was occupied, so that it was not in substitution for, but in addition to the old house, and thus any prescriptive right acquired by the old house could not apply to this. As regards the house occupied by the person under whom the remaining defendant Adams justifies, the condition of things appears from paragraph 70 of the case. She occupies a house partly new and partly old, and it may be collected from the statement that the old part may originally, along with another old building, have constituted one house, or it may have been originally a separate house, and a question might arise whether a user was sufficiently made out in respect of the present house so as to make the prescription apply. But an opinion was intimated in the course of the argument that there was no evidence of the exercise of the right to take haskets as belonging to any particular house. On the contrary, it was proved that the right was exercised in respect of inhabitation of houses whether old or new. We should have felt justified in coming to the conclusion that Harriett Adams, as alleged in the third plea, was seised in fee of the house occupied by her, and that it was not comprised in the lease of the 15th of March, 1781, mentioned in paragraph 68 of the case, but we could not have come to the conclusion that the allegation in the plea was made out, namely, that she and her predecessor in title had exercised the right of taking estovers as to the messuage appertaining. This is a conclusion of fact, and though the actual taking of haskets by the occupiers of the house was proved to the fullest extent (see paragraph 71 of the case), and though the case does not expressly find in what alleged right it was taken, but leaves that to us, yet the evidence which we have now before us leaves no doubt as to this, as we have already stated in describing the other question, and shews that the right was exercised in respect of inhabitation. The defendant in the action, Charles Adams, says, page 150, the com-

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mon was free to everybody in the parish.

It is only necessary upon this part of the case to refer to the case of *Campbell v. Wilson* (8) [quoted with approval in *Angus & Company v. Dalton* (9)], to shew the necessity of connecting the user with the right claimed. In that case there had been an enclosure award putting an end to all former rights of way, and a certain private right of way was set out. The question which arose was whether from user for nearly twenty years, as of right, a grant could properly be presumed, and the argument was that the user over the *locus in quo* was a user under the award, and by mistaking the place set out. All the Court expressed their opinion that if it had been shewn that the user was in fact under the award, though adverse and of right, it could not have been made a foundation for presuming a grant. The language of all the Judges is to the same effect, but that of Lawrence, J., is most precise. He says, p. 301: "But it has been said that if the enjoyment were shewn to have been by mistake, however adverse it may have been, that is against the presumption, and that the learned Judge misled the jury in this respect; but no facts appear to warrant the objection, otherwise it might be very material to be considered. For if, in exercising the right of way from time to time, it had appeared that the party had asserted his right to be grounded on the award, though it were exercised ever so adversely, I do not know how the jury would be warranted in referring it to any other ground than what the party himself insisted on at the time."

It is plain that if we refer the user to any other right than the one in respect of which it was actually exercised we might be doing the greatest injustice. For the lord might allow the inhabitants of cottages to exercise the right as inhabitants, knowing that it was a right which could not be established in point of law, and which there was no necessity to interrupt, and he might afterwards be

(8) 3 East 294.

(9) 47 Law J. Rep. Q.B. 163; s. c. Law Rep. 3 Q.B. D. 108.

bound by his non-interruption because another right was acquired.

For the above reasons we think that all the questions at the end of the case (10) must be answered in the negative, and that there must be judgment for the plaintiff in all the actions.

Acting upon the paragraph at the bottom of page 22 of the case we direct that the plaintiff's costs be assessed equally between the three defendants.

*Judgment for the plaintiff, with an injunction.*

Solicitors—Horne & Hunter, for plaintiff; Duncan, Murton, Warren & Gardner, agents for Farrer, Ouvry & Co., for defendants.

[IN THE COURT OF APPEAL.]

1878. { THE QUEEN (defendant in  
Jan. 29, 30, 31, { error) v. BRADLAUGH  
Feb. 2. { AND BESANT (plaintiffs  
in error).

*Indictment—Obscene Libel—Omission to set out the Alleged Obscene Matter—Error—Verdict.*

[For the report of the above case, see 48 Law J. Rep. M.C. 5.]

[IN THE QUEEN'S BENCH DIVISION.]

1878. } EARL MANVERS AND BROWNE  
Nov. 12. } v. BARTHOLOMEW.

*Highway—5 & 6 Will. 4. c. 50. ss. 53, 54—Repair of Highways—License by Justices to get Materials in enclosed Land—Extent and Duration of License.*

[For the report of the above case, see 48 Law J. Rep. M.C. 3.]

(10) These questions were, shortly—Whether the defendants were entitled, as inhabitants of Tollard Farnham, or on any other grounds, to do the acts complained of.

## [IN THE COURT OF APPEAL.]

1878. { MEGGY (trustee, &c.) v. THE  
Feb. 4, 7. { IMPERIAL DISCOUNT COMPANY  
(LIM.)\*

*The Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 125—Joint and Separate Estates under Liquidation—Discharge granted by joint Creditors only—Property left in Possession of Debtor or subsequently acquired.*

A trustee under a liquidation, who, with the authority of the creditors, permits the debtor to remain in possession of his furniture as apparent owner, does not, in the absence of knowledge that the debtor was holding himself out as the real owner, and dealing with it as such, forfeit his right to it so long as there has been no closing of the liquidation or order of discharge; and his right to it and to any after acquired property cannot be defeated by a bill of sale given by the debtor subsequently to the liquidation.

Where a liquidating debtor has separate as well as joint creditors and assets, an order of discharge by the joint creditors will not operate to discharge him from his separate debts, and any after acquired property will therefore vest in the trustee appointed under the liquidation.

Appeal from the decision of Lush, J., reported Vol. 47, p. 119, where the facts are fully set out.

*De Gex* and *R. V. Williams* (*Lumley Smith* with them), for the defendants.—First, the plaintiff's title as trustee for the insolvent is destroyed by the second liquidation, as the goods were left by him in the reputed ownership and possession of the insolvent—*Butler v. Hobson* (1); and even though the defendants seized wrongfully the plaintiff has no better title, for the seizure would not take these goods out of the order and disposition of the bankrupt within the Bankruptcy Act, 1869, s. 15, sub-sec. 5—*Barrow v. Bell* (2), which

\* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

(1) 5 Bing. N.C. 128; s. c. 8 Law J. Rep. C.P. 81.

(2) 5 E. & B. 540; s. c. 25 Law J. Rep. Q.B. 2.

is reconciled with *Ex parte Foss* (3), in *Ex parte Edey* (4).

Second. The plaintiff by his conduct in letting the furniture remain in the possession of the debtor has misled the defendants into supposing that they were his, and cannot now come forward and set up his own title—*Troughton v. Gilley* (5), *Tucker v. Hernaman* (6), *Englebach v. Nizon* (7), *Ex parte Dewhurst* (8), *Ex parte Ford* (9), *Ex parte Hannington* (10).

Third. The certificate discharged from all debts joint and separate. There can be but one discharge.

*Holl and Fullarton, contra.*—As to the first point the trustee under the second bankruptcy has expressly disclaimed and the point is now first raised.

On the second point the authorities refer, and the doctrine applies only to cases where the insolvent has been allowed to trade, and see *Coles v. Coles* (11).

On the third point *Ebbs v. Boulnois* (12) is in point, and shews that there must be a discharge by all creditors and not by one class only. The usual course is for a discharge to be first given by the joint creditors; and at a subsequent meeting by the separate creditors, that was not done here.

*R. V. Williams* in reply, cited *Ex parte Hammond* (13), *Ex parte Tinker* (14), *Megrath v. Grey* (15), *Ellis v. Wilmot* (16).

(3) 2 De Gex & S. 230; s. c. 27 Law J. Rep. Bankr. 17.

(4) 44 Law J. Rep. Bankr. 55; s. c. Law Rep. 19 Eq. 264.

(5) Amb. 630.

(6) 4 De Gex, M. & G. 395; s. c. 22 Law J. Rep. Chanc. 791.

(7) 44 Law J. Rep. C.P. 396; s. c. Law Rep. 10 C.P. 645.

(8) 41 Law J. Rep. Bankr. 18; s. c. Law Rep. 7 Chanc. 185.

(9) 45 Law J. Rep. Bankr. 19, 96; s. c. Law Rep. 1 Ch. D. 521.

(10) 18 W.R. 959.

(11) 6 Hare, 517.

(12) 44 Law J. Rep. Chanc. 691; s. c. Law Rep. 10 Chanc. 479.

(13) 42 Law J. Rep. Bankr. 97; s. c. Law Rep. 16 Eq. 614.

(14) 43 Law J. Rep. Bankr. 91; s. c. Law Rep. 9 Chanc. 716.

(15) 43 Law J. Rep. C.P. 63; s. c. Law Rep. 9 C.P. 216.

(16) 44 Law J. Rep. Exch. 10; s. c. Law Rep. 10 Exch. 10.



*Meggy v. Imperial Discount Co., App.*

BRAMWELL, L.J.—The judgment in this case must be affirmed. As to the first point, namely, that the goods were in the reputed ownership of Beverley, the clear answer is that the trustee under the second liquidation has disclaimed, and therefore the plaintiff has a good title. I cannot help saying with deference that the seizure prevented the goods being in the reputed ownership of the bankrupt. For if the defendants had removed the furniture it is clear they would not have been in the possession of the true owner. One way of applying a criterion in cases of reputed ownership is to enquire whether the goods are in such a plight that all that the true owner has to do is something between himself and the insolvent. But it is not necessary to make that enquiry here, as the plaintiff is clearly entitled unless the trustee under the second bankruptcy makes a claim, and this he does not do but expressly disclaims.

Then comes the second or "standing by" point. It is contended that if the trustees of an insolvent let his furniture remain in his possession, for how long I do not know, and a second liquidation takes place, the second must, as regards the furniture, take priority over the first. If there be any such doctrine I can only say that I have never heard of it before. It would seem to apply equally well to the case of an upholsterer letting out furniture. Is he to lose it because the hirer becomes insolvent? It is said, however, that that is not so, the doctrine only applies to the case of a trustee because he has been guilty of a neglect of duty in leaving the furniture in the hands of the insolvent. I cannot see that. The principle is this.—If it has been declared to all mankind that the debtor may use goods left in his possession as his own, the trustee shall have a title subordinate to the claims of subsequent creditors. For example, to take the case of a wine merchant, if the trustee permits him to retain wine in his cellars, he in effect says to the world, that the debtor is at liberty to part with it, and to get other wine which the trustee shall not take. That is very reasonable. But what has that to

do with the case of household furniture? Mr. De Gex said that the matters are the same, for people borrow money on their furniture; but are we to conclude that people get furniture only for the purpose of borrowing money on it? Mr. Williams says that the trustee has been guilty of laches, but unless his conduct has had the effect of misleading, there has been none. There is nothing in the cases in opposition to this. With regard to *Ex parte Hannington* (10) the settlement there was voidable. I am satisfied that the Chief Judge would never have held in this case that the plaintiff had lost his title.

Then as to the remaining point, the discharge of the debtor. He has got his discharge under a certificate which relates to the joint liabilities of himself and his partner. Nothing was said about the separate creditors, and there was never any resolution by them. I was struck by the observation of Mr. De Gex, that there was never such a thing as two discharges, but I do not think that that can be so. There must be two certificates if there is to be a release from joint and separate debts, and each will be evidence only of discharge from the particular class of debts to which it relates.

The judgment must be affirmed.

BRETT, L.J.—Many points have been raised in this case, but the only material ones are the three that have been noticed by my brother Bramwell.

As to the first point, even if the goods could have been said to be in the apparent ownership of the bankrupt at the second bankruptcy, it would have been immaterial, as the trustee declined to have anything to do with the matter. But I do not think the goods were in his apparent ownership and disposition, and that point was, I think, given up at the trial, so that for three reasons, at least, the first point is unsustainable.

As to the second point I am content to rest on the grounds given by my brother Lush. I am content to assume for the present argument, that if the trustee had authorised the bankrupt to trade, his trade creditors would be

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entitled as against the trustee, see *Troughton v. Gilley* (5). I may also assume the second proposition of my brother Lush, that if the trustee knew that the insolvent was holding himself out as the real owner of the furniture, and was trying to raise money on it, and with that knowledge had withheld notice of his title, he would have been precluded from setting it up; but I am clearly of opinion that my brother Lush is correct as to the facts, namely, that there was no trading and no such knowledge on the part of the trustee as I have referred to. I therefore agree that in this case there is an attempt to introduce the doctrine of reputed ownership to a transaction between private persons, a position for which there is no authority.

With regard to the third point, the discharge, I take a shorter course. I decline to enter into any consideration of the Bankruptcy Act, and adopt the view of Mellish, L.J., in *Ebbs v. Boulnois* (12), that if the meeting be one of joint creditors only, the resolution for discharge can discharge only from joint debts. It is clear here, that no creditors except joint creditors passed the resolution. Mr. Williams practically admitted it. I therefore agree in the judgment of Mr. Justice Lush on all points.

COTTON, L.J.—I am of the same opinion. As to the first point, the express disclaimer of the trustee under the second bankruptcy prevents any question arising under it; see The Bankruptcy Act, 1869, sec. 15, sub-sec. 5.

Then comes the second point, namely, that the trustee has so acted that he cannot now insist on his title. Many cases have, no doubt, decided that if one who has title to property leads others to suppose that he has not, he cannot afterwards set up his title. But the principle is inapplicable here. In order to make it so it must be shewn that the assignee knew that the bankrupt was going to deal with his property, and yet abstained from asserting his title. That cannot be done here. The case of a trustee leaving goods with a trader is very different. What he does there is really to declare that the trader is at liberty to deal with

the goods as he will—*Tucker v. Hernaman* (6).

The case of *Ex parte Hannington* (10) is the only one which appears to be an authority for the defendant, but it is very shortly reported and I doubt if we can gather all that is material from the report. If it really is an authority, then with all respect I must differ from it, but I do not think that the Judge could have relied on any such principle as is contended for. The true doctrine is stated in *Ex parte Ford* (9).

On the third point it is plain, that no meeting of separate creditors was ever called, and it is clear to my mind that they must meet if the debtor is to be discharged from his liabilities to them. I think this is clear from Rules 285 and 302. I also think that *Ebbs v. Boulnois* (12) is against the defendants, though it is not a positive decision on the point. The only case at all in favour of the opposite view is *Ex parte Hammond* (13), but that case was under Rule 287.

The judgment must be affirmed on all points.

*Judgment affirmed.*

Solicitors—Lewis, Munns & Longden, for plaintiff;  
E. H. Barlee, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1878. { THE GUARDIANS OF THE WOODSTOCK  
Nov. 9. { UNION (*appellants*) v. THE  
CHURCHWARDENS, &C., OF THE  
PARISH OF ST. PANCRAS (*respondents*).

*Poor Law—Divided Parishes, &c., Act*  
(39 & 40 Vict. c. 61), s. 35—*Derivative*  
*Settlement of Pauper—Order of Removal.*

[For the report of the above case, see  
48 Law J. Rep. M.C. 1.]

[IN THE HOUSE OF LORDS.]

1878. { SWINTON (appellant) v.  
Nov. 27, 28. { BAILEY AND OTHERS (re-  
spondents).

*Will of Realty before the Wills Act (7 Will. 4. and 1 Vict. c. 26)—Revocation by Obliteration—Statute of Frauds (29 Car. 2. c. 3), s. 6—"Clause."*

*A testator, who died in 1836, by a duly executed will devised realty to "Elizabeth Eley her heirs and assigns for ever." He afterwards obliterated the words "Eley her heirs and assigns for ever," and re-wrote the word "Eley":—Held (affirming the decision of the Court of Appeal, which reversed the judgment of the Exchequer Division) that the obliteration was a revocation of a "clause" within the meaning of the 6th section of the Statute of Frauds, and that the devisee took a life estate only.*

*Per EARL CAIRNS.—In a gift to A. B., his heirs and assigns, the words "his heirs and assigns" do not merely qualify the gift to A. B., but import an actual gift to the persons so described.*

*Per LORD PENZANCE.—Revocation in the Statute of Frauds means revocation of words, and may operate to enlarge as well as to rescind a gift.*

This was an appeal from an order of the Court of Appeal, reversing a judgment of the Exchequer Division.

The proceedings in the Courts below are reported—45 Law J. Rep. Exch. pages 5 and 427; s.c. Law Rep. 1 Ex. D. 110.

The action was one of ejectment, and was tried before Brett, J., without a jury, at the Lincolnshire Spring Assizes for 1875, when the following facts were agreed to:—The will of Joseph Eley, when admitted to probate, was found to contain certain obliterations not noticed in the attestation clause. As originally drawn the will contained a devise of the testator's real estate to his mother, "to hold unto my said mother Elizabeth Eley her heirs and assigns for ever." Then followed a gift of the personal estate, "to hold unto my said mother Elizabeth Eley her executors administrators and assigns absolutely. Subject nevertheless" to the payment of debts, &c. The obliterations were of the words "Eley her

heirs and assigns for ever" (the word "Eley" being restored by interlineation) in the devise of realty, and of the words "her executors administrators and assigns absolutely. Subject" in the bequest of personalty. It was admitted, that the testator was seised in fee of the land for which the action was brought at the date of his will and at his death in the year 1836; that the plaintiff would be entitled as heir-at-law of the devisee of Elizabeth Eley, if she took the fee, and the defendants as co-heirs of the testator, if she took a life estate. The question was, whether the words obliterated in the devise of realty were, or were not, to be read as part of the will. Brett, J., entered the verdict for the defendants, reserving leave for the plaintiff to move to have it entered for him, the Court to be at liberty to draw inferences of fact. The plaintiff moved accordingly in the Exchequer Division, on the ground that there was no proof that the erasures were made by the testator *animo revocandi*, or that the estate in fee simple was intended to be cut down to a life estate. A rule was granted to enter the verdict for the plaintiff. On appeal by the defendants the Court of Appeal reversed the judgment of the Exchequer Division. The plaintiff then brought this appeal.

*Benjamin and T. R. Bennett (Lawrence Biale with them), for the appellant.*—It is admitted here that the words were struck out by the testator. The question, which depends on the construction of the 6th section of the Statute of Frauds (1),

(1) Section 6.—"No devise in writing of lands, tenements or hereditaments, nor any clause thereof, shall, at any time after the said four and twentieth day of June, be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same by the testator himself, or in his presence and by his directions and consent. But all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn or obliterated by the testator or his directions in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor signed in the presence of three or four witnesses declaring the same, any former law or usage to the contrary notwithstanding."

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is, was this a revocation or an alteration? The distinction between the two is clearly drawn in the statute. A devise may be revoked by obliteration, but cannot be altered except by a properly executed codicil. The reason is that alteration requires professional advice. Here the testator was ignorant of law, as appears from his obliteration in the gift of personalty, which was nugatory. He may have thought the words "her heirs and assigns" superfluous, or even that they detracted from the gift to his mother. If his design was to give her a life estate instead of the fee, that was an alteration not a revocation. There is a devise of property to the mother which remains; the quality only of the estate is altered. If there had been a separate devise to the heirs in a separate sentence, that might have been revoked by obliteration; but this is not a gift to the heirs nor intended to be so; the words "her heirs and assigns" are simply words of limitation, equivalent to "absolutely." If the word "absolutely," or the words "in fee simple" had been obliterated, that must have been held an alteration.

[THE LORD CHANCELLOR.—Suppose the obliteration enlarged a gift; if, for instance, in a gift to A. B. and the heirs of his body, the words "of his body" were struck out, it might be difficult to call that a revocation.]

It could not be described as a revocation.

[LORD PENZANCE.—There may be a revocation of a restrictive clause.]

In *Lock v. James* (2), Rolfe, B., seemed to think that there could not. Another question is, what is the meaning of a clause of a devise?

[THE LORD CHANCELLOR.—"Devise" seems to mean "will."]

Yes; and "clause" means a sentence in a will having a meaning of itself. *Larkins v. Larkins* (3) and *Short v. Smith* (4) do not decide otherwise; for in each the name of a devisee was struck out, so a complete devise was revoked. It is submitted that there must be a com-

plete revocation, either of the whole will, or of a gift contained in the will. That this was the intention of the Act appears from the omission of all reference to clauses in the second part of the section, which is contrasted with the first part by the word "But," and is intended to explain the meaning of "clause" as equivalent to "devise" or "gift." Then as to the authorities. In *the goods of Lambert* (5) and *In the goods of Cooke* (6) are not in point. In the former the testator cut out part of the will and joined the pieces. The contents of the excised part being unknown, and therefore impossible to restore, the only choice lay between allowing and refusing probate of the will as it was. Probate was granted. In the latter the same thing happened, the excised part was proved to have contained simply two legacies, and it was held that there was a revocation. In *Larkins v. Larkins* (3) no one disputed that there was a revocation as to the trustee whose name was obliterated; the only question argued was as to the effect on what was left. It was decided that, as the gift was joint, the whole estate passed to the two other trustees. In *Short v. Smith* (4) one trustee's name was obliterated and others substituted, and all that case decides is, that, there being no *animus revocandi*, but only *animus mutandi*, there was no revocation. There is no case in which an estate in fee has been reduced to a life estate by striking out the word "heirs." In *Larkins v. Larkins* (3) the obliteration made no difference in the estate devised, and the decision went upon that ground.

*Wills and Mellor* (*Dunning* with them), for the respondents.—The object of the Statute of Frauds was not to secure the use of apt words, nor to provide that professional advice should be used, but only to guard against fraud and perjury. It was intended to put a stop to revocation of devises of land by parol, which had been allowed by an extension of the ancient law as to wills of personalty. No restriction was intended to be put upon obliteration; it was placed on precisely the same footing as an executed codicil. Whatever the testator could do physically by striking out

(2) 11 Mee. & W. 908; s.c. 13 Law J. Rep. Exch. 186.

(3) 3 Bos. & P. 16, 109.

(4) 4 East, 419.

(5) 1 No. Cas. 131.

(6) 5 No. Cas. 390.

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or cutting out words, he might do without attestation. The only ambiguity arises from the use of the word "clause" instead of "part." There is no reason, even if the object of the statute were to secure professional advice, for giving to "clause" the meaning contended for. The framers of the Wills Act (7) did not so understand the word, for they substituted for it (sections 20 and 22) the word "part," which has always been regarded as equivalent. The word "part" has been applied by Sir H. Jenner Fust to words insensible in themselves. The Lord Chief Baron's view is inconsistent with *Larkins v. Larkins* (3), where a man's name was held to be a clause, and would have made the argument unnecessary in *Short v. Smith* (4). The true question is, whether what is left is sensible. If not, there is no *animus revocandi*.

[THE LORD CHANCELLOR referred to the observation of Serjeant Shepherd *arguendo* in *Larkins v. Larkins* (3), that an estate cannot be cut down from a fee to a life estate by erasing the words "heirs and assigns," and that revocation cannot operate upon less than a whole clause; also to the dictum of Lord Alvanley in the same case that, if the name of one of three tenants in common be erased, the remaining two take only two-thirds.]

It is contended that whatever the effect obliteration may be used. Revocation is not of the gift, but of the clause or part, and none the less revocation if it enlarges a gift. Mellish, L.J., seems to have adopted Lord Alvanley's view, that there can be no enlargement without attestation. But it is not necessary to argue against this view; for the cutting down of a fee to a life estate is properly described as a revocation, since a fee includes a life estate, and revocation may be partial.

[The following authorities were referred to—*Powell on Devises* (3rd edit.), p. 606, note 5, and *Humphries v. Taylor*, there cited from 8 *Bacon's Abridgment* (7th edit.), p. 500; 1 *Jarman on Wills* (3rd edit.), p. 125; and the Lord Chancellor called attention to the argument of Blackstone, J., in *Perrin v. Blake*, cited

in *Fearne's Contingent Remainders* (10th edit.), p. 77, on the effect of a gift to A. and his heirs.]

*Benjamin*, in reply.—The question in all the authorities and in the text-writers was not as to the completeness of the revocation, but as to its effect on what remained. No one doubted that the obliteration of a trustee's name revoked the gift to him; the question was, did it take away the gift to the other trustees; and it was held that there was no *animus revocandi* as to them. The use of the word "part" in the Wills Act suggests the inference that "clause" does not mean "part," for if it does, why change the word?

THE LORD CHANCELLOR (EARL CAIRNS).—The question in this case arises upon a will which came into operation before the Wills Act. It is, therefore, though no doubt important to the parties, not of extended importance in its bearing upon the law of wills. [His Lordship then stated the facts and continued.] I refer to the obliteration in the gift of personalty as not unimportant as to the first question which arises. Now, looking at the matter apart from all legislation on the subject, we must hold that this was an alteration deliberately made and intended to operate on the personalty as well as on the realty. Whether it did operate on the personalty is a question which we may put aside. That it was done *animo revocandi* is, I think, impossible to doubt. What then is the effect of the statutes? Was the obliteration of the words, "Eley her heirs and assigns for ever," effectual to change the estate in fee simple originally devised to Elizabeth Eley to an estate for life? The enactment which relates to the subject is section 6 of the Statute of Frauds. Now that section consists of two parts. I will read the first part first:—

"And moreover no devise in writing of lands, tenements or hereditaments, nor any clause thereof, shall at any time after the said four and twentieth day of June, be revocable otherwise than by some other will or codicil in writing or other writing declaring the same, or by burning, cancelling, tearing or obliterating

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the same by the testator himself or in his presence and by his directions and consent."

The second part is put in opposition to the first, and it seems to me necessary to make an equilibrium between the two parts:—

"But all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn or obliterated by the testator or his directions in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor signed in the presence of three or four witnesses, declaring the same, any former law or usage to the contrary notwithstanding."

I think your Lordships will hold the second part to mean no more than the first, of which it is intended to explain the consequences. The reference in the words, "in manner aforesaid," is a reference to the first part. The section has an affirmative force, providing for revocation and limiting section 5. In the words, "burning, cancelling, tearing or obliterating the same," in the first part, I take "the same" to mean "a devise or any clause thereof." Burning, cancelling, &c., apply to a material thing, so I think "devise" means will. The conclusion arrived at is that you may alter by burning, cancelling, &c., or by the execution of a writing properly attested. Of course the two modes are not coextensive. Anything that can be done by burning, cancelling, tearing or obliterating, may be so done, but that and more also may be done by a writing. What have we here? There is a gift to "Elizabeth Eley, her heirs and assigns for ever," and an obliteration of the words "Eley, her heirs and assigns for ever," whereby the gift is cut down to a life estate. Why is this not within the statute? Are the words "Eley, her heirs and assigns for ever," not a clause? Why not? It was suggested by the Judges in the Exchequer Division, that a clause must be a sentence having a meaning of its own. There is no rule that I know which obliges us so to hold. May it not be the meaning of the statute that a clause must be something which can be obliterated *de facto*? That is the case

here. Strike out the words obliterated, and the will reads as perfectly as if it had been drawn by the most skilful conveyancer. Is there any authority for giving so restricted a meaning to the word "clause?" None has been quoted; and *Larkins v. Larkins* (3) is an authority to the contrary. But I go further. In the eye of the law a gift to A. B., his heirs and assigns for ever, is what it says, a gift to all those persons. No doubt the law says that the estate given to the heirs shall vest in A. B.; but it is a gift to the heirs nevertheless. The conclusion at which I have arrived is, that the decision of the Court of Appeal is correct, and I move that it be affirmed with costs.

LORD PENZANCE.—The question to be decided turns entirely on the construction of section 6 of the Statute of Frauds. I agree entirely that that section is an affirmative proposition, and read the former part as giving power to revoke. In considering what power was given we must look at the exact words. [His Lordship read the first part of the section.] What does "devise" mean? The previous section (section 5) says, "all devises . . . shall be in writing." I understand by "devise," not a whole will but those words reduced into writing which carry with them a disposition of land. By section 6, power is given to revoke a devise by burning, cancelling, tearing or obliterating, or by some other writing. So far the sense is clear. But there is also power given to revoke "any clause thereof." What does "clause" mean? The Lord Chief Baron holds that it means an entire devise, and in support of his view he refers to the second part of the section. He says, "I think the obliteration had no such effect, because I think it plain that the words of section 6 mean, that to constitute a revocation of a will, devise or clause, there must be an obliteration of one entire and complete will, devise or clause. This was not an obliteration of a will, devise or clause, but merely of certain words which mean nothing taken by themselves. Now if the words, 'her heirs and assigns for ever,' stood alone, what effect could they have? None whatever.

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Then can the words constitute a 'devise or clause' within the meaning of section 6? The question answers itself. The word 'revocation,' therefore, in reference to such words is inapplicable and insensible. But if there could be any doubt as to the intention of the legislature, it would be set at rest by the latter half of section 6. That enacts, that all devises shall remain in force until the same be obliterated. What is the meaning of the word 'same?' Has this devise, 'I devise certain lands unto my mother Elizabeth Eley, her heirs and assigns for ever,' which is a complete devise, been revoked or touched in any way except by the obliteration mentioned? It would be quite a different matter if the statute spoke of an 'alteration by obliteration.' There is nothing here revoked, though the effect of the devise is entirely altered by the obliteration. I think, therefore, that this case is not within the words or the intention of the legislature." Therefore it seems that he considered that the thing struck out, to be revoked, must contain a complete devise. But it was not necessary for counsel here to go so far; and I do not think they did. They said "clause" meant a complete sentence. But I am not aware of anything in the Act to shew that such meaning was intended. The following illustration will shew that no reasonable object would be attained by giving such a meaning to the word. Suppose here, in a separate sentence, a gift to the heirs and assigns of Elizabeth Eley, then on this construction of the statute it might have been revoked by obliteration. It is hardly conceivable that it was intended to make a distinction between things identical in effect because they are or are not expressed in a separate sentence. But on this question two cases have been cited, *Larkins v. Larkins* (3) and *Short v. Smith* (4). It is certainly remarkable, considering the time that has elapsed since the statute was passed, that the question has not more frequently arisen. In both the cases it was held that a devise to A. B. was got rid of by striking out the name A. B. But A. B. is not a complete sentence; therefore the cases, as far as they go, are against the appellant's contention. Another point has been touched upon, not perhaps necessary to be decided in this case, because

there is here no enlargement of the estate given. But I am wholly unable to appreciate the argument used in the authorities quoted, and to some extent in this case, that revocation may not have the effect of enlarging a gift. The statute refers to words, and allows any words to be revoked, for example, words making a devisee impeachable for waste. Whether the revocation operate to enlarge or to diminish a gift appears to me immaterial. The contrary view appears to arise from the use of "devise" to mean "gift." But in the statute "devise" only means a disposition of land, and a testator may revoke a disposition or any part thereof, whether the effect is to enlarge or diminish a gift. I think the judgment of the Court of Appeal ought to be affirmed, the view taken by the Exchequer Division being, in my opinion, far too narrow.

LORD O'HAGAN.—I am of the same opinion. The appellant's counsel having admitted that the obliteration was made by the testator, the House is relieved from all question as to the facts. The question we have to consider is, as to the meaning of section 6 of the Statute of Frauds. Mr. Benjamin suggests that there is a difference between the two clauses of the section. I do not so read it. I consider that the first clause is negative, and that the second affirmatively states the same thing, the two being linked together by the words "in manner aforesaid." The question then comes to this, what is the meaning of the word "clause"; because the words "or any clause thereof" are implied through the whole section. I have endeavoured to find what "clause" is represented to mean. We speak of a clause of an Act of Parliament, a clause of a chapter and a clause of a sentence. Here it is used in reference to a devise, it is a clause of a devise. But the Judges of the Exchequer Division make it a complete devise. But can it be held that unless a clause is a devise within a devise, it is not a clause? I can find no authority for such a view. It seems to me that the Court of Appeal is right in holding that "clause" means "part," and there is, in that view, an end of the case. Another portion of the argument, ingeniously pressed by the

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counsel for the appellant, was based upon the distinction between revocation and alteration. The latter, it was urged, could not be effected without an attested paper. But a revocation may be of part of a devise. Suppose in this case a codicil, reciting the gift to Elizabeth Eley, her heirs and assigns, and continuing, "I desire to revoke the portion of the devise giving her the fee, but affirm that giving her a life estate." Would not that be properly described as a revocation? It seems to me that where a gift is divisible, and what is taken away leaves an integral part remaining, that is a revocation. Here there is a distinct interest left. We are not troubled with the question, what would have been the effect if there were an enlargement of a gift; for there is none here.

THE LORD CHANCELLOR.—I wish to say, to avoid misunderstanding, that my observations referred to obliteration, which was a revocation, and took away something. With regard to what would be the effect if it gave something additional, if such a case should arise, I wish to keep my judgment suspended.

*Order appealed from affirmed, and appeal dismissed, with costs.*

Solicitors—J. Grayson, for appellant; Clarke & Son, agents for Harrison & Beaumont, Wakefield, for respondents.

*Portlethwaite v. Ireland 49 L.J. 62631.*

[IN THE COURT OF APPEAL.]

1878. } CUNNINGHAM v. DUNN AND  
Feb. 13, 14. } OTHERS. \*

*Charter-party—Deadweight—Military Stores—Evidence of surrounding Circumstances—Refusal of Foreign Power to allow Ship to load—Readiness to load.*

The plaintiff knowing that the ship *R.* was under a contract with the British Government to load military stores as deadweight at Malta, and that with such

\* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

stores on board she would not, without special permission, be permitted by the Spanish Government to load any cargo at a Spanish port, entered into a charter-party with her owners by which it was agreed that the *R.*, "after loading deadweight at Malta for owners' benefit" should proceed to a Spanish port, and there load a cargo of fruit. The ship proceeded with the military stores on board to Valencia to load the plaintiff's cargo, but permission could not be obtained from the Spanish Government to load. The ship was in all other respects ready to load:—

Held, that no action could be maintained by the charterers against the shipowners for not being ready to load, as both parties were prevented from performing their contract to be ready with a ship and cargo by the action of a superior power.

Appeal from the judgment at the trial before Lord Coleridge, C.J., and a special jury.

This was an action by the charterer against the owners of the ship *Rainton* for not loading a cargo at Valencia pursuant to the charter-party.

The charter-party after stating that the ship was "now on her way to Genoa and Malta" proceeded to state that it was agreed between the plaintiff and the defendants that she should "with all convenient speed, after loading deadweight at Malta for owners' benefit, sail and proceed to Messina, and one first class Spanish port in the Mediterranean, or two first class Spanish ports in merchant's option, or one Spanish port only, orders to be given at Malta twenty-four hours after steamer's arrival there, or so near thereto as she may safely get, and there load from the factors of the said affreighter the remaining measurement space of light cargo only, including all descriptions of fruit, cargo not to exceed 400 tons, nor to be less than 300 tons, which the said affreighter binds himself to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions and furniture, and being so loaded shall therewith proceed to a safe place in the river Thames, London, as ordered on arrival at Gravesend, or so near thereto as she



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may safely get, and deliver the same on being paid freight. . . . By first class is meant any part that a steamer with cargo from a foreign port can load at by Spanish law, without risk of detention by custom authorities."

At the time that the charter-party was entered into, the *Rainton* was under contract with the English Government to load military stores at Malta as dead-weight, a fact which was known to the plaintiff. The plaintiff ordered the ship to Valencia to load pursuant to the charter-party. At that time vessels containing military stores were not allowed to anchor and load at Spanish ports without special permission, a fact known to the plaintiff. On arrival of the *Rainton* at Valencia, permission to load was refused notwithstanding the intervention of the British minister at Madrid, and the cargo had to be loaded in other vessels.

Upon these facts judgment was entered for the defendants by Lord Coleridge.

The plaintiff appealed.

*Murphy and B. M. Bray*, for the plaintiff.—The plaintiff is entitled to judgment. The question depends entirely on the construction of the charter-party, and exterior facts cannot be looked at to shew that there was a contract to carry military stores known to both parties. The defendants were bound to have their vessel ready to load, and she was not—*Stanton v. Richardson* (1). The cases of *Paradine v. Jane* (2) and *Medeiros v. Hill* (3) are in point. *Ford v. Cotesworth* (4), *Harris v. Dressman* (5) are distinguishable, and *Appleby v. Meyers* (6) is not in point.

*Cohen (Greenwell with him) contra.*—*Ford v. Cotesworth* (4) is in point, and the surrounding facts must be looked at

to see what the matter was with reference to which the parties were contracting.

*Murphy*, in reply.

BRAMWELL, L.J.—I do not see any cause for displeasure against the plaintiff for having brought this action; but still I think the claim is hard on the defendants, for both parties knew of the risk. I do not think that there was any default in either party at Valencia; the principle of *Ford v. Cotesworth* (4) applies to the state of circumstances there. It was said by Mr. Murphy, that there is, as a rule, in every charter-party an implied warranty that the ship will present herself at port in such a condition as to be entitled to take a cargo on board, but I know of no authority for that proposition, and I agree with what was said by Mr. Cohen, viz., that we must not introduce any term into the charter-party not put there by the parties. The words of the charter-party are that the ship "now on her way to Genoa and Malta" should "with all convenient speed, after loading dead-weight at Malta, for owners' benefit, sail and proceed to Messina and one first class Spanish port in the Mediterranean, or two first class Spanish ports, at merchant's option, or one Spanish port only." Those words were inserted for the purpose of protecting the shipowner if the ship went to Malta instead of going direct to a Spanish port, and loaded dead weight there. The fair construction of the document is that the ship might take on board any sort of dead weight; there is no restriction. It was also contended that, supposing that there is no general warranty, at all events after the shipowner has entered into the charter-party, he has no right to disable his ship from performing it. I think that there is weight in that argument; but one objection to it is that neither the defendants or their agent knew that there would be any impediment; on the contrary, they thought that there was nothing in it. But it is said they had no right to run the risk. I do not feel clear on that point; at any rate the answer to it is that the plaintiff gave defendants a license to load military stores. Our judgment must be for the defendants.

(1) 43 Law J. Rep. C.P. 230; s. c. Law Rep. 9 C.P. 390.

(2) Aley, 26.

(3) 8 Bing. 231.

(4) 39 Law J. Rep. Q.B. 188; s. c. Law Rep. 5 Q.B. 544.

(5) 9 Exch. Rep. 485; s. c. 23 Law J. Rep. Exch. 210.

(6) 36 Law J. Rep. C.P. 331; s. c. Law Rep. 2 C.P. 651.

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BRETT, L.J.—Under a charter-party in the ordinary form, the shipowner is bound to have his ship at the port of loading in the condition contemplated by the charter-party, ready to receive a cargo. If he is prevented by any unforeseen cause, *e.g.* capture (capture not being excepted), he would be liable on his contract; the capture is his misfortune. So in the case of the charterer not loading within the stipulated time. If he failed to do so through any accident, that is his misfortune, and he is liable to the shipowner. Both parties, therefore, must be ready, and cannot maintain an action unless they were. The charter-party here contains the unusual term "after loading dead-weight at Malta for owner's benefit;" and the first question is, what is the meaning of the unusual phrase "dead weight"? I go further than my brother Bramwell, and say that for the purpose of construing this document you must receive and apply evidence of facts known at the time to both parties, and shew that the parties were negotiating in view of these facts. Now here the ship was on her way to Malta, and was under a contract to load military stores which were "dead weight." This was known to the plaintiff's agent; the negotiations were therefore made in view of these facts. We are, therefore, entitled to notice that the word "dead-weight," which includes these military stores, was put in with a knowledge of the fact that such stores were to be shipped at Malta, and I think that the words "now on her way to Genoa and Malta" were inserted to shew that the voyage under the charter was not to commence till after the "dead-weight" was shipped, and shew that it was in the intention of the parties that the ship should execute her charter with the stores on board, as long as those stores were "dead-weight" and not measurement goods. The case of *Macdonald v. Longbottom* (7) is an authority in point.

The contract of the shipowner here was, therefore, that he should have the ship ready to take a cargo, but should be permitted to have military dead-weight

on board, and the shipper undertook to supply a cargo to such a ship. According to the evidence, the defendants did take the ship to Valencia, and she was ready and fit, so the defendants had up to that time done nothing that they were not authorised to do, and nothing happened which was not contemplated in the agreement. But by the action of the law of Spain, the defendants were unable to be ready, and by the same action the plaintiff was also unable to be ready. This condition of things seems to me to bring the case within *Ford v. Cotesworth* (4), which decides this—that where neither party is ready because they are both prevented by a superior power, neither can maintain any action for the unreadiness of the other.

COTTON, L.J.—We must take it in this case that both parties were ready at Valencia to perform their parts of the contract, and were only prevented by the action of the Spanish Government. If there had been nothing in the charter-party to the contrary I should have thought that the loading of military stores would be a breach of it. But while looking at the contract we must look also at the facts, not for the purpose of seeing what particular words mean, but we may and must learn the facts, and must say not what the parties meant, but what the true construction of a contract dealing with such facts is. Now the facts were these: both parties knew that the ship was going to Malta to load military stores, and the plaintiff knew that the ship having such stores on board could not load without the permission of the Spanish Government. The defendants have done nothing which is not in accordance with their contract, and the plaintiff cannot say that it was through the default of the defendants that the ship was not loaded, as the reason was, not their default, but the action of the Spanish Government.

*Judgment affirmed.*

Solicitors—Lowless & Co., for plaintiff; Miller, Smith & Bell, for defendants.

(7) 1 E. & E. 987; s.c. 29 Law J. Rep. Q.B. 256.

[IN THE COURT OF APPEAL.]

1878. } BORROWMAN, PHILLIPS AND COM-  
 Nov. 25. } PANTY v. FREE AND HOLLIS.\*

*Shipping—Contract to supply Cargo—  
 Appropriation under the Contract—Deter-  
 mination of Election by Void Tender.*

The plaintiffs contracted to supply to the defendants a cargo of maize, bill of lading to be dated between the 15th of May and the 30th of June, shipping documents attached as usual. The plaintiffs tendered, in performance of this contract, the cargo of a ship of which the shipping documents had not arrived. The defendants refused to accept this cargo, and on arbitration, in pursuance of a proviso in the contract, they were held to be justified in their refusal. The plaintiffs then tendered within the time named by the contract another cargo in every way satisfying the contract, but the defendants refused to accept it. The plaintiffs sold this cargo at a loss and sued the defendants for the amount of the loss incurred by their non-acceptance:—

Held (reversing the decision of DENMAN, J.), that the plaintiffs were entitled to recover; that they had not elected to perform their contract by the tender of the first cargo, that being a bad tender, and were not thereby precluded from tendering the second cargo so as to bind the defendants.

Appeal from the judgment of Denman, J., in favour of the defendants.

The claim was for damages for not accepting and paying for a cargo of American maize, pursuant to the terms of a contract made between the defendants and the plaintiffs, Borrowman, Phillips & Co., as agents for Vogan Brothers.

Defence, that the plaintiffs tendered to the defendants a cargo by a ship called the *Charles Platt*, that this cargo was decided not to be such a cargo as the defendants were bound to accept, and that after that they refused to accept a cargo of another ship, the *Maria D.*, tendered by the plaintiffs, on the ground that the plaintiffs had elected to fulfil their contract with the cargo of the

*Charles Platt* and could not force the defendants to accept any other cargo. Issue.

The contract sued on, was made with the defendants by the plaintiffs as agents for Vogan Brothers, but the benefit of the contract and all rights under it, were duly assigned by Vogan Brothers to the plaintiffs in February, 1878. This fact was averred by the plaintiffs and denied by the defendants, but the assignment and notice thereof to the defendants were proved at the trial, and no point was made as to this on the appeal.

The following are the material portions of the contract:—

“London, May 7th, 1877.

“Sold to Messrs. Free & Hollis a cargo of mixed American maize . . . . say three to four thousand quarters of 480 lbs. as per bill of lading, to be dated between the 15th of May and 30th of June inclusive, at the price of thirty shillings and sixpence per 480 lbs.”

“Payment by cash in London, in exchange for shipping documents . . . . or by the buyer’s acceptances at sixty days’ sight from date of arrival of bill of lading in London, with shipping documents attached as usual.”

“Sellers to render invoice within seven days of arrival of bill of lading in England.”

There was also a clause in this contract providing that any dispute arising out of this contract should be referred to arbitration.

At the trial before Denman, J., and a special jury, it appeared that the plaintiffs on the 23rd of June tendered to the defendants a cargo coming by a vessel called the *Charles Platt*, and stated at the same time that they had not yet received the shipping documents. On July 2nd the plaintiffs informed the defendants that the *Charles Platt* had arrived at Queens-town, and added: “We have no invoice yet.”

The defendants having declined to accept this cargo on the ground that the shipping documents had not arrived, the plaintiffs insisted that it was a proper cargo within the contract. This dispute was (under a provision in the contract) referred to arbitration and the award was that the defendants were not

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\* *Coram* Bramwell, L.J. Brett, L.J.; and Cotton, L.J.

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bound to accept the cargo of the *Charles Platt* as a performance of the contract. The plaintiffs then offered the defendants another cargo, in every respect satisfying the contract, in the following letter, dated the 9th of July:—

“Referring to our conversation of to-day, we beg to hand you an invoice of the cargo of maize per *Maria D.* from Baltimore, bill of lading to hand to-day and dated about the 24th of June, in fulfilment of your contract, dated the 7th of May. We shall be glad to know whether you elect to pay cash for the cargo, or our friends are to draw on you with shipping documents attached as usual.”

The defendants replied on the following day and declined to accept the cargo per *Maria D.*, alleging that they were not bound to accept any cargo since the tender of that per *Charles Platt*, which the arbitrator had decided was a bad tender, and which the defendants alleged was an election by the plaintiffs under the contract, and so exhausted the contract.

The bill of lading of the *Maria D.* was dated the 29th of June, and it appeared that the plaintiffs had contracted to buy this cargo after the defendants had refused to accept the cargo of the *Charles Platt*, and that at the time they wrote the letter of the 9th of July, the vendor had given the invoice to the plaintiffs, but that the cargo and shipping documents were not in their possession till the 4th of August. The defendants having refused to accept the cargo of the *Maria D.*, the plaintiffs, after notice to the defendants, sold it by auction at Queenstown, and, the price of the maize having fallen, they brought this action to recover the loss thus incurred.

The defendants also contended at the trial that there had been no tender of the *Maria D.*, inasmuch as the shipping documents were never actually tendered. The learned Judge having allowed an amendment to be made to raise this point, the plaintiffs contended that the defendants had waived the tender by their refusal to accept the cargo of the *Maria D.* The jury having been discharged the learned Judge found for the plaintiffs on

the question of waiver, but found a verdict and gave judgment for the defendants on the ground that the plaintiffs had earmarked the cargo of the *Charles Platt*, had appropriated it to the satisfaction of the contract, and had elected to fulfil the contract with it, and that as it had been decided by the arbitrator that the cargo of the *Charles Platt* was not such a cargo as the defendants were bound to accept, the plaintiffs could not tender and the defendants were not bound to accept any other cargo in fulfilment of the contract.

The plaintiffs appealed.

*Herschell* and *A. Smith*, for the appellants.—The judgment of the learned Judge cannot be sustained. The defendants were bound to accept the cargo of the *Maria D.*, as it was in every way a fitting cargo, and it was tendered within the time named in the contract. No doubt the tender of the *Charles Platt* was not a good tender, as the shipping documents were not tendered before the arrival of the ship, but the plaintiffs cannot be held to be concluded by that insufficient tender. The contract was not for the cargo of the *Charles Platt*, and as the ship was not named in the contract, any cargo in other respects satisfying the contract would suffice. The contention for the defendants is, that when once a cargo has been named, no other can be substituted, and the case of *Guth v. Lees* (1) will be relied on, but the distinction between that case and this is clear. There the plaintiff had an option to deliver in August or September, he elected to deliver in August, and gave notice to the defendant, so that he imposed an obligation on the defendant to accept, and the contract was as though they had agreed on August at first; there rights had accrued, and the defendant had been led, by the plaintiff's election, to alter his position. In *Thornton v. Simpson* (2) the contract was to ship hemp in June or July, the ship's name to be declared as

(1) 3 Hurl. & C. 558.

(2) 6 Taunt. 556.

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soon as known. The letter there announced that the hemp was coming by one ship, but as only a portion came by that ship it was said he had elected to perform his contract by that ship, and could not send any more by any other; that is the argument in substance here, and the decision in that case is in point and contrary to the contention of the defendants. *Tetley v. Shand* (3) is to the same effect, and shews that the plaintiffs were not precluded by the tender of the cargo of the *Charles Platt*, which tender was found by the arbitrator to be a bad tender, from tendering the cargo of the *Maria D.*, and that the defendants were bound to accept and pay for the second cargo, and are therefore liable to pay the loss incurred on a re-sale.

*Benjamin, Philbrick and R. Brown*, for the defendants.—The finding of the learned Judge as to the waiver cannot be supported, and even if there was a waiver it was obtained by an incorrect statement of facts made by the plaintiffs, so that it cannot bind the defendants. The plaintiffs' letter states that the bill of lading was dated about the 24th, whereas in reality it was dated on the 29th of June. The plaintiffs tendered a cargo which was not theirs at the time of the tender, and which did not become theirs till August, so that there was and could be no real tender. But, apart from this question, the plaintiffs are concluded from maintaining this action, by their own act. They elected to perform the contract by the tender of the *Charles Platt*, so that it must be taken as though the *Charles Platt* had been written into the contract. Then, as the *Charles Platt* did not satisfy the terms of the contract, the whole contract is at an end; the plaintiffs having done an act intended to be the fulfilment of the contract cannot afterwards withdraw. The tender of the *Charles Platt* was a determinate election, not a mere proposal on their part. The plaintiffs might have proposed a cargo, they might have asked the defendants to accept the *Charles Platt*, and on the defendants declining, they might have then proposed another cargo,

but they did not ask the assent of the defendants, they insisted on their accepting the *Charles Platt*, and they thus made their option to perform the contract with that ship, and they went to arbitration on that point. Unless the plaintiffs had definitely made their option and attempted to force the defendants to accept the *Charles Platt* there would have been no dispute, no ground for a reference, nothing for the arbitrator to decide. Any cargo, in accordance with the terms, would have satisfied this contract, but when the plaintiffs had once appropriated a cargo in performance of the contract, then they had made their election, and they must be in the same position as though they had originally contracted to do the act which they have elected to do—*Brown v. The Royal Insurance Company* (4). *Tetley v. Shand* (3) does not govern this case, for that was the case of a proposal and refusal, an acquiescence in the refusal, and a new proposal which was therefore binding on both parties. The rules by which the plaintiffs are bound, and which prevent them from maintaining this action, are clearly expressed in *Blackburn on Sales*, p. 126, and an election has been made here which irrevocably determines the right of the plaintiffs (see page 128), and "the certainty and the property" has begun "by election" (page 129).

[BRETT, L.J.—Lord Blackburn is treating in those pages of appropriation passing the property, and so the doctrines are not in point here. BRAMWELL, L.J.—The plaintiffs have not elected because what they tendered was not eligible. They have not exercised an option by the offer of the *Charles Platt* because they could not rightfully do so.]

But they elected all the same, and although their election was a breach of the contract it cannot give them any advantage. *Guth v. Lees* (1) covers this case. There the plaintiff had an option in respect of time, here of cargo; there the plaintiff could deliver in August or September, here he could supply any cargo that fulfilled the requirements of

(3) 25 Law Times, N.S. 658.

(4) 1 E. & E. 853; s.c. 28 Law J. Rep. Q.B. 275.

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the contract; there the plaintiff exercised his option, and it was held binding on him, here he has done the same, and he is bound by it. The argument there was the same as it is here. The party who has a right to exercise an option cannot have two elections and cannot hold the purchaser to two bargains. The plaintiffs, therefore, here could not tender the cargo of the *Maria D.*, and they cannot recover damages from the defendants for non-acceptance.

BRAMWELL, L.J.—I think this judgment cannot be supported. I will first deal with the argument that the plaintiffs could not, in fact, tender the *Maria D.* to the defendants, because the cargo of that ship was not theirs at the time. Now this point was not raised at the trial. If it had been, the plaintiffs could probably have answered it, and, therefore, I do not think it ought to be raised here. If an objection is taken in the Court of Appeal for the first time, which, if taken at the trial could and would probably have been met by further evidence which would have cured the objection, then, I think, we ought not to listen to it. Where, however, the objection is one which no evidence could have cured, and when it is only, so to speak, the evolution of an objection which was shadowed forth at the trial, then, I think, we may entertain it in this Court. But this objection could have been answered, I think indeed it was, in effect, answered, and I doubt whether it is a valid objection at all.

It has further been said that the plaintiffs had not in their possession the shipping documents of the *Maria D.* when they tendered that cargo, and the phrase "dated about the 24th of June," in their letter, is said to shew this; but even if this be so, I do not think it was necessary for them to have them at that time; all they had to do then was to name the ship and to send the invoice, and this they did.

I now turn to the more general part of the case. The contract was for a cargo of maize, the vendor had to name the ship and to send the invoice, the purchaser was then to exercise his option as to the mode of payment, and the duty of the vendor was to be ready with the

shipping documents. It appears that the *Charles Platt* had arrived at a port of call with a proper cargo of maize, but the bills of lading had not arrived. Thereon it was alleged that the plaintiffs could not force them to take that cargo then at the port of call, inasmuch as the plaintiffs had not the shipping documents. The plaintiffs however asserted that they could, and on this the parties went to arbitration, the result of which was that the plaintiffs were held not entitled to do so. I do not give any decision on this point. In consequence of this decision of the arbitrator the plaintiffs then offered and tendered another ship within the time named in the contract, and it is now said that the first tender having been made the plaintiffs had no right to tender a second time. I am of opinion that this contention cannot prevail. The first tender was a wrong tender, the second was a right tender, and the first tender is no answer to the second. It is impossible to read the words *Charles Platt* into the contract as has been suggested by the defendants, and it is impossible that the plaintiffs could elect to have a right to tender a ship which did not satisfy the contract, and they are clearly entitled to carry out their contract by offering, within the time specified by the contract, a ship in accordance with the contract, such as was the second ship tendered by them. The *Charles Platt* was either a tender within the contract or it was not; if it was not, the plaintiffs could not tender it, if it was, they withdrew the tender, with, I may add, the sanction of the defendants. In this case, therefore, they either could not tender the *Charles Platt* or they withdrew it, and then they were entitled, the time not having elapsed, to tender the *Maria D.* If the case of *Guth v. Lees* (1) be examined, it affords no authority for the contention of the defendants. There the plaintiff had an option to deliver in August or September, he made his election, and both parties were bound by it. In the present case the plaintiffs, if they made any election at all, made one which they had no right to make, and the reasoning in that case shews that the action in this case is maintainable. The plaintiffs here did not and could not exercise any option such as is suggested. I think,

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therefore, that judgment must be entered for the plaintiffs.

BRETT, L.J. — I also think that this judgment must be reversed. It is said by the defendants that the plaintiffs could not tender the *Maria D.*, that is, that although they were, in fact, ready and willing to tender, they could not do so in law, that they could not do so because they were not able to hand over the bills of lading. I think that it is manifest that this point was not taken at the trial; if it had been, the plaintiffs could very probably have answered it by further evidence, and, therefore, I think that it should not be raised here.

Then it is said that even if the plaintiffs could tender the *Maria D.* they never did so, and that the absence of tender was not waived. Now my brother Denman finds there was a waiver, and I may say that this finding appears to me to be justified by the evidence.

The case, then, is reduced to the point on which the judgment of the learned Judge was given. It is, that the plaintiffs could not tender the *Maria D.* in such a way as to oblige the defendants to accept it, and that because they had already tendered the *Charles Platt*, and had insisted on that tender. The argument in support of this view was founded on the doctrine of election, and it was said that even if the first tender did not oust the plaintiffs of the right to tender again, yet that they were ousted because they had brought an action to enforce their right to tender the first ship. The plaintiffs, however, did not bring an action to recover damages for the non-acceptance by the defendants of the *Charles Platt*, and the proceedings in the arbitration did not cause the second tender to be out of date, so that the plaintiffs are not barred by reason of their having gone to arbitration, nor are they barred by effluxion of time. Suppose the plaintiffs had succeeded in the arbitration, could they have then sued the defendants for not having accepted the *Charles Platt* before the arbitration? I suppose they could not. The arbitration was, it may be observed, only an arbitration on one point, arising out of the contract; there was no action to enforce the contract. I am of

opinion that the alleged doctrine of election does not apply to this case. The passages cited from Lord Blackburn's book apply to questions which arise out of the passing of property in goods appropriated or not appropriated to the satisfaction of a contract. The whole application of that doctrine depends on the authority given to a person to appropriate, and on that person's exercising, in fact, the authority so given; whereas in this case there was no appropriation at all, and the doctrine seems to me not to be applicable. The case of *Tetley v. Shand* (3) is unaffected by this case, and the law there laid down remains good law. *Thornton v. Simpson* (2) does not apply to the matter now before us. I think that *Guth v. Lees* (1) did not turn on the question of election; the decision was on a demurrer to an equitable plea, not a decision on a case of election by a vendor without agreement with or acceptance by the purchaser, and that case is no authority for saying that the vendor could not have withdrawn from the contract if the position of the purchaser had not been altered. In the case now before us the plaintiffs offered what they had no right to tender, and the defendants objected, the plaintiffs thereupon tendered another vessel, as they had a right to do. I do not decide what would have been the position of affairs had the defendants held the plaintiffs to the tender of the *Charles Platt*. Other questions would have arisen which we need not now consider. The appeal must be allowed, and the judgment entered for the plaintiffs.

COTTON, L.J.—I agree that this judgment must be reversed. It has been objected, on the part of the defendants, that a cargo was never tendered by the plaintiffs in such a way as to bind the defendants. Assume that there was no tender of the *Maria D.*, then the answer is, that there was a waiver. It is then said that this waiver was obtained by a misrepresentation without fraud. That may be so, but the point was not raised at the trial, and I agree with what Bramwell, L.J., has said as to objections which are raised for the first time here, and I do not think we ought to give final decisions on points not raised in

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the Court below. It was then urged that there could be no valid tender, as the plaintiffs were not in possession of the cargo of the *Maria D.* This point also was not raised at the trial; but I will also say that, in my opinion, the plaintiffs had a right to tender the cargo, as they could have got possession of it before the time appointed for delivery.

In one sense, no doubt, the plaintiffs made an election, that is, they elected to tender the cargo of the *Charles Platt*; but when it was held that that was not such a cargo as the defendants were bound to take, the plaintiffs tendered another, so that the offer by the plaintiffs of the first cargo was not a selection within the terms of the contract, and so not an election within the meaning of this contract, and therefore not an election which would bind both parties. After the arbitration, which decided that the plaintiffs were wrong in contending that the ship which they had selected was a ship within the contract, it became clear that the plaintiffs had never tendered at all within the meaning of this contract, and, therefore, that there had been no election, and the rule founded on the doctrine of election does not govern this case.

The arbitration, moreover, was not equivalent to an action for damages, it only assumed to settle one point which was in dispute. It decided that the cargo of the *Charles Platt* was not such a cargo as the defendants were bound to accept, and, as the time had not elapsed, the plaintiffs were entitled to tender another cargo, and one which should satisfy the contract. With regard to the case of *Gath v. Lees* (1) I would merely say that I think the plea was a good legal plea, it was, in brief, a plea that there had been a contract, to which both parties had assented, and that then another contract could not be substituted without the assent of both parties.

*Judgment reversed, and entered for the plaintiffs.*

Solicitors—Plews, Irvine & Hodges, for plaintiffs;  
Philbrick & Corpe, for defendants.

*Ferguson & Davidson 51296 L 267*  
*Arbitration between Wacker & Horn 51296 L 424*

[IN THE COURT OF APPEAL.]

(Appeal from the Exchequer Division.)

1878.

Nov. 20. }

GALATTI v. WAKEFIELD.\*

*Arbitration and Award—Reference by Consent—Award under 20l. in Action of Contract—Costs of Reference—County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5.*

*Where a cause has been referred by consent, and the order of reference leaves the costs of the reference and award in the discretion of the arbitrator, and the award is for less than 20l. in an action founded on contract, the arbitrator's control over the costs of the reference and award is not taken away by section 5 of the County Courts Act, 1867.*

*The decision of the Common Pleas in Moore v. Watson discussed.*

This was an action commenced in the Liverpool district registry to recover 80l. 6s. 1d. for commissions. The defendants set up a counter-claim for 42l. 3s. 7d.

All matters in dispute between the parties were referred by consent to a barrister, and by the order of reference it was provided that "the costs of the said cause shall abide the event and determination of the said certificate or award, and that the costs of the said certificate or award shall be in the discretion of the said arbitrator, who shall award or certify by whom, or to whom and in what manner the same shall be paid, and the same shall be taxed, allowed or deducted by the district registrar, and shall be recovered, if necessary, in the same manner as if the same were costs in the cause."

The arbitrator found the sum of 10l. 3s. 4d. was due from the defendants to the plaintiff in respect of the claim, and that nothing was due from the plaintiff to the defendants in respect of the counter-claim. He directed the defendants to pay to the plaintiff the said sum of 10l. 3s. 4d., and further to pay to the plaintiff the costs of and incidental to the reference and the costs of the award.

\* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.



*Galatti v. Wakefield (App.), Exch.*

The arbitrator made no formal certificate as to costs under 30 & 31 Vict. c. 142. s. 5.

The plaintiff went before the district registrar to tax the costs of the reference and award, but the registrar refused to do so, on the ground that the plaintiff was debarred from recovering his costs under the above section. On appeal, Cleasby, B., ordered the registrar to tax the costs; and the Exchequer Division affirmed his order.

The defendants now appealed against the decision of the Divisional Court.

*Henn Collins*, for the defendant.—Section 5 of the County Courts Act applies to the present case—*Moore v. Watson* (1). A reference by consent is practically on the same footing as a compulsory reference. It is the same tribunal, and the parties have put themselves within the Act by the terms of their reference—*Smith v. Edge* (2), *Oswell v. The Amman Colliery Company* (3). The case of *Forshaw v. De Wette* (4) proceeds on the mistaken hypothesis that there is a distinction between arbitration by consent and by compulsory order.

*French*, for the plaintiff, was not called upon.

BRAMWELL, L.J.—I think that the judgment of the Court below is right, and for these reasons:—It cannot be said, if the costs of the reference are by the order placed in the discretion of the referee, so that they may be attended with a different result from that which attends the costs in the cause, that the parties cannot contract themselves out of the provision of the County Court Act. They have as a matter of fact actually done so. It has been said, and some remarks of my own in *Smith v. Edge* (2), and of the Queen's

Bench in *Oswell v. The Amman Colliery Company* (3), have been cited to shew it, that there is no difference in this respect between a compulsory reference and a reference by consent; and then it is shewn that the Court of Common Pleas has held that where there is a compulsory reference, in cases within the statute, the costs of the reference must follow the event.

It may be that the proposition that there is no difference between the two cases is not true, or at all events that it ought to be qualified as regards this particular matter. It may be that the Exchequer was right and at the same time that the Court of Common Pleas was not wrong, and that the cases are distinguishable. Now, without wishing to differ from the Common Pleas on that point for the present, I desire to say that I do not agree with them; and I reserve my own judgment on the point till it comes before me. The judgment in the case of *Moore v. Watson* (1) was purely technical, on the ground that the certificate of an arbitrator having the effect of a verdict by a jury, the costs of the reference ought to be taxed as costs in the cause, and therefore the clause leaving the costs of the reference in the discretion of the arbitrator is nugatory when the sum recovered is below the amount specified in the County Courts Act. I do not dissent from that doctrine, but I cannot say I agree with it; and I have a difficulty in agreeing with it for the reason mentioned in the judgment of Willes, J. Suppose the arbitrator awarded 1s. to the plaintiff, and the costs to the defendant, saying that it was a vexatious action, and the time occupied in the reference had been wasted. How is the defendant to get the costs? It is clear he cannot get them as costs in the cause, for he has not gained the cause. Is the award of costs nugatory in such a case? As a matter of convenience both sets of costs are taxed together, and there is but one allocatur. But as a matter of convenience, when there are two sets of costs awarded in different ways, why should there not be a separate allocatur for the costs of the reference, and a separate order to pay them?

(1) 36 Law J. Rep. C.P. 122; s. c. Law Rep. 2 C.P. 314.

(2) 2 Hurl. & C. 659; s. c. 33 Law J. Rep. Exch. 9.

(3) 6 B. & S. 333; s. c. 34 Law J. Rep. Q.B. 161.

(4) 40 Law J. Rep. Exch. 153; s. c. Law Rep. 6 Exch. 200.

*Galatti v. Wakefield (App.), Exch.*

Not therefore differing from the decision of the Common Pleas Division, and not agreeing with it, but holding it inapplicable to the present case, I am of opinion that the plaintiff is entitled to the costs of this reference, on the ground that the plaintiff and the defendant have both agreed that it shall be so.

BRETT, L.J.—This question is solely as to the costs of the reference, as to which the plaintiff and the defendant have come to an express agreement; and I see nothing in any Act of Parliament which disables them from making that agreement. As to the case of *Moore v. Watson* (1) I decline to express, either directly or by implication, any opinion. That was a case where there was no agreement, but a compulsory reference, and is distinguishable, therefore, from the present case.

COTTON, L.J.—I am of opinion that the Exchequer Division was right. Reliance was placed by the defendant on the County Courts Act, which enacts that where less than 20*l.* is recovered in an action of contract no costs shall be recovered by the plaintiff, unless a certain certificate is given. That is the law independently of agreement; but by agreement the parties may, if they think fit, waive their rights under the Act. Here, as to the costs of the reference it has been agreed that they shall be in the discretion of the arbitrator, and the parties have a perfect right to make that agreement. We were pressed with the case of a compulsory order. Now, although a compulsory order may be made in these terms, yet still it is a compulsory order, and it may be that the meaning would be that such costs as the arbitrator had power over should be in his discretion. But when the submission is voluntary, and the costs of the reference are left in the discretion of the arbitrator, it is clear they must be so in every event. As to the case in which my brother Bramwell said there was no difference between a voluntary and a compulsory reference, we must consider what was the state of things with reference to which that observation was made. It was with regard to the

costs of the action, which must abide the event, and must be treated in both cases on the same footing. But it is a different matter where an express agreement has been made as to the costs of the reference.

*Appeal dismissed.*

Solicitors—J. H. Lydall, agent for Stephens & Danger, Liverpool, for plaintiff; Shaw & Tremellen, agents for Powles, Liverpool, for defendant.

*Gordon v. Harrison. Supra. 223.  
Kewick v. Graham 50 L.J. 2397.*

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1878.

Nov. 4, 14. }

TAYLOR v. BATTEN.\*

*Practice — Discovery of Documents — Affidavit — Sufficiency of Description — Privilege.*

The defendant's affidavit of documents contained the following paragraph:

2. "I have in my possession or power certain letters and correspondence which have passed between me and my legal adviser, in relation to the matters in question in this cause, and with a view to my defence to the plaintiff's claim, and certain instructions to and opinions of counsel in relation to the same matters, all of which I claim to be privileged from producing." In a further affidavit he swore, "The documents referred to in paragraph 2 of my former affidavit are numbered 50 to 76 inclusive, and are tied up in a bundle marked A, and initialed by me":—

Held, that the two affidavits together were sufficient, as they identified the documents for which privilege was claimed, sufficiently to enable the Court to order them to be produced if necessary.

This was an action upon a judgment obtained by the plaintiff against the defendant in the island of Jersey.

For the defence it was alleged that the defendant had no notice of the proceedings in Jersey, and that the judgment had

\* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

*Taylor v. Batten (App.), Q.B.*

been obtained without the defendant's knowledge.

The plaintiff having called upon the defendant to make an affidavit of documents, the defendant made an affidavit, scheduling a number of documents which he did not object to produce, and containing the following paragraph 2:—

"I have in my possession or power certain letters and correspondence which have passed between me and my legal adviser, in relation to the matters in question in this cause, and with a view to my defence to the plaintiff's claim, and certain instructions to and opinions of counsel in relation to the same matters, all of which I claim to be privileged from production." The above paragraph having been objected to as insufficient, the defendant, in pursuance of an order, filed a further affidavit to the following effect:—

"The documents referred to in paragraph 2 of my former affidavit are numbered 50 to 70 inclusive, and are tied up in a bundle marked A, and initialed by me."

The plaintiff applied to Huddleston, B., at chambers, for a further affidavit, on the ground that the documents for which privilege was claimed were not sufficiently identified. His Lordship refused the application. On appeal to the Queen's Bench Division, that Court was equally divided, and the order of Huddleston, B., consequently stood affirmed.

The plaintiff then brought the present appeal.

*Townsend*, for the plaintiff, contended that each of the documents for which privilege had been claimed, should be identified by date and by the name of the writer, and that each document, other than a letter, should be specifically described as "case for opinion," "opinion of counsel," or the like. He cited—*Daniel's Chancery Practice*, p. 1679, 5th ed.; *Hamilton v. Nott* (1); *Lazarus v. Mozley* (2); *Fortescue v. Fortescue* (3).

*J. O. Matthew*, for the defendant.—The object of the present application is to compel the defendant to disclose the names of any persons with whom the defendant may have been in communication at the time of the proceedings in Jersey. This is a subject for interrogatories. The affidavit is sufficient; for it is enough to shew the Court that the order has been complied with. He cited *Minet v. Morgan* (4).

*Townsend*, in reply, referred to the case of *Phelps v. Olive*, mentioned in a note to *Inman v. Whitley* (5)

*Cour. adv. vult.*

The judgment of the Court was, on Nov. 14, delivered by—

COTTON, L.J.—This was an appeal in a case where the Court below was equally divided. The circumstances are as follows:—The plaintiff in this action called on the defendant to make an affidavit of documents in his possession. The first affidavit made by the defendant was clearly insufficient; the plaintiff applied for and obtained a further affidavit, and the question is whether that second affidavit was sufficient. The question arises as to documents for which privilege was claimed, on the ground that they consist of correspondence with the defendant's legal advisers, cases for the opinion of counsel and counsel's opinions. There is no question as to the first affidavit, it was clearly insufficient; it ran thus: "I have also in my possession or power certain documents, letters and correspondence, which have passed between my legal advisers and myself in relation to the matters in question in this case, and with a view to my defence to the plaintiff's claim, and certain instructions to and opinions of counsel in relation to the same matters, all of which I claim to be privileged from production." This is clearly insufficient, as it only describes the documents as "certain documents, letters, &c.," without any further identification. In the further

(1) 42 Law J. Rep. Chanc. 512; s. c. Law Rep. 16 Eq. 112.

(2) 5 Jur. N.S. 1119.

(3) 34 Law Times, 849, 7.

VOL. 48.—Q.B., C.P. & EXCH.

(4) 42 Law J. Rep. Chanc. 627; s. c. Law Rep. 8 Chanc. 361.

(5) 4 Beav. 549.

*Taylor v. Batten (App.), Q.B.*

affidavit, the second paragraph is as follows: "The documents referred to in paragraph 2 of my former affidavit are numbered 50 to 76 inclusive, and are tied up in a bundle marked with the letter A and initialed by me."

The plaintiff contended that this was insufficient, but, as I understand, he did not deny that it would have been sufficient if it had referred to documents which the defendant was not unwilling to produce. In my opinion, if these documents had been merely scheduled in the ordinary way, and no objection had been made to their production, the description would have been amply sufficient for the purpose of identification. For all the Court requires, where there is no question of privilege or objection to produce the documents, is that they should be so far identified that the Court can see that the documents referred to are produced if required.

Then let us see whether further identification is required if there is an objection to produce the documents. We must remember that the plaintiff is bound to take the affidavit as true, unless it can be shewn that there is some reason on the face of it why it cannot be relied on. The affidavit is sufficient if the documents are sufficiently identified. But it is said that the plaintiff is entitled to be put in such a position as to test the truth of the affidavit by the description of the documents. That, however, is, in our opinion, erroneous. The only object of the affidavit is to enable the Court to order the documents to be produced if it think fit to make an order to that effect; and if words are used which, if true, protect the documents, no further particularity is necessary than in the case of documents for which protection is not claimed. If an affidavit claiming protection for documents some of which are, while others are not, privileged did not sufficiently shew which were entitled to protection, the Court would either order protection of all, or, as under ordinary circumstances would be the proper course, allow the party an opportunity of making a further affidavit to identify the documents entitled to protection. But here the protection claimed applied to all the

classes of documents mentioned in the schedule. The case stood over, not because of any doubts we entertained on the subject, but because it was suggested that a case before Lord Cottenham was an authority against the view we have taken. Mr. Townsend has sent me that case, *Phelps v. Olive* (5), which is shortly reported in a note to a case in Mr. Beavan's Reports. It amounts to this, that the mere statement, "I have a bundle of letters," is not sufficient identification. But here we have more than that. We have the papers numbered 50 to 76 in a bundle marked and initialed. He referred us to another case—*Fortescue v. Fortescue* (3), before Vice-Chancellor Hall. If we dissented from the decision in that case, we should not follow it. But it does not decide this point at all. The affidavit there was with regard to certain deeds, which it described merely as a bundle of deeds relating to the defendant's title, and the Vice-Chancellor held that the affidavit was not sufficient. This is within the principle of our decision. It is true that in ordering a better affidavit the Vice-Chancellor says, that the plaintiff is entitled to a proper discovery of the instrument which would take away his title, and that he is entitled to know whether that instrument is in the possession of the defendant, and that giving a proper schedule would shew that. If the decision was that the plaintiff was entitled to a detailed schedule shewing the nature of the defendant's title-deeds, we should not agree with it. But that was not the decision. That case, therefore, does not support the plaintiff's view. The plaintiff admits that his object in endeavouring to obtain the further affidavit is to make out some case against the defendant by extracting from him some acknowledgment of his having been acquainted with certain proceedings in Jersey. Now, though he cannot require any further specification in the schedule of documents, yet if he has reason to believe that the defendant was in communication with a solicitor in Jersey shortly before the judgment, or can make out any other case as to his knowledge of the proceedings there, he can administer interrogatories as to those

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matters, so as to prevent the defendant from setting up as a defence that the judgment was recovered against him without notice. We are of opinion that the appeal fails, and that the defendant ought not to be required to make any further affidavit. The principle of our decision is that the object of the affidavit is to enable the Court to make an order for the production of the documents mentioned in it, if the Court think fit so to do, and that a description of the documents which enables production, if ordered, to be enforced, is sufficient.

*Appeal dismissed.*

Solicitors — Hurford & Taylor, for plaintiff;  
Waltons, Bubb & Walton, for defendant.

*In E Bk 52 2 9 6 2 186*

[IN THE EXCHEQUER DIVISION.]

1878. } WELLS v. THE MITCHAM AND WIM-  
Nov. 4. } BLETON GASLIGHT COMPANY.

*Costs—Notes of Evidence—Copy of Shorthand Writer's Transcript—Reference.*

*The cost of copies of a shorthand writer's notes of the evidence supplied to counsel from day to day in the course of a reference will not be allowed on taxation, although there was only one counsel engaged.*

Motion to rescind the order of Huddleston, B., made at chambers on the 7th of August, 1878, and to direct the Master to review his taxation of the plaintiff's bill of costs.

By an order of a Judge of the 4th of October, 1878, the action, which was brought on a building contract, and all matters in difference, were referred to an arbitrator. Before the arbitrator one counsel, instructed by a solicitor or solicitor's clerk, appeared on each side, and a shorthand writer was employed to take notes. The arbitration lasted for several days, and a brief copy of the transcript of the notes of the evidence of the pre-

vious day was supplied to the plaintiff's counsel day by day. The plaintiff's bill of costs contained charges for these copies, and the Master in taxing allowed them. The defendants objected to their being allowed, but the Master overruled the objection.

The Master's written reasons were the following:—

"In consequence of these objections I have reconsidered my allowance of the items objected to, but still consider they were rightly allowed. Though the notes were used by the arbitrator, all that I have allowed is a copy of the evidence for counsel as the case progressed. It is true that solicitor's notes might have been shorter, but the defendant might well have objected to such notes being referred to, and the employment of a shorthand writer probably prevented the reference being prolonged to other meetings, or a second counsel might have been instructed to take a note of the evidence. But it appears to me the expense would not have been less."

Huddleston, B., affirmed the decision of the Master.

*J. Brown*, for the defendants, argued that it was a departure from the practice of the Court to allow the cost of shorthand notes—*Oroomes v. Gore* (1). Shorthand notes ran to great length, and were very expensive, and in reality were never read by counsel. The practice of allowing them would be liable to great abuse. Notes of the evidence are better taken by counsel, or if he is examining witnesses, by the solicitor or his clerk. He cited *Kirkwood v. Webster* (2).

*Gates and Cock*, for the plaintiff.—The Master has a discretion to allow these charges under rule 29 of the "Rules of the Supreme Court (Costs)." The Court will not review his discretion, having regard to the reasons he has given, which involve not merely these transcripts, but the whole conduct of the case. There being no second counsel to take notes, it

(1) 1 Hurl. & N. 14; s. c. 25 Law J. Rep. Exch. 267.

(2) 47 Law J. Rep. Chanc. 880; s. c. Law Rep. 9 Ch. D. 239.

*Wells v. Mitcham Gas Co., Exca.*

was necessary to employ a shorthand writer. They cited *Sinclair v. The Great Eastern Railway Company* (3) and *Wakefield v. Brown* (4).

KELLY, C.B.—I am of opinion that the costs of the copies of a shorthand writer's notes in this case, being in the lengthy form of question and answer, ought not to be allowed.

CLEASBY, B.—I am of opinion that the Master has acted on considerations not properly applicable to the case. I do not think that any rule of equivalents can be applied, so that shorthand notes shall be allowed, because there was no second counsel. In the absence of any agreement between the parties or order in the cause, copies of shorthand writer's notes ought not to be allowed.

*Motion allowed.*

Solicitors—Wilkins, Blyth & Fanshawe, for plaintiff; J. Keily, for defendants.

[IN THE COURT OF APPEAL.]

(Appeal from the Common Pleas Division.)

1878. } CROWLE v. RUSSELL AND  
Nov. 11. } ANOTHER.

*Mortgage by Executor—Lease of Mortgaged Hereditaments—Action for Re-entry under—Stay of Proceedings in until Conclusion of Action to administer Estate of Testator—Judicature Act, 1873, s. 24, sub-sect. 5.*

An executor mortgaged certain of his testator's hereditaments to O. to pay off incumbrances. O. leased these hereditaments, with the consent of the equitable tenant for life, to R. Default having been made in the interest due on the mortgage debt, O. directed R., pursuant to a proviso contained in the lease, to pay the rent to him. This not having been done, O. brought an action against R. on the covenant to pay rent and

to enforce a reserved right of re-entry and the executor was admitted to defend this action. Shortly before this the executor had instituted an action to administer his testator's estate, and enquiries had been directed in the Chancery Division as to the encumbrances on the estate.

An order having been made at Chambers and affirmed by a Divisional Court that the action for rent and re-entry should be stayed until the administration action was concluded, O. appealed:—

Held, reversing the decision of the Divisional Court, that the order could not be sustained, that although the executor was the plaintiff in the administration action, and the defendant in the action by O., still that O. not being a party to the administration action, ought not to be restrained from pursuing all the remedies reserved to him under the mortgage, and that he was entitled to proceed with his action.

This was an appeal by the plaintiff from an order of the Common Pleas Division, affirming an order of Huddleston, B., at Chambers.

In 1858, John Long was entitled to the equity of redemption in certain premises in Cornwall, subject to two charges amounting to about 600*l*. On his death in that year his executors, of whom Clarke was one, mortgaged the above-mentioned hereditaments in fee to Crowle, for 700*l*., and with the sum so raised the two prior charges were paid off and the mortgagees under those mortgages concurred in the mortgage to Crowle.

In March, 1877, Crowle, with the concurrence of the equitable tenant for life, granted a lease for fourteen years to Russell and Farmer, the defendants in this action. This lease contained a proviso making the receipt of the equitable tenant for life for the rent sufficient until the mortgagee should give the tenants notice to pay rent to him directly. It contained also the usual covenant by the lessees to pay the rent and a proviso for re-entry by the lessor at the expiration of twenty-one days in the event of a breach of any of the covenants in the lease.

Crowle died in December, 1877, and devised the hereditaments in question to

(3) 39 Law J. Rep. C.P. 165; s.c. Law Rep. 5 C.P. 135.

(4) 43 Law J. Rep. C.P. 222; s.c. Law Rep. 9 C.P. 410.

*Crowle v. Russell (App.), C.P.*

his wife, the present plaintiff, whom he also made his executrix.

Default having been made in the payment of the interest on the mortgage, the tenants were, in January, 1878, directed to pay their rent to the plaintiff. They, however, failed to do so, and she accordingly issued a writ on June 21, to recover the rent due and to enforce her right of entry under the covenant contained in the lease. Before this writ was issued an action had been instituted in the Chancery Division by Clarke, the surviving executor of John Long's will, for the administration of Long's estate, Clarke being the plaintiff, and the beneficiaries under the will being the defendants in that action, and enquiries had been directed as to the validity of the mortgage made by Long's executors.

After Russell and Farmer, the tenants, had appeared to the action brought against them by Mrs. Crowle, Clarke obtained an order at Chambers, admitting him to defend the action as landlord of the premises in question and staying the proceedings in the action on the ground that the plaintiff's interests would be protected in the administration action in the Chancery Division.

From this order made by Huddleston, B., Mrs. Crowle appealed to the Divisional Court, and the Court affirmed the order, giving, however, the plaintiff leave to apply again if it should happen that her rights were not adequately protected in the administration action.

The plaintiff, Mrs. Crowle, now appealed from so much of this order as stayed the proceedings in the action in the Common Law Division.

*Bleby and Orispe*, for the appellant.—This order deprives the plaintiff of the rights secured to her by the mortgage deed, and there is no principle on which mortgagees ought to be restrained from pursuing remedies expressly given by the mortgage, and from enforcing their rights. The plaintiff's title is derived from a mortgage made by Long's executors, but that does not enable her to prove in the administration action, nor is she a party to that action, nor will the decree in that action bind her—*Farhall v.*

*Farhall* (1). The parties to the administration action are not the same persons as the parties to the action in the Common Law Division.

*Chute*, for the respondent.—The appeal is only against the stay of proceedings, so that the plaintiff cannot object to the admission of Clarke as the real defendant. The mortgage to the plaintiff is the question in the administration action and also in the present action, so that the administration action, which was commenced first, and in which justice can be done to all the parties in every respect, will practically decide the same question as that which the present action is brought to try. This is an application to the discretion of the Court under the provisions of section 24, sub-section 5 of the Judicature Act, 1873; that is a large provision and fully covers this case.

COTTON, L.J.—As I am familiar with the practice of the Chancery Division, I have been requested to deliver my opinion first. I think that this order is bad, and that it would affect injuriously the security of the mortgagees. The order was made because an action has been instituted for the administration of Long's estate, and it is said that as the decree in that action will provide for the clearing off of the incumbrances on that estate, therefore the plaintiff in the present action would obtain payment of the sum due to her under the mortgage. But the decree in the Chancery Division cannot deal with the rights of the mortgagees in their absence, and this is shewn by the fact that the decree for sale is only made subject to their rights. If the decree in the administration action gave an absolute right to all the creditors of the deceased to prove against his estate, then the Court of Chancery used in former days to restrain actions against the estate, but that principle does not apply here. Mrs. Crowle is, in fact, the mortgagee under a mortgage made by Long's executor, and she is not entitled to go in and prove in the administration action for the amount of the mortgage debt. A

(1) 41 Law J. Rep. Chanc. 146; s. c. Law Rep. 7 Chanc. App. 123.

*Crowle v. Russell (App.), C.P.*

mortgagee has always been a favoured person in the Court of Chancery, and has a right to pursue all the remedies reserved to him by his mortgage, but Mrs. Crowle is not bound, even if she were able, to prove in this administration action. Why then should she be stayed from bringing her action in ejectment? She has directed the tenants to pay their rents to her and they have declined. No tender has been made and yet it is proposed to fetter her by orders which do not concern her, which cannot bind her and which are made behind her back. Mrs. Crowle wishes to get the legal possession of the property, and the question which she seeks to raise is quite different from that which is raised by the enquiries in the Chancery Division; she does not wish to come in under the decree which will be made in the administration action, and as a mortgagee she ought to be allowed to pursue this action. If at any time it should prove convenient, then the action commenced in the Common Law Division can be transferred to the Chancery Division.

Since the Judicature Act of 1873 was passed, one Court has no longer power to restrain another, but it is provided by section 24, sub-section 5, that the Courts may stay their own proceedings if they think fit, and by virtue of this proviso it is a question in each case whether there is good reason for exercising that power. I am of opinion that in this case there is no good reason for doing so, and I think that this order must be discharged.

BRAMWELL, L.J.—I am of the same opinion. The plaintiff in the ejectment action would get no benefit from the decree in the action in the Chancery Division, unless in some indirect way. No question there raised will bind her. Even if the mortgage should prove to be bad, still the tenant will be estopped as against the plaintiff from denying the title of the plaintiff to lease and Clarke cannot be in any better position than the tenant. A Court of Equity would not have interfered, and Clarke gains no fresh rights from being let in to defend, he merely retains those which he had before. Suppose that this had been the case of a

pledge of a chattel which had been improperly seized by some one, then the pledgee could have sued, and what reason would there have been for restraining him? None at all. The order now before us seems to contemplate the necessity for further applications to the Court, and therefore seems to cast a doubt on its own propriety, a doubt in which I concur.

BRETT, L.J.—It is suggested that this order may be supported on two grounds. One is, that a Court of Equity would formerly have made such an order; the second is, that the Divisional Court is authorised to make it by the 24th section of the Judicature Act of 1873. As to the former ground I will only express my assent to what has been said by Cotton, L.J. The second ground is founded in reason on this, that this is an order made by the Common Pleas Division restraining an action and staying proceedings in an action in the Common Pleas Division, that it is made in pursuance of a power given by the Judicature Act of 1873, and that it is not an order for an injunction. Now if the same questions were raised in both actions, then, as that in the Chancery Division was commenced first, and as perhaps the Chancery Division has more ample powers to deal with such a case as this, the Common Pleas Division might do well in the exercise of their discretion to stay the action in that division until the other action should be disposed of. That, however, is not the case here. The same questions may arise in both actions, but not between the same parties, and therefore the same questions are not really raised, and one action cannot dispose of the other, so that in my opinion the Common Pleas Division had no good reason for restraining the action in that division, and this appeal must therefore be allowed and the order discharged.

*Appeal allowed, order of the Divisional Court discharged.*

Solicitors—Noon & Clarke, for appellant; Roberts & Barlow, agents for Coxwell & Co., Southampton, for respondents.



[IN THE EXCHEQUER DIVISION.]  
 1878. } BLACK AND OTHERS v.  
 Nov. 18. } HOMERSHAM.

*Company—Sale of Shares—Dividend declared after Sale.*

*A sale of shares in a company to be completed on a future day without mention of dividends passes dividends declared after the sale but before the day of completion.*

This was a CASE stated, in interpleader proceedings, for the opinion of the Court to decide claims to dividends declared on the 28th of August, 1877, on certain shares sold by the defendant.

On the 30th of June, 1877, the defendant was the registered holder of 251 shares in the Mitcham and Wimbledon District Gas Light Company.

The shares were, on the 1st of August, 1878, offered for sale by public auction, subject to conditions of sale. The third of the conditions of sale was as follows:—

“Each purchaser shall immediately pay into the auctioneer’s hands a deposit of twenty per cent. in part of his or her purchase money and sign an agreement for payment of the remainder on the 29th of August, 1877, at the offices of the vendor’s solicitor, when and where the purchases are to be completed, and in this respect time shall be of the essence of the contract.”

The shares were sold to the claimants, some at the auction and the rest on subsequent days prior to the 21st of August. The sales were made and completed in accordance with the conditions of sale.

On the 28th of August the ordinary half-yearly meeting of the shareholders was held, when a dividend for the half-year ended the 30th of June, 1877, was declared.

No mention of dividends was made either in the printed particulars and conditions of sale or by the auctioners, or by any other person on the defendant’s behalf at the time of the sales.

*Gore*, for the claimants.—The dividend, although undeclared, passed at the time of the sale. He cited *Shelford on Companies* (12th edit.), p. 156.

*Webster* (Candy with him), for the defendant.—The dividend was declared on the 28th of August, and the purchase was not completed until the 29th. The date of the completion of the purchase, and not the date of the sale, is the dividing line on the analogy of the sale of real property. “Up to the time fixed for completion the vendor is, in the absence of special stipulation, entitled to the crops or other ordinary profits of the land.”—*Dart’s Vendors and Purchasers* (5th edit.), p. 247. He also cited *Poole v. Shergold* (1). In *De Gendré v. Kent* (2), a dividend payable after the death of the testatrix was held to fall into the residuary estate, and did not pass to the legatee. There is no relation to the date of the contract of purchase when the day of completion is named. This dividend was declared in respect of a period during which the defendant was proprietor subject to no contract.

KELLY, C.B.—I am clearly of opinion that the completion of the purchase was the time of making the contract. The case is altogether different from the sale of real property, in which case a man buys an estate with the rental or the crops, and not shares with a dividend. Judgment must be for the claimants.

CLEASBY, B.—I am of the same opinion. When a man buys shares he expects to get all subsequent dividends or he would give much less.

*Judgment for the claimants.*

Solicitors—J. A. Girling and H. Kimber & Co., for claimants; William Sturt, for defendant.

(1) 1 Cox, 273.

(2) Law Rep. 4 Eq. 283.

[IN THE COURT OF APPEAL]

1878. }  
Nov. 20. } BEYNON v. GODDEN.\*

*Practice—Costs of Interlocutory Proceedings—Power to alter Judgment.*

*E. having been joined as a third party in an action appealed against the order joining him, and his appeal was dismissed with costs.*

*At the trial he obtained judgment dismissing him from the action, with costs against the party who obtained the order joining him, and on appeal that judgment was affirmed with costs. On taxation the Master refused to allow E. his costs of the interlocutory proceedings by which he was joined as a party of the action.*

*On an application to the Court of Appeal for E.'s costs of the interlocutory proceedings,—Held, that the Court of Appeal had no power to alter the judgment they had delivered on the appeal from the interlocutory proceedings, so as to give E. his costs; nor to vary their final judgment in the action.*

This was an original motion to vary a judgment of this Court delivered on the 18th of May last.

The circumstances are as follows—The defendant Godden took out a summons to join Evans as defendant, and the Master refused to make the order. A Judge at Chambers afterwards granted the order, but the Exchequer Division reversed his decision. From this decision the plaintiff appealed and the judgment of the Exchequer Division was overruled with costs.

The action was tried before Huddleston, B., who gave judgment for the plaintiff, dismissing Evans from the action and ordering Godden to pay Evans's costs, including the expenses of his joinder. The judgment of Huddleston, B., was affirmed on appeal generally, the costs following the event as usual. In their judgment the Court of Appeal gave their opinion that Evans had been wrongly joined.

\* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

On taxation the Master refused to allow the defendant Evans his costs of the interlocutory proceedings, holding that he was bound by the order of the Court of Appeal as to the costs of those proceedings.

*Lawrence*, for the defendant Evans, now moved the Court to vary the final judgment of the Court by ordering that the costs of the defendant H. Russell Evans should include the costs of the appeal from the order joining him as a defendant in the action, or to give such other relief as the case might require. He relied on Order LVIII. rule 5 as giving the Court power to grant the relief asked for.

*Pollard*, for the defendant Godden, was not called upon to argue.

BRAMWELL, L.J.—I do not think we can grant this application, for we cannot alter the judgment which has been given by this Court on the interlocutory proceedings either specifically or by making a substantive order in the action; nor can we vary the final judgment in the action. The defendant Evans need not have resisted the order to join him, which may have been right at the time though afterwards it was shewn that there was no case against him. Both the judgments of this Court must stand as pronounced.

BRETT, L.J.—I am of the same opinion. The judgment of Huddleston, B., must have its legal consequences, whatever they may be, and if a mistake is made we must rectify it afterwards.

COTTON, L.J., concurred.

*Order refused.*

Solicitors—T. White & Sons, agents for Payne & Son, Newport, for plaintiff; Cowdell, Grundy & Brown, for defendant Godden; Stocken & Jupp, agents for Williams, Newport, for defendant Evans.

*At Sale 502962/115.*

[IN THE COMMON PLEAS DIVISION.]

(Appeal from Revising Barrister's Court.)

1878. } LEONARD (appellant) v.  
Nov. 19, 20. } ALLOWAYS (respondent).

*Parliament—County Vote—Objection to Person on List of Claimants—Proof of due Claim—6 Vict. c. 18. ss. 4, 5, 37, 40.*

*Where the name of a person published in the list of claimants for a county is objected to, the Revising Barrister has only to consider whether the claimant is entitled to be on the list "in respect of his qualification described on such list;" he is not to require proof of due notice of the claim, for that is a matter between the claimant and the overseers.*

*Davies v. Hopkins* (3 Com. B. Rep. N.S. 376; s. c. 27 Law J. Rep. C.P. 6), followed.

Appeal from the decision of the Revising Barrister for the county of Gloucester.

At the revision of the list of voters for the parish of Stapleton, the appellant objected to the name of the respondent being inserted in the list.

The following facts were established by the evidence:—

That the claim of the respondent to be inserted in the said list of voters for the parish of Stapleton was not delivered or sent to the overseers of the said parish until after the 20th day of July last, but was delivered to the said overseers on the 25th of July last.

That the said overseers published the said claim on the 29th of July last.

That the respondent attended at the said Court and duly proved his qualification.

Ten other persons delivered claims to be inserted in the said list under similar circumstances, and such claims were published by the said overseers on the said 29th day of July, and they also attended at the said Court and duly proved their qualifications.

The Revising Barrister decided that the names of the respondent and of the said ten other persons should be inserted in the said list.

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If the Court should be of opinion that the decision was wrong the register of voters for the western division of the county of Gloucester is to be amended by erasing therefrom the names of the respondent and of the said ten other persons.

*Bowen*, for the appellant.—The statute 6 Vict. c. 18. s. 4, requires that every claimant "shall, on or before the said 20th day of July, deliver or send to the said overseers a notice signed by him of his claim." This is a condition precedent to the right to vote. By a subsequent section it is enacted "that the overseers shall, on or before the last day of July in every year, make out a list of all persons who, before the 20th day of July then next preceding, shall have claimed as aforesaid," and unless, therefore, the notice is sent in before the 20th of July, the claimant could not be a claimant on the list. This matter has been discussed in *Davies v. Hopkins* (1), which will be relied on by the respondent, but that case is not a decisive authority on the present point. It is true *Williams, J.*, at the conclusion of his judgment says—"that if no notice had been given to the overseers, and they had thought fit notwithstanding to put the party's name in the list, that would have been sufficient to entitle him to be upon the register," but if no notice be given, from what is the overseer to make the list? The Act says he is to make it from the notices.

[LORD COLERIDGE, C.J.—This is a statutory power. What other power has the overseer got?]

None; the list is not to be a list of persons entitled to vote, it is to be a list of persons who claim. By section 40—"where the name of any person inserted in any list of voters shall have been objected to by the overseers or by any other person," the Revising Barrister "shall then require it to be proved that the person so objected to was entitled on the

(1) 3 Com. B. Rep. N.S. 376; s. c. 27 Law J. Rep. C.P. 6.

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*Leonard v. Alloways, C.P.*

last day of July then next preceding to have his name inserted in the list of voters in respect of the qualification described in each list," so that the Revising Barrister has to see that he is entitled to have his name on the list on the 31st of July, and going back to section 5 it is seen that the only persons who are entitled to have their names on the list are the persons who have sent in their notices by the 20th of July.

[LORD COLERIDGE, C.J.—*Davies v. Hopkins* (1) decides that the notice would be good though not signed by the claimant.]

It might be held that the direction as to signature was directory, and the direction as to time not.

[LORD COLERIDGE, C.J.—It is impossible to deny that *Davies v. Hopkins* (1) is in point.]

In principle it does cover this case, and unless the Court will review it, it is practically conclusive.

[GROVE, J.—Does not *Hadfield's Case, Webster v. The Overseers of Ashton-under-Lyne* (2) decide that this Court may review its own decision in registration cases?]

Yes, if the Court is satisfied the previous decision is wrong.

[LORD COLERIDGE, C.J.—There is a difference between error in law and error in fact. Supposing the Court decide without noticing an Act of Parliament which they did not know of and which was not brought to their knowledge, would that not be error in fact? Bovill, C.J., draws this distinction. In *Davies v. Hopkins* (1) the Court had before them the very Act; that would not be error in fact.]

In *Davies v. Hopkins* (1) there was a misapplication of the law. That decision seems to have proceeded on the supposition that the overseers had power to waive the directions of the statute; but that a person may waive a statutory condition given for his own benefit and thus clothe the Court with a jurisdiction it would not otherwise possess, is a view

not known to the law. The maxim *quilibet potest renunciare juri pro se introducto* has the words *pro se* introduced to shew that no man can renounce a right which his duty to the public and the claims of society forbid the renunciation of—per Lord Westbury in *Hunt v. Hunt* (8). The claimant has not claimed at all, because he has not claimed within the time required by the Act.

*Anstie*, for the respondent, was not called upon.

LORD COLERIDGE, C.J.—I am of opinion that the judgment of the Revising Barrister was right and should be affirmed.

Many points have been raised in the argument of the case, some of which I decline to give an opinion upon. What may be the power of the Court to reverse its own decision I decline to say, because the decision on which I base my judgment is, in my opinion, a right decision, and what I should do if it were otherwise I am not prepared to say, because the time has not arrived.

In the present case the objection raised against the claimant is that he did not claim within the day specified in the sections 4 and 5, and the counsel for the appellant, in an argument which on this point was short and clear, has argued that the claimant must be one who makes a claim within the provisions of the Act, for that if the claimant does not follow the provisions of the Act he is not a claimant within the meaning of the Act, and consequently has no right to be on the list. No doubt, on the words of section 5 there is plenty of ground on which to found such an argument, and if that section stood alone there would be considerable force in the argument; but there are other sections, especially sections 37 and 40, which throw light on that section by shewing; first, what the Revising Barrister has to do when the claimant is not on the list and is objected to; and, secondly, what he has to do when the claimant is on the list and is objected to. Section 37 deals with the case of a claimant who is omitted from

(2) 42 Law J. Rep. C.P. 146; s. c. Law Rep. 8 C.P. 306.

(8) 31 Law J. Rep. Chanc. at page 176.

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the list. There the Revising Barrister is ordered to call on the claimant to shew that he is *rectus in curia*, and that before he is entitled to be placed on the list he has fulfilled all the conditions of the various Acts of Parliament; the Revising Barrister has, in the words of the section, to see "that such person gave *due notice* of such his claim to the said overseers," words which are omitted in section 40. But when we come to look at section 40 and see what is ordered to be done when persons are on the list and are objected to, then all that we find the Revising Barrister is entitled to require is, proof that the claimant was entitled on the 31st of July then next preceding in respect of his qualification described in such list to have his name inserted in the list. True I have changed the collocation of the words, but that does not alter the sense, while it makes it clearer that the duty of the Revising Barrister is less if the name be already on the list than if the name be not there. This appears to me to be a strong argument to shew that the duty of making the claim and the power of the overseers are correlative, and that the overseers only are concerned with the directions of section 5.

Such, then, being my opinion when regarding the other sections, I find that in *Davies v. Hopkins* (1) a case in which all these sections were before the Court, the same conclusions were come to, and I have, therefore, merely to say that I think *Davies v. Hopkins*, (1), was perfectly well decided, and on the authority of that case and the construction there placed on the Act I am of opinion that the decision of the Revising Barrister was right and should be affirmed.

GROVE, J.—I am of opinion the judgment of the Revising Barrister must be affirmed, and I base my judgment on *Davies v. Hopkins* (1). That case is admitted to be identical in principle with the present. If anything it is a stronger case, even if there be a distinction, but practically there is none.

I was struck with the argument of the appellants' counsel on section 5. That ar-

gument remains on my mind, and I am not prepared to say I should have decided against his contention without hearing counsel on the other side if it were not for the decision in *Davies v. Hopkins* (1). The strength of his argument is lessened by sections 37 and 40, which seem to point to the 31st of July as the date to which the Revising Barrister has to look when considering the qualification of the claimant, and on which the public are informed of the names of the persons on the list and the claimants. But the argument has not satisfied me on any view of these sections that *Davies v. Hopkins* (1) was wrongly decided, and I gather from *Hadfield's Case* (2) that we must be satisfied the previous decision was clearly and manifestly wrong, before we reverse it; and I am not satisfied *Davies v. Hopkins* (1) was wrongly decided. I am of opinion, therefore, the decision of the Revising Barrister was right.

LINDLEY, J.—I am of the same opinion. The claim ought to have been sent in on the 31st of July, instead of which it was sent in on the 25th of July. This was wrong, and the claimant not having claimed in time had no right to be on the list—so far the case is clear. The question then arises, had the overseers power to receive the claim though not sent in in time? *Davies v. Hopkins* (1) decides that they had, and on a careful review of the sections of the Act and especially section 37, I agree with the conclusions there arrived at, and I am of opinion that though the claimant had no right to be on the list, yet that his sending in the claim late was an irregularity which the overseers had power to waive.

*Decision affirmed with costs.*

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Solicitors—Ellis, Munday & Co., agents for Vizard & Co., Duralee, for appellant; Jardein, agent for Carter, Newnham, for respondent.

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[IN THE COMMON PLEAS DIVISION.]  
(Appeal from Revising Barrister's Court.)

1878. } SMITH (appellant) v. WOOLSTON  
Nov. 20. } (respondent).

*Parliament—County Vote—Description of Qualification—Part of Property parted with—Amendment—Registration Act, 1843 (6 Vict. c. 18), s. 40—Grounds of Objection—28 & 29 Vict. c. 36. s. 6.*

*The description of the qualification of a county voter in the fourth column of the register consisted of fifteen specified plots of land on the Victoria estate. He had in fact parted with fourteen of these plots, but the plot which he retained was of sufficient qualifying value to confer the franchise:—*

*Held, that the Revising Barrister had power and ought to have amended by striking out the surplus plots.*

*Semble—that since the Act 28 & 29 Vict. c. 36. s. 6, the Revising Barrister must confine the objector to the particular column and grounds of objection specified in the notice of objection.*

Appeal from the decision of the Revising Barrister for the Northern Division of the county of Northampton.

The case stated was as follows:—

At the revision of the list of voters for the parish of Wellingborough the respondent duly objected to the name of the appellant being retained on the list. The objection was grounded on the 3rd column of the register, and the objection related to the nature of the interest of the appellant in the qualifying property. The name of the appellant was on the list of voters for the parish of Wellingborough.

Christian name, &c.	Place of abode.	Nature of qualification.	Street, &c., where the property is situate.
Smith, Henry . . .	33 Norfolk Street, Strand, London.	Freehold land . . .	Plots 166, 167, 168, 169, 171, 172, 173, 174, 176, 177, 178, 179, 175, 476, 476 Victoria Estate.

It was admitted the appellant had parted with all the plots mentioned as above in the fourth column except plot 476, and that plot 476 which he retained was freehold land and of sufficient qualifying value to confer the franchise.

The Revising Barrister was of opinion that the freehold land mentioned in the third column was not the freehold land now possessed by the appellant, and that he had no power to amend the fourth column as requested by the appellant by striking out the plots which he had parted with as aforesaid. The Revising Barrister therefore held that the appellant was not entitled to be retained as stated upon the list of voters, and expunged his name from the list of voters.

If such decision was correct such list as revised was to remain without alteration; if such decision was incorrect, the name of the appellant, with his address and particulars of his qualification, was

to be added to the revised list of voters for the parish of Wellingborough, in the Northern Division of the county of Northampton.

*Gibbons*, for the appellant.—The appellant had parted with fourteen plots of the fifteen he was credited with in the fourth column, but the remaining plot was sufficient to entitle him to a vote. The case is covered by the authority of *Bendle v. Watson* (1), and the Revising Barrister had power under section 40 of the Registration Act (6 Vict. c. 18) to amend the description by striking out the surplus plots. The objection, moreover, as found in the present case, was to the third column, where the nature of the qualification is correctly described as freehold.

The Court here called on—

(1) 41 Law J. Rep. C.P. 15; s. c. Law Rep. 7 C.P. 163.

*Smith v. Woolston, C.P.*

*Horace Smith*, for the respondent.—The last mentioned objection was not the one argued before the Revising Barrister, and he did not decide on that ground. The case depends on the description in the fourth column and section 4 of 6 Vict. c. 18, and the question is whether the appellant should have re-claimed.

[LORD COLERIDGE, C.J.—The Revising Barrister finds that the objection was to the nature of the qualification, and that must mean whether the tenure should have been described not as of freehold, but as leasehold or copyhold or what not.]

In these objections the Court will look at the third and fourth columns—*Hitchins v. Brown* (2); and in *Hovitt v. Stephens* (3), which was a case of an objection to the third column, Byles, J., says, “I read the third and fourth columns together.” The main question before the Revising Barrister is whether the claimant is to be struck out. Although a man may have an excellent qualification, yet he is not entitled to vote if he does not within the qualified time “retain the same qualification as described in such register”—6 Vict. c. 18. s. 4. In such case he should have re-claimed—*Burton v. Gery* (4).

[LORD COLERIDGE, C.J.—Had the appellant parted with only one plot could the amendment not have been made?]

No, there would not be the same qualification as described in the register: as in a contract of sale of certain property, if when conveyed it was found that several plots were missing, it would not be the “same” property. In order to exclude the requirements of section 4 it would be necessary to introduce into the section “the same qualification or any part of the same.” The voter has been on the register in one description and has then altered to another. The reason of re-claiming is that the objectors can see in respect of what the voter claims.

(2) 2 Com. B. Rep. 25; s. c. 15 Law J. Rep. C.P. 38.

(3) 5 Com. B. Rep. N.S. 30; s. c. 28 Law J. Rep. C.P. 105.

(4) 5 Com. B. Rep. 7; s. c. 17 Law J. Rep. C.P. 66.

[LORD COLERIDGE, C.J.—I am not sure I concur in the policy of enabling the objectors to object.]

A person might claim for more than he actually had in order to appear doubly well qualified, and so divert attention from his qualification.

LORD COLERIDGE, C.J.—In this case I am not quite certain whether the objection which appears on the case as having been taken before the Revising Barrister was the objection which has been argued before us.

In the third column the appellant's qualification is described as freehold land, and the objection which points to that column would seem to object that the land was not freehold, but some other estate, *e.g.* either leasehold or copyhold. If that were so, being strongly of opinion that the Revising Barrister ought not to go into other objections than those of which notice has been given, I am clearly of opinion that his decision was wrong and must be reversed.

But then it is said that the third and fourth columns should be read together, and that the objection was not to the tenure of the property but to the description as set out in the fourth column. The facts shew that part of the property there set out, consisting of several plots of freehold land, had been sold, but that one plot remained, and that plot was sufficient to entitle the appellant to vote. The Revising Barrister was asked to amend. He considered he had no power, but left it to us to decide whether he had the power, and if we should be of that opinion, then that we should make the amendment.

We are, therefore, to determine whether the Revising Barrister had power to make the amendment asked for, and I am of opinion that he had. This is not a case in which any of those tricks have been attempted which Mr. Horace Smith in his good and able argument suggested might be attempted, and I do not say that in such case or in the event of any fictitious property being inserted on the register the Revising Barrister may not refuse to amend; it is admitted that in the present case everything was *bona fide*, and though it is impossible to draw

*Smith v. Woolston, C.P.*

in words the line where the power of amendment ought to be exercised, I am of opinion that it should have been exercised in the present case. When, in the course of the argument, I put the case of a claimant being possessed of ten plots and selling one, logically Mr. Horace Smith was driven to the conclusion that no amendment could be made, and then it was obvious that his argument, as an argument of sense, fails. It is, as I have said, extremely difficult to draw the line within which the power of amendment ought to be exercised, but I think that where no fraud exists, and where the person objected to retains property sufficient to entitle him to a vote, that then anything inserted in the fourth column beyond what he actually possesses may be struck out as surplusage.

I, therefore, am of opinion that the amendment asked for was within the powers of the Revising Barrister and should have been exercised, and that his decision must be reversed.

GROVE, J.—I am of the same opinion. The case finds that "the objection was grounded on the third column of the register, and the objection related to the nature of the interest of the appellant in the qualifying property." It is not clear how the case was put before the Revising Barrister, but my attention has been called to the 28 & 29 Vict. c. 36. s. 6, by which the grounds of the objection have to be stated in the notice, and therefore it becomes simply an objection to the third column, as to which there really is no objection.

Then as to whether this question comes within the first proviso of section 40 (6 Vict. c. 18). In *Bendle v. Watson* (5) Willes, J., in referring to the first proviso in that section, says, "Then as to the words, 'change the description of the qualification,' there, I think, 'qualification' must mean the nature of the qualification, e.g. freehold, while the object of a number is to individualise, and perhaps, in that sense, to describe. I think that, throughout, the word 'his' governs the

meaning, and as the qualification is the same, and the description one which in one sense might be true, inasmuch as it might indicate his house to some people, and there was no falsification or intention to deceive, the Revising Barrister ought to have amended."

I assume that in the present case there has been no falsification of the register or intention to deceive, that the qualification was the same, namely, freehold, and that one plot was sufficient to entitle the claimant to vote; then could the barrister strike out the plots which were erroneously appended to the description of the appellant's qualification? Has he the power to do so? Supposing the appellant had parted with one plot, could the Revising Barrister then amend by striking out that plot? I am of opinion that he could, and consequently he could strike out the surplus plots in the present case. I do not say the Revising Barrister should amend in all cases, he should exercise a judicial discretion; but in the present case I consider he had the power of amending and should have exercised it.

LINDLEY, J.—I am of the same opinion. After the statute which has been called to our attention I think it unnecessary to add anything on the first point. Then there remains the point as to whether power is given to the Revising Barrister by section 40 to make the amendment asked for. Looking at that section and the object of that section, and especially to the clause where the "nature or description of qualification be insufficiently described for the purpose of being identified," and later on to the proviso forbidding the barrister "to change the description of the qualification as it appears in the list," I should think that the Revising Barrister would have no power to make an amendment affecting the identity of the property. In the present case the qualification of the appellant is rightly described, the land in which he claims a vote is there, and though it is, as it were, over-described, there is no change in its identity; and it appears to me, the land remaining the same, the Revising Barrister has the power to amend, and is not restricted by the words "shall not be at

(5) Grove, J., read from the report of the case in 1 Hopwood & Coltman, 591.



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liberty to change the description of the qualification as it appears in the list," section 40. The mistake amounts, in my judgment, to a mere misdescription. It is described as Victoria Estate which in fact it is, and if it has been altered by addition or subtraction yet the land remains the same, and it appears to me the amendment might in either case be made.

*Decision reversed without costs.*

Solicitors—Henry Smith, for appellant; Lewis & Indermaur, agents for Toller, Kettering, for respondent.

[IN THE COMMON PLEAS DIVISION.]

(Appeal from Revising Barrister's Court.)

1878. { BARTON (appellant) v. THE  
Nov. 19. { TOWN CLERK OF BIRMINGHAM  
(respondent).

*Parliament — Borough Vote — Rating Qualification — Owner paying Rates by Agreement with Occupier — Occupier's Name omitted from Rate Book — Construction of Poor-rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), s. 19.*

*Section 19 of 32 & 33 Vict. c. 41, enacts that—"The overseers in making out the poor-rate shall, in every case, whether the rate is collected from the owner or occupier, or the owner is liable to the payment of the rate instead of the occupier, enter in the occupier's column of the rate book the name of the occupier of every rateable hereditament, and such occupier shall be deemed to be duly rated for any qualification or franchise as aforesaid."*—Held, that this clause applies not only to cases where the owner is "liable" by agreement with the overseers under section 3, or by order of the vestry under section 4 of the same Act, but also to cases where the owner is liable by agreement with the occupier to pay the rates.

*The same section provides that—"any occupier whose name has been omitted shall, notwithstanding such omission and that no claim to be rated has been made by him, be entitled to every qualification and*

*franchise depending upon rating, in the same manner as if his name had not been so omitted."*

*H. had, during the qualifying period, resided within the borough, and had occupied, as yearly tenant, a set of rooms as a "counting-house" within the meaning of 2 Will. 4. c. 45. s. 27. This set of rooms was one of several separate sets in the same house which were similarly occupied. The landlord, who himself occupied part of the premises but did not sleep there, paid all rates for the whole house, and his name appeared on the rate book as occupier. H. had not claimed to be rated or tendered payment of any rates; nor was his name entered in the rate book. The rent paid by H. was more than it otherwise would have been, in consideration of the landlord paying the rates:—*

*Held, that the landlord was "liable to the payment of the rate instead of the occupier" within the first part of section 19, and that H. was entitled to the franchise by virtue of the proviso at the end of the section.*

*Cross v. Alsop (40 Law J. Rep. C.P. 53; s. c. Law Rep. 6 C.P. 315), distinguished. Smith v. The Overseers of Seghill (44 Law J. Rep. M.C. 114; s. c. Law Rep. 10 Q.B. 422), followed.*

Appeal from the decision of the Revising Barrister for the borough of Birmingham.

The case stated as follows:—

At the revision of the list of voters for the borough of Birmingham, the respondent duly objected to the name of Bernard Batigan Hackney being inserted in the list of voters.

The claim was in the following form:—Hackney, Bernard Batigan: 113, Pershore Road: occupation of offices: 37, Waterloo Street.

The following facts were established by the evidence:—

Hackney had during the qualifying period resided at 113, Pershore Road, within the borough, and had occupied offices at 37, Waterloo Street, as yearly tenant for the purpose of his business as a law stationer, at a yearly rent of 34*l*.

The offices consisted of three rooms communicating with each other, and

*Barton v. Town Clerk of Birmingham, C.P.*

having a door leading to the hall, common to all the occupiers.

Hackney had the exclusive right to the offices, the key and the complete control of the door leading from them to the common hall, and a key to the street door which he used when he pleased.

Hackney's name was painted up on the door post in the street with others.

There were several sets of offices of the same description, and let in the same way on the premises.

The landlord, who himself occupied part of the premises, but did not sleep there, was rated and had paid all rates for the whole house, and his name appeared on the rate book as occupier.

Hackney had not claimed to be rated or tendered payment of any rates.

Hackney's name was not entered on the rate book.

The rent paid by Hackney was more than it otherwise would have been in consideration of the landlord paying the rates.

Twelve other persons claimed to be inserted in the said list under similar circumstances.

It was contended on behalf of the objector that Hackney's name not appearing in the rate book, he was thereby disqualified from being placed on the said list.

The Revising Barrister found that Hackney was an occupier as tenant of a counting-house or other building within the meaning of 2 Will. 4. c. 45. s. 27, and that he was the occupier of a rateable hereditament within the meaning of section 19 of 32 & 33 Vict. c. 41, and decided that notwithstanding that the overseers had omitted his name from the rate he was, under the proviso to the said section as interpreted by the case of *Smith v. The Overseers of Seghill* (1), entitled to every qualification and franchise depending upon rating, in the same manner as if his name had not been so omitted, and accordingly inserted his name in the list of voters together with the names of the said twelve other persons.

If the Court should be of opinion that the decision was wrong the register was to be amended by erasing the names of Bernard Batigan Hackney, and of the said twelve other persons from the said list.

*Jelf*, for the appellant.—Rating is the foundation of the franchise, and it is necessary that the claimant should appear on the rate book. There were some exceptions, *Sturge Bourne's Act*, 59 Geo. 3. c. 12. s. 19; *Small Tenements Rating Act*, 13 & 14 Vict. c. 99; but these have been practically swept away by the Representation of the People's Act, 30 & 31 Vict. c. 102. s. 7, by which the occupiers in boroughs are thenceforward to be rated and not the owner; by sub-section 2—"The full rateable value of every dwelling-house or other separate tenement, and the full rate in the pound payable by the occupier, and the name of the occupier shall be entered in the rate book," the only exception is where the house is let out in apartments, and then the owner is to be rated. Next comes the Poor-rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), which by section 19 has created the difficulty in this case, and if the contention of the respondent is correct, rating, which has hitherto been considered by the legislature as the definite qualification for the franchise is indirectly abolished. It is true that section 19 provides that the occupier shall be entitled to every franchise notwithstanding that his name has been omitted from the rate book. But in *Cross v. Alsop* (2) it was held that this applied only where there has been an agreement in writing under section 3 between the overseers and the owner of the premises, to receive the rates from him; or where there has been an order by the vestry for rating the owner instead of the occupier under section 4, neither of which conditions have been complied with in the present case. The decision in *Cross v. Alsop* (2) was deliberately given and is directly in point; it has never been overruled, and

(1) 44 Law J. Rep. M.C. 114; s. c. Law Rep. 10 Q.B. 422.

(2) 40 Law J. Rep. C.P. 53; s. c. Law Rep. 6 C.P. 315.

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though not followed in the case of *Smith v. The Overseers of Seghill* (1), is a standing authority and binding on the Court. This Court, sitting as a Court of Final Appeal for registration appeals, will follow its own decision. It would be a complete revolution of the law of franchise to hold that the claimant in the present case is entitled to vote.

*J. W. Mellor* (*Dugdale* with him), for the respondent.—In *Webster v. The Overseers of Ashton-under-Lyne* (3), it was held that this Court, though a Court of ultimate appeal in registration cases, will review its previous decisions, and overrule them if clearly demonstrated to be erroneous. The appellant's contention would practically leave out the words "every case" and "whether the rate is collected from the owner or occupier" in section 19. That section is not merely confined to the cases mentioned in sections 3 and 4—*Smith v. The Overseers of Seghill* (1), but has wider scope, and relates to such an agreement as is found to exist between the owner and the occupier in the present case. *Cross v. Alsop* (2) is distinguishable on the facts, for there the occupier's name was inserted in the list as jointly occupying instead of as separately occupying, whereas he is here altogether omitted.

[He was here stopped by the Court.]

*Jelf*, in reply.—If the owner is, as stated in section 19, the person liable to the payment of the rate, instead of the occupier, it can only be because he is occupier of the whole house.

[*LORD COLERIDGE, C.J.*—In section 7 the case is mentioned of the owner having agreed with the occupier to pay the rate, would he not in that case be the person "liable" in section 19?]

Section 19 refers only to such a liability as is created by the Act. The agreement mentioned in section 7 would be an agreement entered into under section 3. The section would not apply in the words of *Willes, J.*, in *Cross v. Alsop* (2), to "any loose agreement," but to a special agreement under section 3, or the order of the vestry under section 4.

(3) 42 Law J. Rep. C.P. 146; s. c. Law Rep. 8 C.P. 281.

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*LORD COLERIDGE, C.J.*—I am of opinion that the decision of the Revising Barrister was right, and should be affirmed. In so deciding, it may seem as though we are conflicting with *Cross v. Alsop* (2), but, for reasons to be presently given, it will be found that we are not overruling or differing from that case, or, indeed, seriously differing from what were the *obiter dicta* of the learned Judges who decided it.

In the present case the Revising Barrister has found—if not in terms an agreement—facts from which an agreement between the owner and the occupier may be inferred, to the effect that the owner is to pay the rates. He has found as a fact that the occupier paid more rent in consequence of such agreement; in reality the occupier has paid the rates in the shape of rent. Such are the facts, and in order to see what conclusions of law are deducible from them we have to consider several sections, principally sections 3, 4, 7, 8 and 19 of 32 & 33 Vict. c. 41. Sections 7 and 8 appear exactly to describe the state of facts found in the present case, for section 7 enacts that "every payment of a rate by the owner, whether he is himself rated instead of the occupier," which must refer to the order of the vestry, under section 4, "or has agreed with the overseers to pay such rate," which refers to the agreement with the overseers mentioned in section 3, "or with the occupier," which is the third case, "shall be deemed a payment of the full rate by the occupier for the purpose of any qualification or franchise which as regards rating depends upon the payment of the poor rate." Then section 8 enacts that, "where an owner who has undertaken, whether by agreement with the occupier or with the overseers, to pay the poor rates, or has otherwise become liable to pay the same, omits or neglects to pay the same," the occupiers paying the same may deduct the amount from the rent. Those are the 7th and 8th sections, which incorporate the 3rd and 4th sections. Then comes section 19, imposing certain duties on the overseers, the neglect of which is visited by a penalty to be imposed on summary conviction; and these duties are, that the overseers "shall, in

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every case, whether the rate is collected from the owner or occupier, or the owner is liable to the payment of the rate instead of the occupier, enter in the occupier's column of the rate book, the name of the occupier of every rateable hereditament, and such occupier shall be deemed to be duly rated for any qualification or franchise as aforesaid."

Now, how is the owner to be liable? He may, as I have shewn, by the 7th and 8th sections be liable in three ways; first, by agreement with the overseers; second, by order of the vestry; third, by agreement with the occupier, and to remove all doubt the word "liable" is used in section 8 to shew that in all those ways he is so to be considered. The argument in answer would amount to a contention that though the word "liable" in section 8 refers to three ways in which the liability of the owner may arise, yet when you come to section 19, you are to limit the liability to two of those ways, and exclude the third way, which was mentioned in the same Act. I confess I am unable to accede to such a contention.

The remainder of section 19 provides that "any occupier whose name has been omitted shall, notwithstanding such omission, and that no claim to be rated has been made by him, be entitled to every qualification and franchise depending upon rating, in the same manner as if his name had not been so omitted." If, then, the occupier in the present case is within the first part of the section, and it seems to me clear that he is, then the franchise is preserved for him by the proviso at the end of the section.

It is said, however, that our decision conflicts with *Cross v. Alsop* (2), and at first sight it does conflict with some of the expressions of the learned Judges in that case. But two observations present themselves as distinguishing that case from the present. In the first place, the facts were not the same. So far from the name of the occupier in that case having been omitted from the rate book it had been inserted, and wrongly inserted. This point was expressly raised for the consideration of the Judges, and they held that the claimant could not have the vote because he had improperly

claimed, and had not brought himself within the earlier statute. It is true, the learned Judges go on—and it was quite necessary they should in order to shew that the provisions of section 19 did not apply to the case before them—to say, dealing with the only two occasions which the facts before them raised, that as there was no agreement with the overseers under section 3, or order of the vestry under section 4, to render the owner liable, the earlier part of the section had no application, and the occupier's name not having been omitted, but inserted, he could claim no benefit from the proviso at the end. But, in the second place, it was not suggested that this third mode of liability existed. It appears, therefore, that *Cross v. Alsop* (2) could not have been decided otherwise than it was, and it is also apparent that the circumstances of the present case could not have been brought before the Court. Neither the facts nor the argument would raise it, the question whether under the present circumstances the landlord would be the person "liable" was not decided at all, and I am therefore of opinion that, in deciding the present case, we are not conflicting with *Cross v. Alsop* (2). No doubt there are expressions in some of the judgments which appear to limit the application of section 19, but I do not think, for reasons I have given, those expressions are to be taken in their full latitude.

But there is a case which is directly in point, *Smith v. The Overseers of Seghill* (1), and there it became necessary to construe section 19 with reference to the omission of the occupier's name. The true construction of section 19 was a necessary part of the *ratio decidendi* of that case; the same construction as we place on it was placed on it by the learned Judges in that case; and, so far as was necessary to remark on *Cross v. Alsop* (2), they pointed out, as I have done here, that the opinion there expressed on the construction of section 19 was not necessary to the decision of the case; and they also said, as I have said, that the construction they placed on section 19 did not conflict with *Cross v. Alsop* (2).

Placing, then, the same construction on

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section 19 as was placed on it by a Court of co-ordinate authority, I come to the conclusion that the decision of the Revising Barrister was right, and should be affirmed.

GROVE, J.—I am of the same opinion. I do not wish to add anything to the judgment of my Lord on the application of sections 7 and 8, in which I entirely agree, but merely to add some observations as to the effect of our judgment on *Cross v. Alsop* (2).

In forming an opinion as to the real judgment of a Court one must look to see what was the point actually before them; and considering the case of *Cross v. Alsop* (2) by this light one sees that the point actually before the Court of Common Pleas was whether the claimant should have been separately rated. The case was argued on that ground. It was, under 30 & 31 Vict. c. 102. ss. 3, 61, held he should have been separately rated, but as he was not, then came the question whether 32 & 33 Vict. c. 41, remedied this state of things and enabled the requirements of the former statutes to be dispensed with. Upon that the Chief Justice applies himself in his judgment to section 19 of that Act, and considers whether, assuming him not to be entitled under any other Act, that section would entitle him to vote; and having first shewn that the case is not within the earlier part of that section, shews that it is not within the proviso, because that applies to cases of omission. It is true that some expressions of the other Judges appear to shew that the inclination of their minds was to consider section 19 confined to cases within sections 3 and 4 of the Act, but those opinions were not necessary to the decision.

On the other hand, the case in the Queen's Bench is *quatuor pedibus* with the present case. There Mellor, J., expressly alludes to this distinction, and says: "It was sufficient to have decided *Cross v. Alsop* (2) that the occupier of part of a house must be separately rated to the relief of the poor to entitle him to the franchise under sections 3 and 61 of 30 & 31 Vict. c. 102, and that a joint rating with other occupiers was not sufficient.

Therefore, without interfering with *Cross v. Alsop* (2), the construction put upon section 19 being not directly necessary for the decision of that case, we are at liberty to consider the construction of that section independently of that authority." Lush, J., and Quain, J., expressly distinguish the case upon this ground. It appears to me, then, that we are not acting in opposition to *Cross v. Alsop* (2), and that we are distinguishing it on the very ground which was taken by the Judges in *Smith v. The Overseers of Seghill* (1).

I think, therefore, that the present case is distinguishable on the grounds pointed out by the Judges in *Smith v. The Overseers of Seghill* (1), and comes within the qualifying proviso of section 19.

LINDLEY, J.—I am of the same opinion. But for *Cross v. Alsop* (2) I should have had no difficulty in coming to the conclusion that the Revising Barrister was right; but it is impossible to say that that case does not present a difficulty. The question here really depends upon section 19, and the view to be taken of *Cross v. Alsop* (2) and *Smith v. The Overseers of Seghill* (1). On the whole, I think *Cross v. Alsop* (2) is distinguishable on the grounds pointed out by my Lord and my brother Grove, but at the same time I cannot but say it presents a difficulty. It strikes me that we may deal with *Cross v. Alsop* (2) in the same way as the Queen's Bench did when they had that case and this section before them, and I think with them that we are not bound to follow that decision.

The point, then, for our decision is whether an occupier who does not pay rates, but which are paid by the landlord, is entitled to vote. That depends on sections 3, 4, 7, 8 and 19 of the Act. How may the occupier become not liable to be rated at all and the owner liable? By agreement in two ways—first, by agreement with the overseers under section 3; secondly, by agreement between the landlord and tenant, which, as far as I can see, need not be in writing—sections 7, 8. There is also a third way, which is by order of the vestry under section 4. If the owner is liable to pay

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the rates either by agreement with the overseers or by agreement with the tenant, it appears to me too narrow a construction of section 19 to say that that section only applies to one of those cases and not to the other; in other words, that section 19 only applies to section 3. The wider construction appears to me more in accordance with section 19 than the rival construction.

But then it is said that if that is so rating will be no longer necessary, and that by a side-wind we shall be repealing all the former policy of the Legislature. But I confess I do not think so, and for this reason—the rates must be paid by some one. It would be a mistake to say that rating will no longer be the test, and it is enough to say, and the only consequences of our decision will be, that if the person claiming is not in the rate book he will not be disfranchised. I therefore come to the conclusion that the decision of the Revising Barrister was right.

*Decision affirmed (4).*

Solicitors—Robinson, Preston & Co., agents for Rowlands & Bagnall, Birmingham, for appellant; Sharpe, Parkers & Co., agents for E. I. Hayes, Birmingham, for respondent.

[IN THE COMMON PLEAS DIVISION.]  
(Appeal from Revising Barrister's Court.)  
1878. } GREEN (appellant) v. MEPHAM  
Nov. 23. } (respondent).

*Parliament—Borough Vote—Notice of Objection—Service—Poor Rate Collector—Office—6 Vict. c. 18. ss. 17, 101.*

*Notice of objection to the name of the appellant being retained on the list of voters for the borough of Bedford, was sent to the office of the collector of poor rates, appointed by the guardians of the poor of five parishes, constituting the borough of Bedford. The collector was in the habit of discharging all the ordinary overseer's*

*duties, including that of making up the lists. He transacted the whole of the business connected with the poor rates and the preparation of the list of voters at his said office, which was within the borough, where all the parish books were kept, and all notices of claims and objections were sent. The collector produced such notices to any voter requiring to see them, and also attended to produce them at the Revising Barrister's Court. The overseers did nothing whatever besides receiving notice of claims and objections if sent to them, and signing the lists which the collector produced to them, and there was no other office in the borough where any parish business was transacted:—*

*Held, that the collector's office was "the place for transacting parochial business" within the terms of 6 Vict. c. 18. s. 101, and that the notice was duly served.*

*Semble, that the collector was a person executing the duties of overseers of the poor within the terms of 6 Vict. c. 18. s. 101.*

*Appeal from the Revising Barrister for the borough of Bedford.*

So far as is material to the case the facts were as follows:—

At the revision of the list of voters for the parish of St. Mary, in the borough of Bedford, the respondent duly objected to the name of the appellant being retained on the list.

Thomas Bithrey and Thomas Binney are the regularly appointed overseers of the poor for the parish of St. Mary, Bedford, for the year 1878.

St. Mary is one of the five parishes which constitute the borough of Bedford, and for the whole of these five parishes one collector of poor rates is appointed by the guardians under the provisions of 4 & 5 Will. 4. c. 76. s. 46, and the lists of voters for the said several parishes constitute the register of voters for the borough.

The collector's duties, by the terms of his appointment, are to assist the churchwardens and overseers in making, assessing and levying and collecting the poor rates, in filling up receipts, keeping books, and making returns relating to poor rates, and to obey all lawful orders and directions of the guardians and of the majority

(4) See now 41 & 42 Vict. c. 26. s. 14.

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of the churchwardens and overseers, but as a fact, and by the consent of the overseers, he has been in the habit of discharging all the ordinary overseers' duties, including that of making out lists for revision purposes, and of attending at the Registration Court, and there performing the overseers' duties.

The present collector, Thompson, transacts the whole of the business connected with the poor rates and the preparation of the list of voters at an office No. 99, Tavistock Street, in the borough of Bedford (called for the purposes of this case the rate office), being a portion of his own residence, but having a separate entrance to it distinct from the dwelling-house. No allowance beyond his salary is made to the collector for the use of this office. A similar office in his own dwelling-house for such purpose was kept by Thompson's predecessor, Joy. It was proved that all persons going to the dwelling-house on parochial business are always sent to the office door; that at this office all the parish books are kept and produced to any voter requiring to see them; that all notices of claims and objections which have been delivered to any of the overseers are sent there to, or collected by Thompson, who produces them to any voter requiring to see them; and that he also attends to produce them to the revising barrister at his Court; that Thompson also makes out the list of voters and of claims and objections, which are kept at this office to be produced to any voter requiring to inspect them. The overseers do nothing whatever besides receiving notices of claims and objections if sent to them, and signing the lists which Thompson produces to them. There is no other office in the borough of Bedford where any parish business is transacted.

It was also proved by evidence that when Joy (the predecessor in office of Thompson, who held the same appointment Thompson now holds) was collector of the rates notices of claims and objections were usually served at the office then occupied by him in a similar manner and duly published by the overseers without any objection having been made, and that since Thompson has held the ap-

pointment notices of claims and objections have been left at the said rate office and duly published by the overseers, but that on one occasion when notices were handed to Thompson personally he informed the person delivering the same that in his opinion such delivery was irregular, but no objection was afterwards made before the revising barrister to the service of such notices; that both Joy and Thompson always received the whole of the allowance awarded by the revising barrister in respect of the overseer's duties connected with the registration, and that for many years past the whole of such allowances for the five parishes were included in one certificate, and were charged by the collector to the said parishes according to the rateable value thereof respectively.

On the 24th of August, 1878, the respondent left at the rate office a notice of his objection to the appellant's qualification, and this notice was received by Thompson on the same day. The overseers of St. Mary objected to publish the name of the appellant in the list of persons objected to.

On behalf of the appellant it was objected that notice of the objection had not been duly given to the overseers.

For the respondent, the objector, it was contended that Thompson was, within the meaning of 6 Vict. c. 18. s. 101, a person who by virtue of his office or appointment executed the duties of the overseers of the poor, and that the said rate office was the office or other place for transacting parochial business within the meaning of the said section, and that the notice was duly served.

The revising barrister decided on the evidence that notice of the objection had been duly given to the overseers, and the appellant not having a good qualification he struck out his name from the list. Against this decision the appellant appealed.

*Graham*, for the appellant.—First, the notice served on the poor rate collector instead of the overseers was not a good notice. 6 Vict. c. 18. s. 15, requires the notice of claim to be given "to the overseers of that parish or township in the

*Green v. Mephram, C.P.*

list whereof he shall claim to have his notice inserted," and section 17 requires the notice of objection to be given "to the overseers who shall have made out the list in which the name of the person so objected to shall have been inserted." The collector of poor rates is appointed by the board of guardians under 4 & 5 Will 4. c. 76. s. 46, and 7 & 8 Vict. c. 101. s. 62. But by section 61 the vestry may appoint such collector "to discharge all the duties of an overseer of the poor in addition to those of collector of poor rates for such parish, and in the same manner as if he were appointed thereto as an assistant overseer under the provisions of 59 Geo. 3. c. 12." There has been no such appointment in the present case, and the collector is not within the interpreting section (section 101) of 6 Vict. c. 18, which enacts that the words "overseers" or "overseers of the poor" shall extend to and mean "all persons who by virtue of any office or appointment shall execute the duties of overseers of the poor by whatever name or title such persons may be called, and in whatsoever manner they may be appointed."

[GROVE, J.—Do not the words "in whatever manner they may be appointed" cover this case?]

No; because he must be appointed by virtue of his office. Thompson seems to have discharged the duties of the overseers with their consent, but that is not appointing him to an office; nor is it executing the duties of the overseers "by virtue of his office or appointment," for there would then be no meaning to these words of the statute. There is here no evidence of his appointment as assistant overseer, as in *Points v. Attwood* (1).

[LORD COLERIDGE, C.J.—Would it have been a lawful order of the overseers to tell him to perform these duties?]

No. There is no evidence he was appointed by the overseers, though this, it is contended, would not bring him within the definition. It is only if by virtue of his office and appointment he is bound to discharge the duties of overseer, that

then he is an overseer within section 101. The duties of collector are prescribed by order of the poor law board, and are set out in *Archbold's Poor Law*, p. 84, 12th ed. In *The Guardians of Malling v. Graham* (2) it was held that the offices of assistant-overseers and collector of poor rates were incompatible.

[LORD COLERIDGE, C.J.—That case merely decides that a person who undertakes the liability of one appointment will not discharge the liability of another appointment.]

Still the two offices were held to be different.

Secondly, it was contended on the facts of the case, that, assuming Thompson not to have been an overseer within the meaning of the Act, the notice was not served on the overseers within the interpretation clause (6 Vict. c. 18. s. 101), by which the notice "shall be left at his place of abode, or at his office or other place for transacting parochial business."

*Shield*, for the respondent, was not called upon.

LORD COLERIDGE, C.J.—I am of opinion that the decision of the Revising Barrister was right, and should be affirmed. We think the service was good. I confess that in my judgment there was a good service on the right person, but as I understand my brother Grove entertains some doubts on this point, I do not, therefore, base my judgment on that part of the case, but upon what constituted the second part of the argument for the appellant, namely, the question whether the notice was served at the right place.

The Act (6 Vict. c. 18. s. 101) says "that wherever any notice is by this Act required to be given or sent to the overseers of any parish or township, it shall be sufficient if such notice shall be delivered to any one of such overseers, or shall be left at his place of abode, or at his office or other place for transacting parochial business, &c.;" and the case finds that "Thompson has an office where all business connected with the poor rates

(1) 6 Com. B. Rep. 38; s. c. 18 Law J. Rep. O.P. 19.

(2) 39 Law J. Rep. C.P. 74; s. c. Law Rep. 6 C.P. 201.



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and the preparation of the lists of the voters is transacted; that all persons going to his dwelling-house on parochial business are always sent to the office; that at this office all the parish books are kept, and produced to any voter requiring to see them; and that all notices of claims and objections which have been delivered to any of the overseers are sent there to, or collected by Thompson, who produces them to any voter requiring to see them, and that he also attends to produce them to the revising barrister at his Court; and further, there is no other office in the borough of Bedford where any parish business is transacted."

It seems to me clear, and too clear for argument—I was about to say, were it not for the very ingenious argument of the appellant's counsel—that this was the proper place in which to serve the notice, and I therefore am of opinion that the decision of the Revising Barrister was right.

GROVE, J.—I am of the same opinion, and I hardly think it necessary to add anything. If there had been any other independent place for the transaction of parochial business then this latter part of the case would have been arguable, but as it is there was no other place, and as it is stated to us that the overseers had no other office I am inclined to think that this is their office.

With regard to the other point, my doubt only goes to this extent, that if the case rested on it I should have wished to have heard argument on the other side before deciding; but as the latter point is clear this is not necessary, because I base my judgment on the latter point, and I consider that the service was good.

*Decision affirmed with costs.*

Solicitors—J. E. Fox & Co., agents for Conquest & Clare, Bedford, for appellant; Sharpe & Ullithorne, agents for L. Jessopp, Bedford, for respondent.

IN THE COMMON PLEAS DIVISION.

(*Appeal from Revising Barrister's Court.*)

1878. } BENNETT (appellant) v.  
Nov. 28. } ATKINS (respondent).

*Parliament—Borough Vote—Payment of Poor Rates by Landlord—Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), secs. 3, 4, and 7—Deductions allowed—Notice in Writing to Overseers a Condition precedent—Waiver.*

It is a condition precedent to the overseers of a parish being empowered to make any abatement or deduction from a poor rate under section 4, sub-section 2 of the *Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41)*, that the owner of the rateable hereditaments should give notice to such overseers in writing that he is willing to be rated in respect of all such hereditaments of which he is owner, whether the same be occupied or not; and the giving of such notice is a matter which cannot be waived by the overseers as they act in discharge of a public duty.

Therefore where no such notice was given, but the owner (pursuant to an agreement with his tenant, the occupier,) paid the poor rate made in respect of the house the tenant occupied, and was allowed by the overseers a deduction from the rate not exceeding the limit given by such section 4, sub-section 2, but which deduction was not authorised by any other clause in the Act, it was held that there had not been such a payment of poor rate as was by the Act to be deemed a payment of the full rate by the occupier for the purpose of the franchise, and, consequently, that such occupier was not entitled to the borough franchise under section 3 of the *Representation of the People Act, 1867*.

Consolidated appeal from the decision of the Revising Barrister appointed to revise the list of voters for the borough of New Windsor.

The respondent duly objected to the name of the appellant being retained on the list of voters for the parish of Clewer, in the said borough.

The description of the appellant on

*Bennett v. Atkins, C.P.*

the said list was as follows:—Bennett, Charles: 91, Victoria Cottages: House: 91, Victoria Cottages.

The appellant occupied during the qualifying period a house, No. 91, Vic-

toria Cottages, and he stated that by agreement with the owner of the house the owner paid the poor rate thereon.

The rating of the said house, No. 91, Victoria Cottages, was as follows:—

Parish of Clewer—Rate made in the month of October, 1877.

No.	Arrears due or if excused	If excused, write the word excused	Name of Occupier	Name of Owner	Description of property rated	Name or situation of property
263	£ s. d. —	—	Bennett, Charles	R. R. Gardner	Cottage	91, Victoria Cottages

Estimated extent	Gross estimated rental	Rateable value	Rate at 6d. in the pound.	Amount of rate assessed upon and payable by the owner instead of the occupier by virtue of the statute or statutes in that behalf	Allowed to owner	Total amount to be collected.	Amount actually collected
A. R. P. 0 0 8	£ s. d. 10 0 0	£ s. d. 8 9 0	£ s. d. 0 4 0	£ s. d. 0 3 0	£ s. d. 0 1 0	£ s. d. 2 9 6 Bracketted with other names	£ s. d. 2 9 6

The Assistant Overseer of the parish of Clewer produced the minute-book of the vestry of the parish of Clewer, from which it appeared that at a Vestry meeting of that parish, held the 11th day of November, 1869, it was proposed by Mr. Foster, seconded by Mr. George, and ordered that the owners of all rateable hereditaments in that parish to which the 4th section of the Poor Rate Assessment and Collection Act, 1869, applied, be rated to the poor rate in respect of such rateable hereditaments instead of the occupiers; under which order of the vestry owners of property were entitled to an allowance of fifteen per cent. from the full amount of rate payable by ordinary occupiers.

The assistant overseer stated that neither he nor the overseers had received any notice in writing, as required by the 4th section, sub-section 2, of the Poor Rate Assessment and Collection Act, 1869, from the owner of the cottage No. 91, Victoria Cottages, that he was willing to be rated and to pay the rates made in respect of the said cottage, whether the same was occupied or not; and although such notice had not been given, the owner

had been allowed a further abatement or deduction of ten per cent., making together an allowance of twenty-five per cent. from the full amount of rate paid by ordinary occupiers.

It was objected to the appellant's right to be on the list of voters that the extra ten per cent. was illegal, as no notice in writing had been given by the owner to the overseers that he was willing to be rated and pay the rates in respect of cottage No. 91, Victoria Cottages, whether the same was occupied or not, and that he had not paid an equal amount of rate in the pound to that paid by an ordinary occupier, as required by the People's Representation Act, 1867, section 3, sub-section 4.

On behalf of the appellant it was contended that the rate having been paid by the owner, he being rated instead of the occupier, pursuant to the order in vestry, such payment by the owner must be considered as that of the occupier, by virtue of the 7th section of the Poor Rate Assessment and Collection Act, 1869.

The Revising Barrister held that there was no proof or evidence that any written notice had ever been given by the owner

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to the overseers, as required by section 4, sub-section 2, of the Poor Rate Assessment and Collection Act, 1869, to entitle him to the further abatement or deduction of ten per cent., as had been allowed to the owner by the overseers, and therefore the owner was not entitled to the extra deduction of ten per cent., and the extra allowance of ten per cent. allowed by the overseers to the owner was an illegal allowance; and that the appellant had not therefore on or before the 20th of July last *bona fide* paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor rates that had become payable by him in respect of the premises occupied by him up to the preceding 5th of January; and the Revising Barrister expunged the name of the appellant from the said list.

If the Court should be of opinion that the amount paid by the owner, after deducting the extra allowance of ten per cent., was a legal amount without any notice being given to the overseers, and was a sufficient payment of the rate by the appellant within the meaning of the 4th section of the People's Representation Act, 1867, sub-section 3, the name of the appellant was to be inserted in the said list.

The names of 230 other persons whose qualifications were similar to those of the appellant, and who were objected to on the same ground, were also expunged by the Revising Barrister, and their appeals were consolidated with the principal case.

*The Solicitor-General (Lewis Coward with him)*, for the appellant.—The only question is whether the absence of proof of a notice in writing to the overseers, according to section 4, sub-section 2 of the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), made the deduction of the extra allowance of ten per cent. illegal; and it may be assumed that the owner paid to the parish all that the parish would be entitled to receive, if such notice had been given. The scheme of the statute, as shewn by sections 3 and 4 (1), is to

allow the parish to enter into arrangements with the owners of certain houses, by which the rates shall be paid by the owner instead of by the occupier. As a consideration for the owner doing so, fifteen per cent. is to be allowed him for collecting the rate from the tenant, in the shape of rent, so saving the parish the trouble of collecting it; and as a further consideration, if the owner will undertake to pay the rate, whether the house be vacant or not, an additional deduction not exceeding fifteen per cent. is to be allowed him. It is consistent with the facts as they appear in this case that the owner has for the last ten years paid all the rates in respect of all the houses of which he is owner, whether they were occupied or not, and has been allowed by the overseers a deduction of 25½ per cent. May it not therefore be assumed that everything has been done

hereditament does not exceed" (a certain sum varying according to the situation of the hereditament, and which in the present case was 8½) "and the owner of such hereditament is willing to enter into an agreement in writing, with the overseers, to become liable to them for the poor rates assessed in respect of such hereditament, for any term not being less than one year from the date of such agreement, and to pay the poor rates whether the hereditament is occupied or not, the overseers may, subject nevertheless to the control of the vestry, agree with the owner to receive the rates from him, and to allow to him a commission not exceeding twenty-five per cent. on the amount thereof."

Section 4. "The vestry of any parish may, from time to time, order that the owners of all rateable hereditaments to which section 3 of this Act extends, situate within such parish, shall be rated to the poor rate in respect to such rateable hereditaments, instead of the occupiers, on all rates made after the date of such order; and thereupon, and so long as such order shall be in force, the following enactments shall have effect:—

"1. The overseers shall rate the owners instead of the occupiers, and shall allow to them an abatement or deduction of fifteen per centum from the amount of the rate.

"2. If the owner of one or more such rateable hereditaments shall give notice to the overseers, in writing, that he is willing to be rated for any term not being less than one year in respect of all such rateable hereditaments of which he is the owner, whether the same be occupied or not, the overseers shall rate such owner accordingly; and allow to him a further abatement or deduction not exceeding fifteen per centum from the amount of the rate during the time he is so rated."

(1) The following are sections 3 and 4, viz., section 3: "In case the rateable value of any

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properly, as required by the Act, to entitle such deduction to be made?

[LORD COLERIDGE, C.J.—You must, I think, argue on the assumption that there was no notice in writing ever given to the overseers. For if such notice had been given, the owner at least must have known it and might have proved it.]

Very well; then assuming that to be so for the purpose of the present argument, the absence of such notice is not fatal to the franchise. It will be said on the other side that the requirement in sub-section 4 of section 3 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), that the occupier should pay "an equal amount in the pound to that payable by other occupiers in respect of all poor rates that have become payable by him in respect of the said premises," has not been complied with. That is not so; payment by the landlord is payment by the tenant, and the parish has received what the 32 & 33 Vict. c. 41, has enacted shall be deemed equivalent to a full rate. The 7th section of that last Act expressly enacts that "every payment of a rate by the owner, whether he is himself rated instead of the occupier, or has agreed with the occupier or with the overseers to pay such rate, and notwithstanding any allowance or deduction which the overseers are empowered to make from the rate, shall be deemed a payment of the full rate by the occupier for the purpose of any qualification or franchise which as regards rating depends upon the payment of the poor rate." What that statute intended as a consideration for the parish making the allowance to the owner is, first, the being relieved from the trouble and expense of collection of the rate from the occupier, and in respect of this an allowance of fifteen per cent. is to be made to the owner; and, secondly, the payment of the rate whether the premises be occupied or not, and for this a further allowance is authorised not exceeding fifteen per cent. Then can it be said, when the substance of the Act has been performed, and the parish has received this consideration for a number of years, the mere omission of a written agreement in the one case or of a written notice in the other is to disfranchise the tenant, who is no party to the

arrangement between the parish and the owner, and who has no right or means of learning whether the statute has been complied with in this respect or not? The 19th section, by which it is enacted that the overseers are to insert the name of the occupier in the rate-book whether the rate is collected from the owner or occupier, and that the occupier is to be deemed duly rated, contains a proviso that the occupier, notwithstanding his name has been omitted, "is to be entitled to every qualification and franchise depending upon rating in the same manner as if his name had not been so omitted." Although this is not a case of rating to which that section applies, it may be referred to as exhibiting the intention of the Legislature to guard the franchise in cases like the present, where the owner agrees to pay the rates. The case of *Durant v. Withers* (2), on which the other side relies, does not apply to the present case. The agreement which had been made there between the owner and the overseers of the parish was said to have been an agreement under 59 Geo. 3. c. 12, and sec. 23 of that Act declared that nothing in that Act should give power to assess the owner not being the occupier of any house in any borough in which the right of voting for members of Parliament depended on the rating. So that by the express language of that statute the assessment was illegal, and the 4s. 8d. which was paid by the owner was not the rate which was due, but a composition rate. Neither the decision nor the reasoning of the Judges in that case is applicable to the present, unless it be held that the notice in writing is a condition precedent to the power of the overseers to make any allowance at all, which is not what the Act intended. In *The Queen v. The Mayor, &c., of Kidderminster* (3), the decision was on a local statute by which certain owners of houses within a borough were to be rated instead of the occupiers, and the overseers might compound with the owners at a certain rate according to the rent or value, but that nothing in the Act was to affect any municipal franchise

(2) 2 Hop. & Colt. 202; s. c. 43 Law J. Rep. C.P. 113; s. c. Law Rep. 9 C.P. 267.

(3) 20 Law J. Rep. Q.B. 281.

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of the occupiers; and it was held that the title of the occupier to be put on the burgess roll could not be affected by any mistake in the amount of the composition between the owner and the overseers. The language of the Poor Rate Assessment and Collection Act, 1869, in sections 3 and 4 is curious: in the 3rd section it is, if the owner "is willing to enter into an agreement in writing." The willingness and not the agreement is required to be in writing; and in sub-section 2 of section 4 it is "if the owner shall give notice in writing that he is willing." The notice therefore is only something preliminary to the agreement which may be made between him and the overseers, and which agreement need not be in writing. The agreement may be here inferred from what was done for a number of years, during which twenty-five per cent. has been allowed. Is then the whole transaction to be vitiated, and especially as against third parties, because a notice which is only preliminary to the agreement is not proved to have been given? The omission to give this notice might be waived by the overseers. To give effect to the contention on the part of the respondent, the words, "after notice in writing to the overseers," will have to be inserted in section 7 after the words, "empowered to make from the rate."

*Kingdon*, for the respondent.—There is a difference between the 3rd and 4th sections of the Poor Rate Assessment and Collection Act, 1869. The third section applies to voluntary agreements and allowances, and the 4th section applies to orders and allowances which are absolute. The agreement in section 3 and the notice in section 4 are in respect of houses which may be vacant, and therefore in order to bind the owner, and to protect the parish in case of any dispute, the statute requires that both, the agreement in the one case and the notice in the other, shall be in writing. The case here wholly turns on the 4th section, and the further deduction which the overseers are empowered to make under sub-section 2 of that section is only if the owner "shall give notice to the overseers in writing that he is willing to be rated," whether the premises be occupied or not. It is

therefore essential that such notice should be given to enable the deduction or allowance to be made. If this be so, the case of *Durant v. Withers* (2) applies.

[LORD COLERIDGE, C.J.—The Act of 59 Geo. 3. c. 12, in that case expressly made the rating of the owner unlawful so far as regards the franchise. Here you say it is the same thing if the deduction is what the overseers are not empowered to make.]

Yes. The notice in writing is a condition precedent to the authority to make the allowance, and if that be not given, as it was not in this case, the allowance is not one which is referred to in the 7th section as an allowance the overseers are empowered to make, and consequently there has not been a payment of an equal amount in the pound to that payable by other occupiers within the meaning of section 3, sub-section 4, of the Representation of the People Act, 1867.

*The Solicitor-General*, in reply, contended that the giving of the notice might be waived, and further, that if the full rate or its equivalent, as authorised, had not been paid, then notice of the rate in arrear should have been given to the voter, according to section 28 of the Representation of the People Act, 1867, and that until such notice was given there was no such rate payable by the voter—*Fletcher v. Boodle* (4).

LORD COLERIDGE, C.J.—The argument of this case has occupied a considerable time, but in my judgment the point is a simple and short one. I assume that it has been found by the Revising Barrister that no notice was given by the owner to the overseers, as required by the section 4, sub-section 2 of the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41). It is true that the case does not find this in express terms; but the Solicitor-General admitted, for the purpose of his argument, that no notice in fact had been given, and I therefore assume that that was so; and the question then is, whether the deduction of 25l. per cent., which had been allowed to the owner from the full amount of rate,

(4) Hop. & Phil. 238; s. c. 34 Law J. Rep. C.P. 77.

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can be justified. Now that must depend on the true construction of the sections of the 32 & 33 Vict. c. 41. It is quite true that the person to be affected by our judgment is not the owner, but the occupier, and it may be said that a judgment disfranchising the occupier is disfranchising him for what he has no means of preventing, he being no party to the proceedings between the owner and the parish, and having no means of knowing whether the same have or have not been properly carried out. One answer to this, and that a short one, is, that we have nothing to do with the effect of the statute, but have only to construe the enactment to the best of our ability, and if the effect be contrary to public policy, it is for the Legislature to alter it. A better though a narrower answer is, that the provisions of the statute give certain privileges to the voter with reference to the rating required for the franchise, and which he would not have had but for these provisions, and therefore, as he takes the benefit on the one hand, so he must on the other hand take the disadvantage. Now the question is, were these deductions proper? I doubt whether, in any view of the statute, the deduction of twenty-five per cent. could be sustained, because, as I gather, no question was raised under the third section of the 32 & 33 Vict. c. 41; in other words, there was no evidence of any agreement with the overseers according to that section, nor indeed any suggestion of any such agreement having been made, so as thereby to justify an allowance of twenty-five per cent.; and at all events, as regards the further abatement of ten per cent. which was allowed in addition to the fifteen per cent., the case finds as a fact that which puts the appellant out of Court, and therefore it is unnecessary that I should decide, and I do not wish to do so, whether under section 4 the deduction of twenty-five per cent. could have been sustained. Whether the case be looked at as turning on the third or on the fourth section, or on these two sections taken together, my judgment must equally be against the appellant. Now the third section provides for a case in which, irrespectively of any act of the

parish by its vestry, there is an agreement between the owner and the overseers for the payment of the poor-rates. [His Lordship read the third section.] The fourth section deals with another state of things. It is limited to places to which the third section applies. It states that "the vestry may order the owner to be rated instead of the occupier in respect of hereditaments, to which section 3 applies;" and whilst such order is in force sub-section 1 enacts that "the overseers shall rate the owners instead of the occupiers, and shall allow an abatement of fifteen per cent." That applies only where the hereditaments are occupied and the owners are rated *in invito*; but by sub-section 2 the 4th section goes on to say that "if the owner shall give notice in writing that he is willing to be rated for any term not less than one year in respect of hereditaments of which he is the owner, whether the same be occupied or not, the overseers shall rate such owner accordingly, and allow him a further abatement not exceeding fifteen per cent." Now I am of opinion that the agreement must be in writing to be an agreement within the 3rd section, and that the notice must be in writing to be a notice within the 4th section, and that their being so in writing are conditions precedent to any allowance to the owner, whether under section 3 or under section 4. The 3rd section clearly contemplates the agreement being in writing. With regard to the 4th section, the construction is this: By the statute of 43 Eliz. c. 2, and subsequent Acts the overseers are empowered to make rates for the relief of the poor; but in doing so they must rate all equally, and if they do not the rate is bad. By this 4th section of 32 & 33 Vict. c. 41, the overseers are empowered under certain conditions to rate unequally; but if they do not pursue the conditions of this enactment, the rating unequally would not be valid. In the present case the overseers have rated unequally, and have not pursued the conditions of the statute. I confess I dislike being drawn into a consideration of what is called the intuits or spirit of an Act of Parliament, where the words are plain which we are required

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to give effect to. Here the words of the statute are plain, and only empower the overseers in a particular event to make the allowance, and that event has not here arisen. That in my judgment shortly disposes of this case. It is said, however, that the overseers may waive this notice in writing. I do not see any provisions of the statute which would enable them to do so; and therefore, as they act in discharge of a public duty, in my opinion they can do nothing of the sort.

Then there is the 7th section of the statute. That section deals with the payment of rates, both by the occupier and the owner; and in certain cases it enacts that payment by the owner shall be payment by the occupier for the purpose of the franchise. The first part of it deals with the payment by the occupier; that is not this case. The next part is with respect to payment by the owner; it says, "every payment of a rate by the owner," that I think means the payment of a full rate, "whether he is himself rated instead of the occupier, or has agreed with the occupier or with the overseers to pay such rate, and notwithstanding any allowance or deduction which the overseers are empowered to make from the rate shall be deemed a payment of the full rate by the occupier" for the purpose of the franchise. Then what is the allowance or deduction from the rate which may be made? It must be what the overseers are empowered to make; and if it be not such, then the owner who pays does not pay what shall be deemed a full rate. Now in my opinion "empowered" here means empowered by law. The law but for this statute requires an equal rate to be paid. By this statute, if certain conditions are fulfilled, the overseers are empowered to make a deduction from the rate; but if the conditions are not fulfilled, then the overseers are not empowered to make it. Here they have not been fulfilled; consequently the overseers were not so empowered, and the decision of the Revising Barrister ought to be affirmed.

GROVE, J.—I also am of opinion that the decision of the Revising Barrister was right; but for some time during the argu-

ment I confess that the leaning of my mind was in the contrary direction, because it was argued by the Solicitor-General, and apparently, as I understood, acquiesced in by the counsel for the respondent, that the agreement with the overseers within the meaning of the statute might be a verbal agreement. If that had really been so, it would have had this effect on my mind: Supposing the agreement might be verbal, then sections 7 and 8 would have great force in shewing that the franchise is not made to depend on any preliminary matter, but on an agreement between the owner and overseers to pay the rate, and which agreement need not be in writing. The 7th section says, "Every payment of a rate by the owner, whether," *inter alia*, he "has agreed with the overseers to pay such rate, and notwithstanding any allowance," "shall be deemed a payment of his full rate by the occupier for the purpose" of the franchise. Now if the agreement there alluded to referred to the agreement mentioned in the 3rd section, or to what may be called an agreement in sub-section 2 of the 4th section, then the substance on which the franchise depended was the agreement itself, which might be verbal, and the preliminary as to notice could not affect the franchise. But upon more carefully reading the 3rd section, I have come to the conclusion that it does require the agreement to be in writing; and if so it shews that before the allowance should be made to the owner by the overseers there must be in the one case a definite agreement in writing, and in the other case a notice in writing. I think it is clear that the proper reading of the 3rd section is that the agreement must be in writing. It states that the owner "is willing to enter into an agreement in writing with the overseers;" and it would be singular that the mere intimation of a will should be made by the statute the foundation of a subsequent verbal agreement; but when one reads further on it seems to me that what is the essence of this section is the existence of an actual agreement in writing, and that this willingness to enter into the agreement is only preliminary to it. The section goes on thus: "to become liable to them for the poor rates assessed in respect

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of such hereditament for any term not being less than one year from the date of such agreement." Now there could be no date without an agreement, and the only agreement before mentioned to which the words "such agreement" could refer is "an agreement in writing." If the enactment be read in that way all the words in it become sensible. The owner says, "I am willing to agree to become liable to the overseers to pay the poor rates in respect of the house, whether it be occupied or not;" and the Act says that the overseers may on their part agree with the owner to receive the rates from him, and to allow him a commission not exceeding twenty-five per cent. on the amount. If the overseers choose, they may therefore enter into such an agreement in writing with the owner for any term not less than one year from the date of such agreement; but then if that be so, this gives a different sense to the agreement referred to in the 7th section, which must then be construed as meaning an agreement in writing, as mentioned in the 3rd section. Further, section 4, sub-section 1, enacts that "the overseers *shall* rate the owners instead of the occupiers, and *shall* allow to them an abatement or deduction of fifteen per cent. from the amount of the rate." Next, sub-section 2 of that section enacts: "If the owner of one or more such rateable hereditaments shall give notice to the overseers in writing that he is willing to be rated for any term not being less than one year in respect of all such rateable hereditaments of which he is the owner, whether the same be occupied or not, the overseers *shall* rate such owner accordingly, and allow to him a further abatement or deduction not exceeding fifteen per cent. from the amount of the rate during the time he is so rated." Therefore under this last sub-section an agreement on both sides in writing is not required as in section 3, nor is it optional on the overseers what they may do; on the contrary, it is imperative, and what is wanted to make it so imperative on the overseers is that which is to be evidence of the consent of the owner to his being so rated. In the first case, which is under the 3rd section, where it is optional with the overseers to agree or not, the agreement is required to be in writing;

and in the second case, which is under section 4, sub-section 2, where it is not optional with the overseers, the notice by the owner is required to be in writing. Consequently the notice is not directory only, and is something more than a preliminary matter, for it becomes a requisite provided by the statute for what is afterwards to be done; and its object is, I think, the same as the agreement in writing under the 3rd section, namely, to secure something definite in writing—a definite agreement in writing in the one section, and a definite consent or notice in writing by the owner in the other section. I also think the omission to give such notice in writing is a matter which cannot be waived by overseers, who are acting for the public under the regulations of a statute. For these reasons, the decision of the Revising Barrister was, I think, a right decision.

LINDLEY, J.—I am of the same opinion. The question is whether the appellant is entitled to the borough vote, he not having paid the rates himself, and that raises the question whether the landlord has properly paid the rates in respect of the premises so as to make such payment equivalent to a payment by the appellant. That turns on two points, first, on the construction of 32 & 33 Vict. c. 41; and secondly, on the power of the overseers to waive the so-called formality of a notice in writing by the owner. With respect to the construction of the statute, I do not think that there can be any difference of opinion. The statute is an enabling one, and the 3rd section applies to an agreement which may be made between the owner and the overseers for the payment of the poor rates by the owner. I certainly am at a loss to know why the words, "willing to enter into an agreement in writing" are used, but as there are afterwards the words, "from the date of such agreement," I can have no doubt but that the construction which my Lord and my brother Grove have put on that section is the right one, and that the agreement there meant was an agreement in writing. Then with respect to section 4, sub-section 2, it is equally clear that what is there contemplated is that a notice in writing should be given by the owner



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before any allowance should be made him by the overseers. That condition has not been complied with in the present case, and that, therefore, reduces the question to the last point, namely, whether it was competent for the overseers to waive the giving of such notice. At first I thought this plausible. It appeared that the substance of the enactment was that the allowance to the owner should be in consideration of rating him in respect of all his houses, vacant as well as occupied, and that as the overseers had had the benefit of this, which was the substance, the giving of the notice in writing was a mere matter of form which could be dispensed with. But the answer to this is, that the overseers are the representatives of the parish, and parishes might be exposed to a great abuse of power unless this requisite of the statute was complied with, so that there might be evidence capable of being produced against the owner either of the existence of an agreement in writing or of a notice in writing. On the broad ground, therefore, that the overseers are trustees for the parish, and that it would be unsafe if a notice in writing could be dispensed with, by which the parish might be involved in lawsuits, I am of opinion that the overseers had no power to waive. It is true that in *Leonard v. Alloways* (5) we held the other day that overseers could waive compliance with the condition of 6 Vict. c. 18. s. 5 as to sending in a claim before the 20th of July, but the reason was that it was almost impossible to otherwise construe that statute. The language is very different here, and I am of opinion that the overseers cannot waive this matter, which is a condition to the making of the allowance. That was the only thing about which I ever had any doubt in the present case, and as the condition of giving the notice has not been complied with, this appeal must be dismissed.

*Appeal dismissed with costs.*

Solicitors—C. T. Phillips, London and Windsor, for appellant; T. Durant, agent for B. C. Durant, Windsor, for respondent.

[IN THE COURT OF APPEAL.]

(*Appeal from the Exchequer Division.*)

1878.

Jan. 11.

Feb. 4.

June 22, 26.

THE MAYOR, ALDERMEN AND  
BURGESSES OF THE BO-  
ROUGH OF PENYTN v.  
BEST.\*

*Market—Prescription—Right to prevent Sale of Marketable Articles in Shops on Market Day.*

The right of the owner of a market to prevent tradesmen from selling marketable articles in their shops within the limits of the franchise, without paying the market dues in respect of such sales, is not unreasonable and may be gained by immemorial custom or prescription. The grant of a market "with all liberties and free customs to such a market belonging" does not imply such a right.

In an action for the infringement of such a right in respect of a meat market within a borough, it was proved that, from the time of living memory up to 1862, butchers having shops within the borough were in the habit of closing their shops on market days and going into the market to sell their goods, paying stallage. That in 1862 two butchers refused so to close their shops but submitted on actions being brought, and afterwards paid the market dues for what they sold in their shops on market days; and that the defendant had paid dues in like manner for some time before the year 1875 when he declined to continue the payment:—

Held (reversing the judgment of the Exchequer Division), that there was evidence from which the jury might find that the plaintiffs had established their right to prevent the owners of butchers' shops from selling in them on market days without paying market dues.

This was an action brought by the plaintiffs as owners of a market at Penryn in Cornwall, which they held from 1820 to 1875 as lessees of the Bishop of Exeter, and from 1875 as owners in fee by purchase from the Ecclesiastical Commissioners. The statement of claim al-

\* *Coram Bramwell, L.J.; Baggallay, L.J.; and Theiger, L.J.*

*Mayor of Penryn v. Best (App.), Exch.*

leged that the plaintiffs were owners in fee of a certain market holden in the borough of Penryn in the county of Cornwall on Thursdays and Saturdays in Easter week, for the buying and selling, amongst other things, of flesh meat, together with tolls, stallage and other perquisites to that market appertaining; and that all persons selling flesh meat on Thursdays and Saturdays within the borough ought of right to sell the same within the market, and not in any private shop without payment to the plaintiffs of the tolls, stallages and other perquisites and profits of the market. But that on Saturday, the 4th of December, 1875, and from that date on each Saturday thereafter, the defendant exposed for sale in his shop, within the limits of the borough, flesh meat, and refused to pay the plaintiffs any of the tolls, stallages or other perquisites and profits of the market, and caused them to lose the tolls, and thereby disturbed the plaintiffs' market.

The action was tried before Lord Coleridge, C.J., in Middlesex, during the Michaelmas Sittings, 1876.

The evidence produced at the trial was as follows:—

In 1259 Henry 3 granted a market at the manor of Penryn to the Bishop of Exeter. This charter is recited by *inspecimus* in a second charter of Richard 2 in 1380, which grants and confirms to the Bishop of Exeter that he and his successors for ever may have a market in his manor of Penryn in Cornwall every week on Monday; the bishop and his successors "to have the aforesaid market and a yearly fair with all liberties and free customs appertaining to a market and a fair of this kind."

The town of Penryn was incorporated as a borough in 1621 by James 1. The manor of Penryn was at various times leased by the Bishops of Exeter to trustees for the corporation. In 1820 the corporation obtained a lease direct, and in 1820 purchased the manor in fee from the Ecclesiastical Commissioners.

An old inhabitant of the borough, named J. Robins, sixty-three years of age, proved that as long as he could remember the meat market had been

held on Saturday and not on Monday, and that the butchers in the borough closed their shops on market-day and sold their meat in the market at stalls provided by the corporation for which stallage was paid; and the town clerk was called, who deposed that such had been the custom since his appointment to his office in 1848. This evidence was not contradicted.

It was also proved that two butchers, in the year 1862, had sold meat in their shops and refused on demand to pay to the corporation an equivalent to the stallage charged in the market. But on actions being brought against them by the corporation they submitted to verdicts and thenceforward paid the sum demanded; and no butchers since that time had sold meat in their shops on market-days without paying a sum equivalent to the stallage charged in the market for doing so.

The defendant had regularly made such payments till 1875, when he refused either to pay or to close his shop on Saturdays.

On these facts the learned Judge directed a verdict to be entered for the plaintiffs for 20s., leaving the plaintiffs to move the Court for judgment, and on the 11th of January, 1878,

*Herschell* and *A. Charles*, for the plaintiffs, moved the Exchequer Division accordingly.

*Murphy* and *Wormald*, for the defendant, opposed the motion.

The arguments used and the cases cited appear sufficiently from the judgment of the Court (*CLEASBY, B.*, and *HAWKINS, J.*), which was delivered after consideration, on the 4th of February, by

*CLEASBY, B.*—This is an action for the disturbance of the market of the plaintiffs. The plaintiffs are, no doubt, entitled to have a meat market on Saturdays; and the defendant on a Saturday when the market was held sold meat in his own private shop in the town, at some distance from the place where the market was held.

The question is whether the franchise of the plaintiffs was of such a nature that

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they could maintain an action against the defendant.

Similar questions have arisen before, and two conclusions may be considered as settled by authority. First, that the mere grant of a market does not of itself confer the right to prevent persons from selling on market days in their private houses, though within the town or manor where the market may be held. This was decided in the case of *The Mayor of Macclesfield v. Chapman* (1). It is pointed out in the judgment that an old case—*The Prior of Dunstable's Case*—had been erroneously supposed to decide the contrary. It may also be considered as decided by *The Earl of Egremont v. Saul* (2). We feel bound by these authorities, although *dicta* may no doubt be found to the contrary. See the case of *Mozley v. Chadwick*, referred to in the note in 7 B. & C. 47.

The second conclusion by which we are bound is that such a right as is contended for may be acquired by immemorial enjoyment or prescription. For this there are two decisions—*Mozley v. Walker* (3) and *The Mayor of Macclesfield v. Pedley* (4).

It is not necessary to say anything about the effect of a modern grant or a grant since the time of legal memory of a market with this additional incident of preventing persons from selling in their own houses within the limits of the franchise. The question does not arise in the present case, but there are obvious objections of a serious nature to the grant of a franchise which prevented persons who were selling meat at the time in their private houses from continuing to do so.

The facts brought before us in the present case are as follows:—We understand that the verdict of the jury was not taken upon any particular question, but upon the evidence being given a verdict was taken for the plaintiffs generally, it being considered there was sufficient evidence to warrant that verdict. But the

Court was upon the case being brought before them to deal with the facts and say what the proper conclusion was.

Evidence was given of a charter in the reign of Henry 3, A.D. 1259, by which the King granted that the Bishop of Exeter and his successors might have a market in his manor of Penryn every week on Monday, and also in every year a fair of three days' duration on days named, and that they should have the aforesaid market and fair with all liberties and free customs appertaining to such a market and fair, except that they were not to be the nuisance of neighbouring markets and fairs.

Proof of this was given by a charter of confirmation upon an *inspeximus* in the reign of Richard the 2nd. We think that, having regard to these two charters, there is no sufficient ground for regarding the charter of Henry 3, which refers to no previous grant as a confirmation of any previous grant of a market, notwithstanding the use of the not usual words "grant and confirm" at the commencement.

A number of leases were produced from the bishop to the borough of Penryn of property in the borough, and all these leases contained the general words, "together with all markets," but there was no particular reference in any lease to the market which formed the subject of the grant by the Crown to the Bishop of Exeter or to the charter of Henry 3. These leases were granted from time to time, and may be said to have brought the right of market down to the time when the borough became purchasers of the bishop's rights from the Ecclesiastical Commissioners.

One of the leases, that of 1745, contained an indorsement of delivery of seisin of the Guildhall and market houses. This is of importance, as shewing that all rights of the plaintiff to the market were derived from the bishop. There was also evidence of the holding by the plaintiffs of a meat market on Saturdays, so far as living memory goes. But there was no evidence to connect in any way the market so held with the Monday market granted in 1259.

There was further evidence that there were three or four butchers who had

(1) 12 Mee. & W. 18; s.c. 12 Law J. Rep. Exch. 32.

(2) 6 Ad. & E. 924; s.c. 6 Law J. Rep. K.B. 205.

(3) 7 B. & C. 40.

(4) 4 B. & A. 397.

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shops in the town, and that it had been usual for these butchers on the Saturdays when the market was held to close their shops and go and sell in the market, and that this had been done till 1862; and it was further proved that in that year two butchers opened their own shops on Saturdays and disputed the right of the corporation to prevent it, and that writs having been issued against them they submitted and paid the costs, and that they have since had their shops open on the Saturdays and paid the plaintiffs toll, which must mean no doubt the stallage which the plaintiffs would have been entitled to if the butchers had occupied stalls in the market house.

Authorities were referred to for the purpose of shewing that no right to tolls was acquired by the charter referred to, particularly *Heddy v. Wheelhouse* (5); but the real question in this case is not the right to tolls, but the right to compel the defendant to sell in the market house if at all, by which the plaintiffs would acquire a right to stallage as owners of the soil. And the real question is whether the evidence establishes any such right.

The facts are peculiar, because we have a charter for a market on Monday, and the proof is that no market has ever been held on Monday, but there is proof of a meat market having been held on Saturday.

If the proof had been of a charter for a meat market on Saturday in the terms of the present charter, the grant being of a market and fair with all liberties and free customs to such a market and fair belonging [the words in the original no doubt being *cum omnibus libertatibus et liberis consuetudinibus ad hujusmodi mercatum et feriam pertinentibus*, as in *The Earl of Egremont v. Saul* (2)], we should have felt satisfied that there is not sufficient evidence to justify us in reading the grant as a grant of a market with the incident of preventing persons from selling meat in their own houses away from the market. As this incident is not a liberty belonging to a market, it would be enlarging the franchise beyond the words and would be at variance with

*The Earl of Egremont v. Saul* (2). But the plaintiffs rested their case mainly on another ground, namely, that there was sufficient evidence to warrant the conclusion of a right by prescription to hold a market on Saturday with this incident, and it was said that if there was sufficient evidence of this enjoyment, the plaintiffs ought not to be worse off because there was in 1259 also an express grant, which had vested in them, of a Monday market. And the cases of *Moseley v. Walker* (3) and *The Mayor of Macclesfield v. Pedley* (4) were referred to as shewing that such a right might be so gained. But upon referring to these cases and the evidence produced in the present case we find a very great difference. We cannot examine in detail the evidence in those cases upon which the jury found in favour of the right, but it appears to us that if the same question had been left to the jury in this case they ought upon such different evidence to come to a different conclusion. The evidence in the present case, except as to the existence of a market, only dates from the year 1848, and from that time to 1862 the only proof is that on the market-day the butchers closed their shops and resorted to the market.

This is entitled to very little consideration as shewing that the butchers were under an obligation to close their shops. It is equally reconcilable with its being more to their advantage to sell in the market than at home, and it only dates from 1848. In 1862 they claimed the right to keep their shops open on Saturdays. Two actions were, however, brought and submitted to by two butchers, and since that time the butchers who have opened their shops on Saturdays have paid toll until the present defendant disputed the right. This evidence is, in our opinion, far too weak to justify the conclusion of the right being governed by immemorial enjoyment, more especially when taken in connection with a charter being granted in 1259 for a market with ordinary incidents.

The enjoyment of the right claimed is, properly speaking, only from 1862, as we consider the attendance of the butchers at the market on market-days as proving little or nothing. The actions brought

(5) 1 Cro. Eliz. 591.

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against the two butchers and submitted to, though proof of enjoyment, are no further evidence against the defendant; and the proof of payment of toll even by the defendant (as the witness says he believes) would not be conclusive to justify the conclusion of immemorial enjoyment, the evidence ought to go further back and be like such as was given in the two cases last referred to; the effect of the evidence is also weakened by the demand of the plaintiff (which was acceded to) being for tolls which they were certainly not entitled to, their only right being to stallage as owners of the soil of the market, and the payment might be made under the belief that the plaintiffs were entitled to tolls, and not as an acknowledgment that the plaintiffs were entitled to make them close their shops.

We have considered the case upon its merits, and not with reference to the particular claim set up in the statement, namely, for tolls and stallage for selling out of the market, which seems open to objection, but might have been amended.

For the above reasons we think the plaintiffs have not established the right claimed, and there must be judgment for the defendant.

*Judgment for the defendant.*

Against this decision the plaintiffs appealed. The case came on for argument in the Court of Appeal on the 22nd of June.

*Herschell* and *A. Charles*, for the plaintiffs, contended that the right claimed was one which could be acquired by immemorial usage; that there was evidence that it had been so acquired; and that the Court below had given insufficient weight to the evidence produced at the trial in support of the usage.

*Murphy* and *Wormald*, for the defendant.—The right claimed is not a usual incident of a market, and it is not such a right as the Crown could grant. Even if it could, the Crown has not granted it, as is shewn by the charter, which confers a different franchise altogether. The existence of the actual charter negatives the presumption of a lost grant containing the privilege sought

by the plaintiffs; for it shews that the present practice is not immemorial. (The cases cited in argument were those mentioned in the judgment of the Exchequer Division.)

*Cur. adv. vult.*

The following judgments were delivered (on June 26):—

*BRAMWELL, L.J.*—I am of opinion that this appeal ought to be allowed. If I thought I was differing from my brother *Cleasby* on a point of law, I should have serious misgivings. But it is a matter of fact, with regard to which we think there has been a mistake in the Court below. The first question in the case is, have the plaintiffs a right to hold a Saturday market? This was not very strenuously contested by the defendant, and the Court below say they have. Whether, according to the very truth of the matter, they have a title to such a market as of right may perhaps be questionable, but according to a known principle of law we must hold that they have such title. No doubt such a market has been held so long as living memory goes. There is no charter except for a Monday market, and no Monday market is held. But it is obvious that the corporation may have a right to both, or may have acquired the right to the one by surrendering the right to the other, or they may have lost the right to hold the Monday market by letting it fall into desuetude. It is a convenient thing that every presumption should be made in favour of long-continued enjoyment; and I have no doubt if the corporation were to endeavour to establish a Monday market they would meet with a vigorous opposition. Therefore, I should say, that we ought to hold that the plaintiffs have proved their right to a Saturday market. The next point, which is not contested, is that there might be such a right as would entitle the plaintiffs to bring this action. It is contended that if there were a modern grant or any actual grant produced, giving such a privilege, the grantee would not be entitled, even though the right were given in express words, to compel the tradesmen of the borough to shut up their shops on market day. On the other hand

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we must take it to be part of the law of the land, even if we think it to be wrong, that the grantee of a market may not only have a right to the market, but may be entitled to say to all persons within a certain area of an undefined extent, "You must shut up your shop and come into the market, or pay me the market dues." That is established by the Legislature and the ultimate Court of Appeal, and it may be accounted for as I have suggested by a sort of probability that at the time of the grant the whole area of the manor of Penryn was in the grantee of the market, who could hold his market where he chose, though in more recent times the head-quarters of the market became restricted to a particular spot. Therefore, we ought to hold that it is competent to the plaintiffs to maintain a market with this incident attached. So far we go with the Court below. The only remaining question is, whether it was a right inference which they drew from the evidence. As I understand it, they proceeded on the assumption that the earliest evidence of a claim to this incident of the market was in the year 1848. But that is not so. The evidence is that the incident has been claimed during living memory, and one witness was sixty-three years old, and could therefore recollect that during at least fifty years, the state of facts existed upon which the plaintiffs rely. Of course, there might possibly have been evidence of the plaintiffs' title beyond living memory. Some record might have been produced which might have shewn it, and which, I presume, would have been evidence; but I think this is not the kind of right of which you would expect that it would be easy to find documentary evidence. There is evidence during living memory of this state of things; and it is undisputed that when a market was held all the butchers in the town used to shut up their shops, even those who lived within a stone's throw of the market place—all the butchers went into the market, and paid the corporation their tolls. This is a remarkable thing to my mind. Mr. Murphy says it proves little, for the market is the place to which the butchers would naturally go. But I am inclined to think the butchers would like

to keep their shops open. At all events, their all going into the market would be a wonderful instance of unanimity. It would be a very remarkable fact, and not easily to be accounted for except by the existence of some right to make them come into the market. Further, in the year 1862, there were two recalcitrant butchers, which shews that going to market was not altogether such a matter of convenience as Mr. Murphy suggests. These two butchers resisted. The corporation insisted on their right, and the butchers acquiesced; they did not actually shut up their shops, but they acquiesced in the demand, and paid the tolls. Well, it may be possibly objected, "was it not better for them to pay a trifling toll than to involve themselves in litigation?" That, no doubt, is a just remark, but it is almost met by this, at the present moment the defendant does not think so; and why should his predecessor? But, suppose the observation well founded, what else can the plaintiffs prove? They can only prove that, when the occasion arose, they asserted their title and succeeded. Arguments of this kind might be used to shake the title to the best established estate in the world. I really think that, assuming, as I have for the reasons I have given, there was a good Saturday market, and that there might exist such an incident as the one set up by the plaintiffs, they have proved it in the only manner in which it could be proved, and I agree that the evidence, if rightly considered, is stronger in the present case than it was in the case of *Mosley v. Walker* (3). As I said before, the judgment of the Court below was founded on the assumption that the earliest proved enjoyment of this incident was in 1848, and that it was uncertain what had been the practice before that date. If that had been so, the plaintiffs would have a very weak and defective case, but on the evidence as it is, they are entitled to our judgment.

BAGGALLAY, L.J.—I am of the same opinion. I have very few words to add, except that I assent to the law as laid down by my brother Cleasby: first, that a right of market in itself does not entitle the plaintiffs to shut up the shops in the

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town during market days; and secondly, that such a right may be acquired by immemorial custom. And I agree in all the conclusions he drew, that the plaintiffs were entitled to a market, either with or without the incident in question, with the exception of the one point mentioned by Lord Justice Bramwell. I think I see how the mistake may easily have arisen. There was a great mass of evidence printed, but only three witnesses, of which the town clerk occupied by far the greater space, and the deposition of the witness Robins, sixty-three years old, contains the important evidence in twelve lines only. He was not cross-examined, so Mr. Herschell said he would bring no more evidence on that point. It is clear to me that the evidence of Robins escaped the notice of the Court below.

THE SINGER, L.J.—I am of the same opinion. We differ very little from the Court below. In the law we do not differ at all. Our view is the view of Lord Coleridge as regards the evidence. It appears to me that the mistake of the Court below arose from their passing over the evidence of Robins.

*Judgment reversed.*

Solicitors—Gregory, Rowcliffes & Co., agents for G. A. Jenkins, Penryn, for plaintiffs; Harris & Powell, agent for R. Dobell, jun., Truro, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1878. { THE QUEEN on the prosecution  
Nov. 11. { of the METROPOLITAN BOARD  
OF WORKS v. LEE.

*Metropolitan Building Act (18 & 19 Vict. c. 122), sections 3 and 69 to 74—Dangerous Structures—"Owner" of Building—Liability for Repair of District Church—Church Building Act (58 Geo. 3. c. 45), section 70.*

[For the report of the above case, see 48 Law J. Rep. M.C. 22.]

[IN THE EXCHEQUER DIVISION.]

1878. }  
May 6. } CROWHURST v. THE BURIAL BOARD  
Nov. 8. } OF THE PARISH OF AMERSHAM.

*Nuisance—Duty to Neighbour—Tree poisonous to Cattle—Liability for not preventing Encroachment of Branches.*

*An occupier of land adjoining a meadow where cattle are pastured, who grows a tree likely to be eaten by cattle, and poisonous, if eaten, must keep it within his own boundaries, and if he does not do so is prima facie answerable for the death of the cattle caused by their browsing on branches which project beyond his boundaries.*

*Fletcher v. Rylands applied.*

This was a SPECIAL CASE stated by the County Court Judge of Buckinghamshire in an action to recover damages for the loss of the plaintiff's horse, under the circumstances hereinafter stated.

The defendants were owners and occupiers of about half an acre of land which had been used for a cemetery for about seventeen years under the statutes in that behalf. The plaintiff had been tenant for the preceding two years, and for a period of three years previously, of a meadow adjoining the cemetery, used for the pasture of his horses. The defendants' cemetery was separated from the plaintiff's meadow by a wall about two feet high, and at two places by an open iron railing about two feet high upon the wall. The wall and railing were constructed by and belonged to the defendants, and when the cemetery was laid out about seventeen years ago, the defendants planted two yew trees about four feet within their fence. The trees had grown through and beyond the iron railings and projected on or over the meadow.

The plaintiff's horse had been in the meadow for some months immediately preceding the 26th of September, 1877, and on that day the plaintiff saw the horse and also a pony of his, alive and well in the meadow. On the morning of the 27th of September the horse was found dead in the meadow, having been poisoned by nibbling and eating the

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twigs of branches and leaves of one of the yew trees. The pony was alive and well. It was found that the horse must have browsed, and had browsed, on leaves and twigs of one of the yew trees extending through the rails into the meadow, and also on leaves and twigs within the defendants' fence. The wall and rails were at that spot not sufficiently high to prevent a horse from so browsing. The other yew tree did not appear to have been interfered with. The plaintiff was not aware of the existence of the yew trees. It is a fact generally known that cattle browse on the leaves and branches of yew trees when within reach and not unfrequently are poisoned thereby.

The case was tried without a jury, and the County Court Judge found that in fact there had been no contributory negligence on the part of the plaintiff and that the defendants were liable, and gave judgment for the plaintiff for 21l. and costs.

The case came on to be argued on the 6th of May, when it was remitted to the County Court Judge to be re-stated.

In re-stating the case the Judge found as an additional fact that the leaves and twigs of the yew tree which extended beyond the defendants' land and over a perpendicular plane drawn from the extremity of the plaintiff's land, and which had been eaten by the plaintiff's horse, were of themselves sufficient to have caused the horse's death.

*Herschell* and *G. Shaw*, for the appellants.

*J. O. Griffiths* and *Cooper Wyld*, for the respondent.

[The arguments used and cases cited appear from the judgment of the Court.]

The judgment of the Court, prepared by *POLLOCK, B.*, was read, on Nov. 8, by

*KELLY, C.B.*—This is an appeal from the County Court of Amersham, held at Chesham. The judgment in the Court below was for the plaintiff, damages 21l., and the Judge stated a case for our opinion.

The material facts of this case are as follows :—The defendants some seventeen years ago obtained a piece of land for the

purpose of their cemetery, and fenced it round with a dwarf wall, in which at two places there were openings filled up with iron railings about two feet high. Where these railings occurred the defendants planted two yew trees at about four feet distant from the railing. These grew through and beyond the railings so as to project over an adjoining meadow. The plaintiff two years before the alleged cause of action hired this meadow to pasture his horses for a term of three years. After the plaintiff had occupied the field for two years, his horse, which was feeding on the meadow, ate of that portion of the yew tree which projected over the field, the walls and rails not being sufficiently high to prevent a horse from so eating, and died from the effects of the poison contained in what he ate. The question for our determination is whether the death of the horse so occasioned, afforded any cause of action against the defendants.

There being no pleadings in the County Court, the question is not in any way affected by the form in which the cause of action is put forward, and the facts as found by the Judge of the County Court must be taken as conclusive. The only matter therefore for our decision is, whether upon those facts any legal liability is disclosed. The matter might appear to be somewhat trivial, but the case gives rise to a question which may not unfrequently arise, and therefore is of some general importance. Considering this, it is remarkable that there is an absence of any immediate authority by which our decision should be governed, and it is therefore necessary to determine what are the principles of law properly applicable to it. Before doing this it may be well to state shortly what I apprehend to be the effect of the finding of the County Court Judge. In the first place I consider that the Judge has so found the facts as to the planting and growth of the yew trees as to preclude the supposition of mere accident, and that the trees must be taken so to have been planted and grown with the knowledge of the defendants, as to make them responsible for whatever might be the



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direct consequence of the original planting. Secondly, although it is found that the plaintiff saw the horse in the meadow the day before it died, it is also found that he was not aware of the existence of the yew trees, and I think it must be taken that any such negligence on the part of the plaintiff as would disentitle him to recover is negatived. The mere fact that the plaintiff saw the horse in the field would go for nothing and I do not think that he was bound to examine all the boundaries so as to see that no tree likely to be injurious to his horse was projecting over the field he had hired. It ought also to be noticed that the decision in no way depends upon any question of fencing or the correlative rights and duties arising therefrom, and therefore the cases which were cited to us based upon these, afford no assistance.

The question seems to resolve itself into this. Was the act of the defendants in originally planting the tree, or the omission to keep it within their own boundary, a legal wrong against the occupier of the adjoining field which when damage arose from it would give the latter a cause of action? On the part of the defendants it may be said that the planting of a yew tree in or near to a fence, and permitting it to grow in its natural course, is so usual and ordinary that a Court of law ought not to decide that it can be made the subject matter of an action, especially when an adjoining land-owner, over whose property it grew, would, according to the authorities, have the remedy in his own hands by clipping. On the other hand, the plaintiff may fairly urge that what was done was a curtailment of his rights, which, had he known of it, would prevent his using the field for the purpose of which he had hired it, or would impose upon him the unusual burden of tethering or watching his cattle, or of trimming the trees in question, and although the right so to trim may be conceded, this does not dispose of the case, as the watching to see when trimming would be necessary, and the operation of trimming, are burdens which ought not to be cast upon a neighbour by the acts of an adjoining owner. It may also be

said, that if the tree were innocuous it might well be held, from grounds of general convenience, that the occupier of the land projected over, would have no right of action, but should be left to protect himself by clipping. Such projections are innumerable throughout the country and no such action has ever been maintained, but the occupier ought from similar grounds of general convenience to be allowed to turn out his cattle, acting upon the presumption that none but innocuous trees are permitted to project over his land. The principle by which such a case is to be governed is carefully expressed in the judgment of the Exchequer Chamber in *Fletcher v. Rylands* (1), where it is said: "We think that the true rule of law is, that the person who for his own purposes brings on his lands, and collects and keeps there anything likely to do mischief, if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape." This statement of the law was cited and approved of in the judgment of the House of Lords in the same case. In *Fletcher v. Rylands* (1), the act of the defendant complained of, was the collecting in a reservoir a large quantity of water which burst its bounds and flowed into the plaintiff's mine, but though the degree of caution required may vary in each particular case, the principle upon which the duty depends must be the same, and it has been applied under many and varied circumstances of a more ordinary kind, as in *Aldred's Case* (2), where the wrong complained of was the building of a house for hogs so near to the plaintiff's premises as to be a nuisance, the user of a lime kiln and lime pit for tanning or a dye house (2 Rolle, 141), the laying of dung so high as to damage a neighbour, *Tenant v. Goldwin* (3), and others which are cited in *Comyn's Digest*, "Action on the case for nuisance," and in the judgment in *Fletcher v. Rylands* (1), in

(1) 34 Law J. Rep. Exch. 177; s. c. (Ex. Ch.) 35 Law J. Rep. Exch. 154; s. c. (H.L.) 37 Law J. Rep. Exch. 161.

(2) 9 Rep. 57, b.

(3) 1 Salk. 361.

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all which cases the maxim "*Sic utere tuo ut alienum non lædas*" was considered to apply, and those who so interfered with the enjoyment of their neighbours of their premises were held liable. Other cases of a similar kind may be found in the books. Thus in *Tubervil v. Stamp* (4) it was held that an action lay by one whose corn was burnt by the negligent management of a fire upon his neighbour's ground, although one of the Judges did not agree in the decision upon the ground that it was usual for farmers to burn stubble. In *Lambert v. Bessey* (5), the action was in trespass *quare clausum fregit*. The defendant pleaded that he had land adjoining plaintiff's close, and upon it a hedge of thorns; that he cut the thorns and that they *ipso invito* fell upon the plaintiff's land and the defendant took them off as soon as he could. On demurrer judgment was given for the plaintiff on the ground that though a man do a lawful thing, yet if any damage thereby befalls another he shall be answerable if he could have avoided it. This case was alluded to and approved of by Lord Cranworth in his judgment in the House of Lords in *Fletcher v. Rylands* (1), where he says: "The doctrine is founded on good sense. For when one person in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer." It does not appear from the case what evidence was given in the County Court to prove either that the defendants knew that yew trees were poisonous to cattle, or that the fact was common knowledge amongst persons who have to do with cattle. As to the defendant's knowledge, it would be immaterial, as, whether he knew it or not, he must be held responsible for the natural consequences of his own act. It is, however, distinctly found by the Judge that "cattle frequently browse on the leaves and branches of yew trees when within reach, and not unfrequently are poisoned thereby, is generally known," and by this finding, which certainly is in accordance with experience, we are bound.

(4) 1 Salk. 13.

(5) Sir T. Raym. 422.

Several cases were cited during the argument. In two of them, *Lawrence v. Jenkins* (6), and *Firth v. The Bowling Iron Company* (7), the liability of the defendant was based upon his duty to fence. These, therefore, as I have already said, throw no light upon the present question. In *Wilson v. Newberry* (8), which arose upon demurrer to a declaration, the Court merely decided that an averment that clippings from the defendant's yew trees got upon the plaintiff's land was insufficient without shewing that they were placed there by or with the knowledge of the defendant. Mr. Justice Mellor, however, in giving judgment, said, after alluding to *Fletcher v. Rylands* (1): "If a person brings on his own land things which have a tendency to escape and to do mischief, he must take care that they do not get on his neighbour's land." Another case which was cited during the argument was that of *Erskine v. Adeane* (9), in which the Court of Appeal held that a warranty could not be implied by the lessor of land let for agricultural purposes that there were no plants likely to be injurious to cattle such as yew trees growing on the premises demised. This decision obviously rests upon grounds foreign to those by which the present case should be determined. I notice it therefore only that I may not appear to have overlooked it.

In the result I think that the judgment of the County Court was correct and that it should be affirmed with costs.

*Judgment affirmed.*

Solicitors—Allen & Edwards, agents for Bedford, Amersham, for appellants; A. T. Cox, agent for Clarke, High Wycombe, for respondent.

(6) 42 Law J. Rep. Q.B. 147; s. c. Law Rep. 8 Q.B. 274.

(7) 47 Law J. Rep. C.P. 358; s. c. Law Rep. 3 C.P. D. 254.

(8) 41 Law J. Rep. Q.B. 31; s. c. Law Rep. 7 Q.B. 31.

(9) 42 Law J. Rep. Chanc. 395; s. c. Law Rep. 8 Ch. App. 766.

[IN THE QUEEN'S BENCH DIVISION.]

1878. } THE QUEEN *on the prose-*  
 June 21. } *cution of JAMES HOWARD v.*  
 Dec. 20. } *HOLBROOK AND OTHERS.*

*Libel—Criminal Information—Responsibility of Proprietor of Newspaper for Libel inserted without his Authority, Consent or Knowledge—Liability for Act of Editor—6 & 7 Vict. c. 96 (Lord Campbell's Act), sect. 7.*

*On the trial of a criminal information for libel, it was proved that the defendants, proprietors of a newspaper, had appointed an editor to undertake the literary management of the paper, and given him general authority and discretion as to the insertion of articles therein, and that the article in question was inserted by him without their knowledge, and without any specific authority or consent from them. The Judge left to the jury the question whether the general authority to the editor included an authority to publish the libel, and the jury found the defendants guilty. Upon motion for a new trial on the ground of misdirection, and that the verdict was against evidence,—*

*Held, by COCKBURN, L.C.J., and LUSH, J. (dissentiente MELLOR, J.), that, inasmuch as the "authority" mentioned in section 7 of 6 & 7 Vict. c. 96, means authority to publish the libel, and as the general authority to an editor to conduct a newspaper must, in the absence of anything to give it a different character, be taken to mean authority to conduct it according to law, the direction of the Judge was defective in not so explaining the law to the jury as bearing on the question left to them; and that the general authority given to the editor to use his discretion in the insertion of articles was not of itself sufficient to make defendants criminally responsible as being evidence that the publication had been made with their authority, consent or knowledge within section 7 of 6 & 7 Vict. c. 96.*

*This was a rule obtained by the defendants (against whom a verdict of guilty had passed upon the trial of a criminal information for libel before Grove, J., at the Spring Assizes for Hampshire, held at Winchester), calling on the prosecutor to shew cause why a new trial should not*

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*be had on the ground of misdirection, and that the verdict was against evidence.*

*This was the second trial of the information, the first having been before Lindley, J., at the Summer Assizes of 1877, when the learned Judge had directed a verdict of guilty against all the defendants upon the close of the case. That verdict was set aside on the ground of misdirection by the Queen's Bench Division (see 47 Law J. Rep. Q.B. 35), and a new trial ordered.*

*On the second trial the same facts were proved as at the first, and as they are fully reported and set out in the judgments, both in that case and this, it will be unnecessary to repeat them at length. Briefly, they were that the three defendants were proprietors of a newspaper in which the alleged libel appeared in the form of a letter; that they habitually resided at Portsmouth, where the paper was published, and took an active part in its management. That the literary department was entrusted to an editor named Green, and that they had given him general authority to insert what he thought fit in the way of articles and correspondence; that the libel was inserted by Green without the knowledge of any of the defendants, and that one of them was away on account of his health at the time, and that no express authority had been given by any one of them to Green in reference to the libel. Upon this, the contention of the defendants being that the libel was published without their authority, consent or knowledge, and that they were within the protection of section 7 of 6 & 7 Vict. c. 96, the learned Judge left the question of authority to the jury, asking them whether the general authority to Green included an authority to him to publish the libel in question.*

*Arthur Charles and A. L. Smith shewed cause.—In the first place, there was evidence here of authority in the general discretion conferred on Green; and that being so, the question is, were the jury perverse in saying that a particular authority was involved in a general authority? The defendants gave no evi-*

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dence of any limit of authority; and unless the Judge was bound to tell the jury that the general authority proved had nothing to do with the case, there was something to be left to the jury, and the jury might thereupon find that there was authority to publish the libel, or at any rate, that there was a want of due care or caution on the part of the defendants in respect of it—*Cooper v. Slade* (1). The former decision of the Court (2) decided that this was not a matter of law, but was a question for the jury; and the learned Judge following that decision, and holding that the statute prevented there being a conclusive presumption of authority against the proprietor of a paper for everything appearing in it, left it to the jury to say whether in fact there was authority to insert this libel given to Green, who said himself that he had unlimited authority.

*H. T. Cole and Folkard*, in support of the rule.—The learned Judge was wrong in not pointing out the distinction between civil and criminal responsibility. The expression “unlimited” authority does not carry the case any further, because the authority given must be presumed to be to insert anything lawful, and not to authorise a criminal act. The conclusion of the prosecution would render it impossible for any proprietor to escape if a libellous article was, in fact, published in his paper. The statute, however, was directed to establishing the necessity of the existence of a criminal intention in reference to libel, as in the case of other offences. No authority to publish a libel can be presumed—*Poulton v. The London and South Western Railway Company* (3).

[COCKBURN, L.C.J.—The statute recognises the presumption, but requires it to be rebutted.]

This being a criminal matter, it is sufficiently rebutted—only a general authority, which must be taken to be limited to lawful acts, is proved. *Col-*

*bourn v. Patmore* (4) shews what was the state of things which the statute was designed to remedy.

[LUSH, J., referred to *The King v. Gutch* (5). It is difficult to see what the Act has effected, if the prosecutor's contention be right.]

Then, in his summing up, the learned Judge led the jury to think that the responsibility of the proprietors could not be removed by their appointment of an editor, which though true as to civil, is not so as to criminal responsibility. He said: “The defendants take the benefit of his services and must take the *onus* of his acts; they have no business to appoint a man and rely upon his discretion so as to shirk responsibility.” Such expressions amount to misdirection, and give no effect to the statute at all, and they rendered it impossible for the jury to consider the facts of the case in the light of the statute, as they were bound to do, in order to say whether or no the authority was proved.

*Our. adv. vult.*

The following judgments were (on Dec. 20) delivered as follows:—

LUSH, J.—The question presented for our decision on this rule is substantially that which arose upon the former motion for a new trial, and which was argued in November of the last year (2). Upon the first trial it was proved that the literary department of the newspaper in question had been entrusted to an editor, who inserted in it what he thought fit in the way of articles, correspondence, &c.; that of the three defendants, who were proprietors of the paper, each took the management of a particular department of the business other than the literary department; that at the time of publication of the libel, one of them was absent from home on account of ill-health, and that neither of them had given any authority for or consent to the publication complained of, or had any knowledge of the libellous article until his attention was called to it after the paper was in

(1) 6 H.L. Cas. 793; s. c. 27 Law J. Rep. Q.B. 449.

(2) 47 Law J. Rep. Q.B. 35.

(3) 36 Law J. Rep. Q.B. 294; s. c. Law Rep. 2 Q.B. 534.

(4) 1 Cr. M. & R. 73; s. c. 3 Law J. Rep. Exch. 317.

(5) Moo. & M. 433.

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circulation. My brother Lindley, on that occasion, ruled as a matter of law, that as an authority had been given to the editor to edit the paper and to insert what he thought fit without supervision or control, the libel could not be said to have been published without the authority of the defendants within the meaning of the Act 6 & 7 Vict. c. 96. s. 7.

The Lord Chief Justice and myself took a different view of the meaning of that section, and for reasons we then gave, we held that the "authority" mentioned in the 7th section was an authority to publish the libel, and that the general authority given to the editor to use his discretion in admitting or rejecting articles or correspondence was not of itself sufficient, under the circumstances, to make the proprietor criminally responsible.

Upon the second trial the ruling in which is now in question, the evidence of authority was carried no further than on the former occasion, but instead of holding as a matter of law that the 7th section of the Act did not protect the defendants, the learned Judge left the question of authority to the jury, but without such an explanation of the meaning of the section as appeared to the majority of the Court on the previous occasion to be required in order to enable the jury properly to apply it to the facts. Other grounds, such as want of due care and caution, the omission to stop the sale of papers outstanding in the hands of retail sellers, when the attention of the two defendants, who were in Portsmouth, was called to the objectionable article, and the inadvertent sale in the shop afterwards of another copy of the paper, were also put forward, but the jury must have found their verdict on the question of authority, inasmuch as they implicated the absent defendant, against whom these, which I may call minor matters of complaint, were not and could not have been made.

As my brother Mellor, after a second argument, retains the opinion which he expressed before, and as my brother Grove, as I infer from his summing up, rather inclines to the same opinion, I have carefully reviewed the authorities and the argument, and after the best

consideration which I can give to the case, I am constrained to hold that the construction of the Act which the Lord Chief Justice and myself adopted on the former occasion is the true construction. It must be admitted that the 7th section, upon which the question turns, is not so precise and clear as it might have been. In order to ascertain the intention of the Legislature, we must have recourse to the well-known rule of construction laid down by Coke, C.J., in *Heydon's Case* (6): "For the sure and true construction of all statutes in general," he says "(be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered: 1st. What was the common law before the making of the Act; 2nd. What was the mischief and defect for which the common law did not provide; 3rd. What remedy the Parliament hath resolved and appointed; 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief and advance the remedy."

Pursuing this line of reasoning, the first question is, what was the law as regards the criminal liability of the proprietor of a newspaper for libel? Libel on an individual is, and has always been, regarded as both a civil injury and a criminal offence. The person libelled may pursue his remedy for damages or prefer an indictment, or by leave of the Court a criminal information, or he may both sue for damages and indict. It is ranked amongst criminal offences because of its supposed tendency to arouse angry passion, provoke revenge, and thus endanger the public peace, but the libeller is not the less bound to make compensation for the pecuniary or other loss or injury which the libel might have occasioned to the person libelled. In this respect libel stands on the same footing as an assault or any other injury to the person. But the publication of a libel, when prosecuted as a criminal offence, was treated upon an exceptional principle, and with exceptional severity. The maxim "*respondet superior*," which

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(with rare exceptions founded on reasons not applicable to libel, and which I will presently notice) pertains to civil liability only, was applied to an indictment for libel, and the proprietor of a newspaper in which a libellous article had been inserted was held to be criminally as well as civilly responsible for it, though he had never authorized it, or had anything to do with its insertion, and whether the editor had inserted it by negligence or wilfully. It was not so in other cases of personal injury. If a coachman accustomed to drive were, while engaged on his master's business, by carelessness or furious driving, to cause the death of another, the master would be liable to an action for damages, but not to a criminal prosecution. The offending servant alone could be charged with the manslaughter. And if the coachman were to be found guilty of such an offence while using his master's carriage without his permission and upon his own business, or if while doing his master's work he were wantonly to assault another, the master would not be liable even to an action for damages. Subject to the exceptions already referred to, the criminal law makes no one punishable for an offence but the person who either committed it or incited and procured the other to commit it, or who aided in its commission. I need only select two cases from the books to shew what the criminal law of libel was. The one is *The King v. Walter* (7). A criminal information had been filed against the proprietor of the *Times* for a libel on a lady. The defendant pleaded not guilty, and proved at the trial that, although he was the proprietor of the paper, he had nothing to do with the conducting of it, that he resided entirely in the country, and that his son was concerned in the conducting of the paper without any interference on his part. Mr. Erskine, his counsel, contended upon this evidence that, though his client might be liable in a civil suit for all acts of his agent, it was otherwise when he had to answer criminally; that though the proving him to be the proprietor of the paper might *prima facie*

subject him criminally, it was otherwise when it was clearly shewn that the fact of the publication was not his, nor done with his privy; that "*actus non facit reum, nisi mens sit rea*," so that, if the act of publication which constituted the crime was proved to be that of another, the jury would be bound to acquit the defendant. Lord Kenyon said he was "clearly of opinion that the proprietor of a newspaper was answerable criminally for the acts of his servants or agents for misconduct in the conducting of the paper, that this was not his opinion only, but that of Lord Hale, Justice Powell, and Justice Foster, all high law authorities, and to which he subscribed. This was the old and received law for above a century, and was not to be broken in upon by any new doctrine upon libel." This occurred in 1808. I have cited the case in full from the report because of its exact analogy in all material circumstances to the present case. The other case is that of *Colbourn v. Patmore* (tried in 1834) (4). A criminal information had been filed against Mr. Colbourn as the proprietor of the *Court Journal*, for a libel on a lady. He pleaded guilty, and was sentenced to pay a fine of 100*l.* and to be imprisoned till the fine was paid. He paid the 100*l.*, and then brought an action against his editor for breach of duty in inserting the libellous paragraph, alleging that it was done without his authority or knowledge, and in violation of the contract between them. This allegation was fully proved, and a verdict was given for the plaintiff for a sum by way of damages, which included the 100*l.* penalty. A motion was then made to arrest the judgment, on the ground that the plaintiff was in contemplation of law a party to the offence, and one wrongdoer cannot have, in a court of law, contribution or redress against another who was his accomplice. The judgment was ultimately arrested, because of a defect in the pleadings, it not being alleged that the plaintiff did not sanction the circulation of the journal after he knew of the libel, and so become actual "publisher" of the libel. But the case is important for the unanimity which evidently prevailed both on the bench and between

(7) 3 Esp. 21.

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the counsel on both sides as to the state of the law. The late Mr. Justice Maule was counsel for the defendant, the editor, and it never occurred to his astute and well-informed mind to suggest that Mr. Colbourn brought the mischief upon himself by pleading guilty, and that he might have defended himself by proving the real facts. This would have been an obvious ground of defence for his client. On the contrary, he admits in his argument, "the law has made the proprietor of a newspaper criminally answerable for the publication of a libel in its columns, whether the libel was inserted with or without his knowledge," and his only argument was, that though the plaintiff was actually innocent, the two parties were in the eye of the law equally guilty. Sir William Follett, on the part of Mr. Colbourn, contended that as his client was in fact innocent, the rule of law which prohibited a claim for redress by one wrong-doer against another ought not to be held applicable. Baron Alderson remarked, in the course of the argument, "Is it not more correct to say that the plaintiff was actually ignorant but legally cognizant?" He afterwards remarks, "A master is presumed to authorize the insertion of a libel; in other cases he is not presumed to authorize the wilful act of his servant, either in civil or criminal proceedings. Does not the proprietor of a newspaper give authority to the editor to publish everything libellous or not?"

This, then, was the state of the law before the Act was passed. The proprietor of a newspaper which contained a personal libel was treated as a criminal, though he had not himself committed the criminal act, or procured or incited another to commit it, nor aided in its commission, nor knew that it was about to be committed. I think it cannot be doubted from the tenour of the Act itself, apart from its historical origin, that the intention of the legislature was, amongst other things, to mitigate the rigour of the common law in this particular, and to place the proprietor of a newspaper in the same position as any other employer whose servant had in the course of his employment committed an offence against,

and to the injury of, a third person. The Act is entitled, "An Act to amend the Law of Libel," and its declared objects are—1st, the better protection of private character; 2ndly, the more effectually securing the liberty of the press; and, 3rdly, the better preventing abuses in exercising the said liberty."

The second object forms the subject of several sections, and by them the defendant in an action for libel is allowed to give in evidence in mitigation of damages, under certain conditions, an apology, and to pay money into court; and the defendant in an indictment or information, is permitted to plead the truth as a justification, provided he shews that the publication was for the public benefit, and to be entitled to costs upon a verdict of not guilty. Between these latter provisions comes the 7th section, the true meaning of which is the question now before us. The words are, "whosoever upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent or knowledge, and that the said publication did not arise from want of due care and caution on his part." Although the section is wanting in precision, it seems clear that the word "publication," wherever it occurs in the section, points to the libel and not to the newspaper. The section says nothing about newspapers; it applies to any printed or written slander, whether contained in a newspaper, book, pamphlet, handbill or letter. What it deals with is the libel and nothing more. Again, the clause does not say what is to be the effect of proving the negative, but there can be as little doubt that it means it to be an entire defence, entitling the defendant to a verdict and not merely to a mitigation of punishment. The effect of it read by the light of previous decisions, and read so as to make it remedial, must be that an authority from the proprietor of a news-

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paper to the editor to publish what is libellous, is no longer to be, as it formerly was, a presumption of law, but a question of fact. Before the Act the only question of fact was whether the defendant authorized the publication of the paper; now it is whether he authorized the publication of the libel. It is true that the production of the paper which contains the libel, coupled with proof that the defendant is the proprietor, is *prima facie* evidence that he caused the publication of the libel, and the *onus* is on him to prove the negative. But when he has proved that the literary department was intrusted entirely to an editor, the question what was the extent of the authority which that employment involved, is to be tried upon the principle which is applicable to all other questions of authority. And I think the jury ought to be told in this as in every other case, that criminal intention is not to be presumed but is to be proved, and that in the absence of any evidence to the contrary, a person who employs another to do a lawful act is to be taken to authorize him to do it in a lawful and not in an unlawful manner. This is the doctrine which is applied to other cases of wrongs done by servants, when it is sought to fix with criminal liability the employer, and the statute intended to place libel upon the same footing in this respect as other torts. Otherwise the statute has afforded no remedy for an admitted anomaly, and the case of *The King v. Walter* (7), if it occurred tomorrow, must be decided as it was decided in 1808. Although the employer is liable civilly for such a wrong, this is not upon the presumption of authority but by virtue of the maxim "*respondeat superior*," which on grounds of policy and general convenience puts the master in the same position as if he had done the wrong himself, a maxim which, as I before observed, pertains to civil and not, except in rare instances, to criminal liability. I am far from saying that the mere appointment of an editor without supervision or control may not, in some cases, involve an authority to publish libels. If the paper was a calumnious paper, its general character would nega-

tive the ordinary presumption of innocent intention and fairly lead to the inference that the proprietor authorized the insertion of slanderous articles. But that cannot be said of a respectable paper as the one in question is admitted to be.

The exceptional class of cases to which I have referred are public nuisances. In these cases the wrong is done to the public and not to any particular individual, and in that case no one can sue for damages unless he happens to have sustained some exceptional injury. Of such a class the case of *The Queen v. Stephens* (8) is an illustration. The workmen of the owner of a quarry had stacked the refuse of the quarry by the side of a navigable river in such a manner that it fell into the stream and obstructed the navigation, and although the owner proved that he lived at a distance, and did not know what was being done, and although he had given directions to the contrary, he was held criminally liable for the nuisance. Here the wrong was common to all the public, and the remedy by indictment was the only remedy. This was the ground of the decision. Libel, as I have already observed, does not belong to this class but to the ordinary class of offences against the person. I am therefore of opinion that the direction to the jury was imperfect and the verdict wrong, and consequently that the verdict ought to be set aside.

MELLOR, J.—The question for consideration in this case arose upon the trial before Mr. Justice Grove of a criminal information against the defendants, who are the proprietors and publishers of the *Portsmouth Times and National Gazette*, for a libel on a Mr. Howard, contained in that newspaper. On the trial the verdict passed against all the defendants, who were all found guilty of the offence. There had been a former trial of the case, in which the Judge had directed a verdict to be entered against all the defendants, on the ground that they did not, upon the evidence then given, come within the true intent and meaning of the 7th section of the 6 & 7 Vict. c. 96.

(8) 35 Law J. Rep. Q.B. 251; s. c. Law Rep. 1 Q.B. 702.



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A rule for a new trial was thereupon obtained by Mr. Cole, and afterwards made absolute, on the ground that the Judge ought not to have withdrawn the question from the jury, but should have left it to them upon that evidence with a suitable direction.

The only respect in which my present judgment differs from that which I gave on the former trial is, that I think that I was wrong in holding that the Judge was right in withdrawing the evidence from the consideration of the jury and deciding upon it himself. On the last trial Mr. Justice Grove left the question to the jury, with a careful and elaborate summing-up, and they thereupon found a verdict of guilty against all the defendants.

Upon the hearing of the present rule Mr. Cole, for the defendants, made several objections to the verdict, namely, on the ground that it was against the weight of the evidence, and on the ground of misdirection by the Judge.

On the argument against that rule the only substantial question turned upon the construction of the statute 6 & 7 Vict. c. 96, entitled, "An Act to amend the Law respecting Defamatory Words and Libel." The recital to the 1st section shows the object of the Act to have been "*for the better protection of private character and for more effectually securing the liberty of the Press, and for better preventing abuses in exercising the said liberty.*"

The section upon which the matter more particularly depends is the 7th, which enacts "that whosoever upon the trial of an indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his *authority, consent or knowledge*, and that the said publication did not arise from *want of due care and caution* on his part." I regret that there exists a difference of opinion amongst the Judges who heard the argument as to the true construction of this statute.

I have read the very able arguments of my Lord Chief Justice and my brother Lush with care, and regret that I am not able to come to the same conclusion with them.

I admit the force of their reasoning, but it does not satisfy all the difficulties in the construction which press upon my mind.

I am of opinion, therefore, that the rule should be discharged, and that the verdict should stand.

The several defendants were joint proprietors of the newspaper in question, and each contributed his assistance in various departments to the management and publication of the same, but neither of them took part in the editorial management of it, but that department was by the defendants devolved upon a manager named Green, who it appeared on the evidence had procured the article in question to be written, and had caused it to be inserted in the newspaper.

The defendants were not any of them aware of the insertion of the offensive article in the newspaper until after the publication thereof, when their attention was called to it. I do not stop to refer to the subsequent sale of a single paper, or to the steps taken on the part of the defendants to stop the further circulation of the newspaper, when they became aware of the libel. I consider that the evidence of Mr. Green, the manager appointed by the defendants, raises the real question in the case, and it is upon that evidence that I base my opinion. Mr. Green being called as a witness on the part of the defendants, said that they, the defendants, "leave it entirely to my discretion what I shall put in the paper; they appointed me with general authority to conduct the paper; they have never taken notice of my articles one way or the other; they have never found fault with the articles." It is difficult to conceive of an authority more complete or unfettered, and it appears to me that by so constituting Mr. Green the editor with such authority, the defendants must be taken to have authorised the insertion of every matter appearing in the newspaper in question. The recital in the statute defines one main object of it to have been

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"the better protection of private character" as well as the "more effectually securing the liberty of the press," which I concede to be a perfectly reasonable object. The words are, "whenever upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a *presumptive* case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent or knowledge." Now, I think that these words may well be satisfied by permitting the defendant to negative, in point of fact, the *presumption* which before arbitrarily prevailed, and could not be controverted on the trial by giving in evidence the real facts. For instance, as proprietors they might have expressly forbidden the insertion of some specific libel in the paper, and have ordered it to be destroyed; nevertheless, by accident, or by design or misunderstanding, it might have got into the newspaper against their order, and without their consent. Again, they may have expressly forbidden the editor to insert any article of a defamatory character without their express authority, but the editor may nevertheless have inserted it in the newspaper without their knowledge. Other circumstances may be imagined in which libels may have been inserted in the newspaper, and for which, but for this section, they would have been liable as upon an actual authority. But so to apply it to a case like the present, where the fullest authority to conduct the paper was given, and to insert any articles at the discretion of the editor without any restriction as to their character and nature, seems strangely at variance with the recited object of the statute, namely, "for the better preventing abuses in the exercise of such liberty;" but it was contended that the statute did protect proprietors of newspapers in all cases in which they had not specially known of or authorised the insertion of the specific libel. I fear that if such a construction of this section should prevail, the other objects recited in the statute, namely, "the better protection of private character

and preventing abuses in exercising the said liberty of the press," would be utterly lost sight of, and it would become, more properly speaking, a statute for the greater protection of newspaper proprietors, and for the more effectual encouragement of the sale of newspapers containing libellous articles. Another main consideration which influences my opinion is the increased difficulty which it introduces and imposes upon a party seeking redress in the case of a scandalous libel in which the obtaining of damages can afford no adequate satisfaction. It is true that the cases of *The King v. Walter* (7), and of *Colbourn v. Patmore* (4), which establish the criminal liability of a newspaper proprietor for the acts of his servants, were supposed to have inflicted a great hardship upon the defendant, and that these cases were doubtless in the mind of the framer of the statute in question, yet it by no means follows that he contemplated the giving of an entire immunity from liability on the part of newspaper proprietors, and it appears to me from the recitals in the statute, and the nature of its provisions, that it was not intended absolutely to reverse the rule laid down by Lord Kenyon in *The King v. Walter* (7).

I cannot help thinking that clearer and simpler language and different recitals would have been adopted had such been the case. It is argued, however, that unless such be the meaning of the section, it will be entirely nugatory. I cannot bring myself to that view of the statute; but, as I have already said, I think that many cases may be suggested in which the objects of the statute may be satisfied without so construing the words used. Should, however, such construction prevail, it will throw the greatest obstacles in the way of a prosecutor desiring to proceed criminally for a libel. Take the case of an indictment or information for a serious and scandalous libel, how is the person defamed to proceed to punish the libeller? If he attacks the proprietor, as the person who profits by the libel, and therefore apparently the right person to proceed against, he may be met by evidence on the trial that such proprietor had nothing to do with the actual manage-

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ment of the newspaper, but merely provided the capital necessary for its establishment, and his only interference was the receiving of the profits arising from the sale. How is the prosecutor to find out the actual libeller, whether proprietor, editor or correspondent? and how is he to prove his identity? Surely, if the wide construction contended for had been intended by the framer of the Act, provision would have been made for the registering of the name of the editor or author who was responsible for the libel, and for enabling the prosecutor to discover who he was. Even then it might be that the editor was a man of straw, without the means of satisfying any fine or the costs of any prosecution which on conviction might be imposed upon him; he might be a person alike destitute of character and principle, hired only for his skill in defamation and his capacity to create a wretched craving to read the scandalous and libellous contents of the paper which he was hired to conduct. This is a consideration which much influences my opinion, seeing that no means are provided in a criminal case by discovery, by interrogatories or otherwise, for ascertaining the real author or contributor. In fact, the result must be, that however scandalous the libel, the person defamed can have no real redress criminally against the actual libeller, as he, being upon the hypothesis a man of straw, can pay neither fine nor costs.

It may, however, be asked—What is then the provision “for more effectually securing the liberty of the press,” if the meaning of the section be limited as suggested by me? I find a ready answer in the provisions of the 2nd and 6th sections, which enable a person charged criminally with libel to plead that the substance of the libel is true, and in case of an action that it was inserted without malice, and that before action he had tendered an apology; which provisions form a most material alteration in the law heretofore in force with regard to the law of libel. On the trial of the present information no doubt could be suggested that a presumptive case of publication by authority of the defendants had been established; and the only question which

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then remained was whether the evidence given on behalf of the defendants negated the presumption, and shewed that the libel in question had been published without their authority, consent or knowledge, and that the said publication did not arise from want of due care or caution on their part.

I am of opinion that the evidence given on the part of the defendants wholly failed to establish such a defence under the statute, but on the contrary warranted the jury in finding them guilty on both divisions of the proposition which were essential to their defence. An unlimited discretion and authority had been in fact conferred on Mr. Green, the editor, to insert articles of whatever nature and character he might deem expedient to insert, and their consent was involved in the same authority; and therefore, unless it can be successfully contended that the authority, consent or knowledge mentioned in the exempting clause of the section requires the prosecutor to prove that the particular specific libel must have been actually authorised, known of and approved in each case, I cannot but think that the evidence sufficed to warrant the conclusion at which the jury arrived. It is true, as was observed during the arguments, that as a general rule an authority to an agent to conduct a commercial business does not extend to enable such agent by implication to make his principal liable for a crime committed by such agent. Now this may be true as a general proposition where a crime is committed by such an agent, beyond the scope of his authority, without the consent of his principal; but it has no application to a business or commercial speculation of this description, where, in the very nature of things, it is essential to the prosperity of the paper that articles of a very various character and description should be inserted. Indeed, the cases of *The King v. Walter* (7) and *Colbourn v. Patmore* (4), shew that this must be so, as those cases proceeded upon the principle that in such a case the liability of the proprietor and superior resulted from the act of the servant. In fact, Mr. Green, in the management of the editorial department, was the *alter ego* of each of the defendants, and

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was in fact authorised to insert in every issue of the newspaper whatever matter he considered suitable, and likely to increase its circulation, and the insertion of the libel in question in the newspaper was clearly within the scope of his authority.

As I cannot believe that the object of the statute was to require prosecutors in such cases to prove actual authority or consent to the specific libel, I cannot do other than express my opinion that the jury were justified in finding the defendants guilty.

I am further of opinion, although it is not necessary in order to discharge this rule to decide it, that there was a question upon the evidence fit for the consideration of the jury, whether the publication in question arose from want of due care or caution on the part of the defendants; and I think that the jury might well think that the defendants failed to shew that it did not so arise. It appears to me that for proprietors of a newspaper to devolve upon an editor the entire control and unfettered discretion as to what articles he shall insert, without requiring him to abstain from the insertion of all defamatory matter, or without making some provision for supervision by the defendants, who are the parties interested in the speculation, does exhibit a want of due care or caution on their part. The object of an editor is generally to make the paper sell, and to become a profitable speculation to his employers; and unhappily the insertion of sensational or defamatory articles has too often a great tendency to bring about so profitable a result. I think, therefore, there was evidence that the defendants did not use due care and caution in intrusting Mr. Green with unfettered authority in the management of the editorial department of their newspaper; and I am of opinion, therefore, that on all grounds the rule should be discharged.

COCKBURN, L.C.J.—The question in this case is one of considerable importance as regards the law of libel, inasmuch as it involves the construction which is to be put on the 7th section of the 6 & 7 Vict.

c. 96, an enactment passed to relieve the proprietors of public journals from the heavy responsibility, so far as the criminal law was concerned, which rested on them before in respect of libellous matter published in such journals without their authority, knowledge or consent. The state of the law which this enactment was intended to remedy was, in my opinion, inconsistent with the first and common principles of justice, and one which was discreditable to the legislation of this country.

It had been laid down authoritatively, at a time when perhaps less liberal views as to the liberty of the press prevailed, that the proprietor of a public journal, though absent, and wholly ignorant of matter inserted in the journal by his editor, was nevertheless responsible, not only civilly, but also criminally, if the matter so inserted were libellous, in direct contravention, I cannot but think, of the fundamental principle that to constitute guilt there must be a *mens rea*, an intention to violate the law.

It was to remedy this state of the law that the statutory enactment 6 & 7 Vict. c. 96 was passed, with which we have here to deal. It provides that "when evidence shall have been given which shall establish a presumptive case of publication against the defendant, by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent or knowledge, and that the said publication did not arise from want of due care and caution on his part." The question is as to what will satisfy the exigency of the terms by which immunity is thus given to the proprietor on the condition of his shewing that he has not given authority for the publication of the libel. In the first place, would it be enough for the defendant to shew that he had not specifically authorised the insertion of the article or matter complained of, if it should appear that he has given authority to insert matter whether libellous or innocent, at the discretion of the editor? I answer unhesitatingly in the negative. But it appears to me equally untenable to say that, because the proprietor intrusts

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the conduct of a public journal to the plenary discretion of an editor, he thereby gives authority to the editor to commit a breach of the law by the insertion of libellous matter. In the first place, let me ask if the principal in appointing and giving authority to his editor were expressly to prohibit the insertion of any libellous matter in the paper, would not, so far as the question of authority is concerned, such express prohibition be sufficient to satisfy the statute? I think the answer must be in the affirmative; for what, unless he himself superintends the insertion of every article, in which case the statute would be useless, can the proprietor do more? But surely the prohibition not to violate the law is impliedly involved in every service in which an agent is employed and in which the law may possibly be broken by such agent. Take the case of an agent employed to buy goods on which a duty is payable, and who, to benefit his employer, buys smuggled goods unknown to the employer. The agent would be criminally liable; the employer would not. As it seems to me, the proprietor of a public journal, who gives general authority to the editor he employs, is entitled to assume that the editor, knowing the law as well as himself, will take care, for his own sake, as well as for that of his employer, to keep within the law, by inserting nothing which would bring himself within the reach of the law, both criminally and civilly, and make his principal liable in damages which he again would be liable to make good. I am at a loss to see to what cases the statutory provision in question would be applicable if not to this. It is notorious that in many, perhaps in the majority of instances, public journals are carried on for the benefit of proprietors, who find the necessary capital, by editors employed by them, and to whom the conduct of the paper is committed without any immediate control or interference of the principal. In my opinion it was intended to exempt principals so circumstanced, if able to satisfy a jury that they had not authorised, directly or indirectly, the insertion of libellous matters, from being held criminally liable. It is to be observed that in

both the striking cases referred to by my brother Lush, those of *The King v. Walter* (7) and *Colbourn v. Patmore* (4), as also in the case of *The King v. Gutch* (5), the conduct of the journal had been left by the proprietor, as in this case, to the management of an editor, while the proprietor, absent at a distance, had been ignorant of the fact of the libellous matter having been published. It was to meet such cases, I cannot doubt, that this section of Lord Campbell's Act was directed. It was a remedial Act, and one which, as bringing the law into harmony with general principles, should receive a liberal interpretation. I think we should be defeating what was intended to be its operation if we were to hold that a general authority given to an editor to manage the conduct of a public journal involved an authority to publish libellous matter, and that a proprietor giving such authority still remained criminally liable for a libel, without specific authority, express or implied, for publishing such libel, or any consent thereto or knowledge thereof on his part. It is true that the terms in which the authority was given to the editor in the present case, at first sight, seem large. According to the evidence of the editor, the defendants "left it entirely to his discretion what he should put into the paper. They gave him general authority to conduct the paper; they never took notice of his articles one way or the other." But what is this beyond what is implied in the general authority given to an editor by every proprietor? What is this more than *in extenso* what would be implied in a general authority to conduct the paper? In my opinion it would be to put much too strained and unwarranted a construction on such authority to treat it as giving a license to the editor to publish libels in a paper he was employed to conduct. I have no hesitation in saying that, where a general authority is given to an editor to publish libellous matter at his discretion, it will avail a proprietor nothing to shew that he had not authorised the publication of the libel complained of. It is equally clear that though in the authority originally given

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to the editor no license to publish libelous matter may have been contained, still such an authority may be inferred from the conduct of the parties, as, for instance, from the fact that other libels have been published in the paper, which have come to the knowledge of the proprietor and without his remonstrance or interference, or the removal of the editor, from which the assent of the proprietor might well be inferred. I therefore do not feel the apprehension which has been expressed of the mischief which would result from the impunity which newspaper proprietors would derive from holding them free from criminal responsibility when they employ an editor with general authority to conduct the paper. The impunity would quickly cease if they suffered the paper to become the vehicle of calumny. There are journals as to which no jury would hesitate to say that the editors were authorised by the proprietors to invent or give currency to libel.

Protection is further afforded to individuals and the public by the immunity afforded by the statute being conditioned on the exercise of due care and caution on the part of the proprietor. Many circumstances might be held by a jury to amount to the absence of the care and caution thus required. The employment of an incompetent or untrustworthy editor, or one who had before been proceeded against for libel; total omission ever to look at the paper to see in what manner it was conducted, or, as in this very case, the omission, though taking part in the publication of the paper, to insist on having articles of a doubtful tendency submitted for approval, might be deemed by a jury sufficient to disentitle a proprietor to the protection of the statute. It must always be borne in mind also that it is only on the penal responsibility of the proprietor that a limit is thus placed. His liability to damages in a civil action remains as before. No hardship is therefore imposed on the individual prosecutor, who, in the eye of the law, prosecuted not on his own behalf, but on that of the public, and who may still hold the proprietor liable in damages, and if he pleases prosecute the editor as the publisher of the libel.

This being the view I take of the statute, it seems to me that the direction of the learned Judge at the late trial was defective in not explaining to the jury that a general authority to an editor to conduct the business of a newspaper, in the absence of anything to give it a different character, must be taken to mean an authority to conduct it according to law. I agree that as regards two of the three defendants, there may have been evidence to go to the jury of knowledge and consent on their parts; as it appears that they became aware of the article in question before the sale of the paper had come to an end, and took no steps to stop the issue of the remaining numbers of the paper, and therefore might be held to have known of and consented to the publication of the libel in such later papers. The jury might also possibly have held that as regards the two defendants who were on the spot, and who might therefore have looked at the articles before the paper was published, there was a want of due care and caution, as required by the statute. But I agree with my brother Lush that the verdict must have proceeded on the ground of authority, as the jury have included in their finding the third partner, who was absent at a distance on account of illness, and to whom none of the other circumstances can at all apply, and as to whom, taking the view of the case which I do on the subject of authority, I think there was no case to go to the jury.

I concur with my brother Lush, therefore, in holding that the rule for a new trial must be made absolute.

*Rule absolute.*

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Solicitors—Gregory, Rowcliffes & Co., for prosecution; Ford & Ford, agents for Feltham, Portsea, for defendants.

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*Batcock v. Lawson* 48 L.J. 525.

[IN THE QUEEN'S BENCH DIVISION.]

1878.

Nov. 7.

Dec. 20.

MOYCE v. NEWINGTON.

*Sale of Goods—Passing of Property—Purchase effected by False Pretences—Conviction—Bona fide Purchase from Fraudulent Party before Conviction—24 & 25 Vict. c. 96. s. 100.*

The plaintiff had bought of one *Wale*, by a bona fide transaction, not in market overt, a flock of forty-nine sheep. It turned out that the sheep had been obtained from the defendant by *Wale* by false pretences, and that of this offence *Wale* was convicted. Subsequently to the conviction, the defendant went to the plaintiff's premises and re-took possession of the sheep. No order for restitution had been made. The plaintiff now sought, in an action for converting them, to recover the value of the sheep:—

Held, that the plaintiff was entitled to judgment. That the provisions of the 24 & 25 Vict. c. 96. s. 100, apply only to cases in which possession has been obtained without the property passing. That there was no property in the defendant at the time of *Wale's* conviction, as it had been parted with by a contract which, though voidable, could not be avoided after the property had been sold to a bona fide purchaser for value, so as to entitle the defendant to take it out of the possession of such purchaser.

This was a motion for judgment in an action to recover damages for the conversion of a flock of forty-nine sheep, tried before the Lord Chief Justice at the last assizes for the county of Kent. At the trial judgment had not been entered for either party.

[The facts are stated in the judgment.]

*Willoughby* and *Shiress Will* now moved that judgment should be entered for the plaintiff.—It is admitted that the sheep were not purchased in market overt. It is also admitted that *Wale* was convicted of obtaining the sheep by false pretences, but the test applicable to this case is, "whether the owner intended to transfer both the property in and the possession of the goods to the party guilty of the

fraud, or to deliver nothing more than the bare possession."—*Benjamin on Sales*, p. 342. The question is, what was in the mind of the defendant when he parted with the sheep? There was fraud, but that only gives the defendant the right to rescind the contract—*Stevenson v. Newham* (1), *White v. Garden* (2), *Parker v. Patrick* (3), *Powell v. Hoyland* (4).

[COCKBURN, L.C.J.—There is more than fraud here, there is crime.]

But here the contract was not rescinded; therefore, when the sheep were transferred to an innocent third person for a valuable consideration, the rights of the original vendor will be subordinate to those of the innocent third person—*Horwood v. Smith* (5). In *Load v. Green* (6), there was no innocent transferee, but the principle was acted upon in *Kingsford v. Merry* (7). The effect of these decisions has not been altered by the statute 24 & 25 Vict. c. 96. s. 100 (8). That statute merely provides a summary mode for disposing of property actually in the hands of the police. It cannot be contended that it does more, it cannot be said that it re-vests property in the defendant, of which, according to the argument of the other side, he has

(1) 13 Com. B. Rep. 285; s. c. 22 Law J. Rep. C.P. 110.

(2) 10 Com. B. Rep. 919; s. c. 20 Law J. Rep. C.P. 166.

(3) 5 Term Rep. 175.

(4) 6 Exch. Rep. 67; s. c. 20 Law J. Rep. Exch. 82.

(5) 2 Term Rep. 750.

(6) 15 Mee. & W. 216; s. c. 15 Law J. Rep. Exch. 113.

(7) 1 Hurl. & N. 503; s. c. 25 Law J. Rep. Exch. 166.

(8) By 24 & 25 Vict. c. 96. s. 100, it is enacted that, "If any person guilty of any such felony or misdemeanour as is mentioned in this Act, in stealing, taking, obtaining, extorting, embezzling, converting or disposing of any chattel, money, valuable security or other property whatsoever, shall be indicted for such offence, by, or on behalf of the owner of the property, and convicted thereof; in such case the property shall be restored to the owner or his representative; and in every case in this section aforesaid, the Court before whom any person shall be tried for any such felony or misdemeanour shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner."

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never been divested. That statute applies only to those cases in which there has been originally no contract whatever—*Lindsay v. Oundy* (9), but the rights of an innocent third party are not affected thereby.

*Grantham and Arbuthnot*, for the defendant.—*Lindsay v. Oundy* (9) is distinguishable from this case. The parties were in an entirely different position there, and the main question was, whether section 1 of 24 & 25 Vict. c. 96, ought or ought not to be incorporated with section 100. The true construction of this Act is, that upon the conviction of the criminal, even though no writ or order has been made, the property re-vests in the original owner; on the conviction there is a relation back to the time at which the fraud was committed—*Scattergood v. Sylvester* (10), *Nickling v. Heaps* (11). In *Peer v. Humphrey* (12), doubt is thrown on *Parker v. Patrick* (3). The object of 7 & 8 Geo. 4. c. 29 and 24 & 25 Vict. c. 96 is to extend the statute of 21 Henry 8. c. 11, to cases of misdemeanour as well as felony, and to prevent not only the recovery of the property fraudulently obtained, but also of the proceeds of the property. The property in the sheep in question here must be treated as never out of the defendant, and the case is not affected by plaintiff's purchase, however innocent, since it was not in market overt—*Hollins v. Fowler* (13).

*Cur. adv. vult.*

The judgment of the Court (14) was (on Dec. 20) delivered by

COCKBURN, L.C.J.—This was a case tried before me at the last assizes for the county of Kent, and in which the action had been brought by the plaintiff to recover a lot of forty-nine sheep under the

following circumstances:—On the 30th of October, 1877, the plaintiff, who is a butcher, and who is in the habit of attending cattle and sheep markets, being at Maidstone market, bought of a man named *Wale*, through a salesman of the market, this flock of forty-nine sheep. The purchase was made in the open market, the price was a fair one, and was paid. The transaction was a regular one, and no blame attached to the plaintiff in respect of it. It turned out, however, that the sheep had been obtained from the defendant, who is a farmer, by *Wale*, under colour of a purchase, but in reality by false pretences. Professing to buy the sheep at the price of 48s. a head, *Wale* gave in payment a cheque on a bank at which he had no funds and kept no account. The cheque was of course dishonoured. A warrant was taken out against *Wale* by the defendant on the 25th of October, and he was afterwards convicted of having obtained the sheep by false pretences, and it must be taken for the present purpose that they were so obtained.

It is to be observed that though the sale from *Wale* to the plaintiff took place in open market, it was admitted before us that the market having been recently established by the corporation of Maidstone under a local Act, was not one in respect of which the protection arising from a sale in market overt would attach. The sheep were taken to the plaintiff's premises at *Seale*, which is some distance from Maidstone, and arrived there on the 31st, the ensuing day. On the 7th of November the defendant, having in the meantime set the police to work, and having learned what had become of the sheep, went with a police-officer to the plaintiff's premises, and there took possession of the sheep, which were afterwards removed to his own farm. On the 7th of November *Wale* was convicted of obtaining the sheep by false pretences. The sheep being already in the defendant's possession no order of restitution was asked for. The question, under the circumstances, is which of the two, the plaintiff or the defendant, is entitled to the sheep.

Although, if the matter rested on ab-

(9) 45 Law J. Rep. Q.B. 381; s. c. 46 Law J. Rep. Q.B. 233; s. c. Law Rep. 1 Q.B. D. 348; s. c. Law Rep. 2 Q.B. D. 96.

(10) 15 Q.B. Rep. 506; s. c. 19 Law J. Rep. Q.B. 447.

(11) 21 Law Times 754.

(12) 2 Ad. & E. 495; s. c. 4 Law J. Rep. K.B. 100.

(13) 44 Law J. Rep. Q.B. 169; s. c. Law Rep. 7 Eng. App. 757.

(14) Cockburn, L.C.J.; Mellor, J.; and Field, J.



*Moyes v. Newington, Q.B.*

abstract principle it might be open to be contended that inasmuch as, to make a valid contract, both parties must intend to be bound by it, consequently, when in an apparent contract of sale the buyer intends to get the goods, but not to pay for them, but to defraud the seller, the contract fails to take effect, and though the seller intended the property to pass, yet that, the contract failing to take effect, the property still remains unaltered, yet the question is now so concluded by authority as to be no longer open to discussion. We must now take it to be settled—it is unnecessary to go through the cases, which are set out in Mr. Benjamin's work—that though a seller is induced to sell by the fraud of the buyer, and though it is competent to the seller by reason of such fraud to avoid the contract, yet, till he does some act to avoid it, the property remains in the buyer, and that, if he in the meantime has parted with the thing sold to an innocent purchaser, the title of the latter cannot be defeated by the original seller. The reasoning on which this conclusion is based may not appear altogether consistent with principle and agreeing in the result we should prefer to adopt the view of the American Courts, as stated in the case of *Root v. French* (15), a case decided in the Supreme Court of Judicature of the State of New York, according to which the preference thus given to the right of the innocent purchaser is treated as an exception to the general law, and is rested on the principle of equity that where one of two innocent parties must suffer from the fraud of a third, the loss should fall on him who enabled such third party to commit the fraud. But on whatever ground it may be said to rest, the law must be taken to be now definitively settled.

The question which in some cases might be a very material one, as well as one of some nicety, namely, what on the part of the defrauded seller, short of retaking possession of the thing sold, will amount to an avoidance of the contract, does not arise in the present instance. The defendant not knowing what had become of

his sheep, or where to find *Wale*, his buyer, had done and could do nothing, beyond giving notice to the police, up to the time when the sheep were bought by the plaintiff.

We must take it, therefore, as incontestable, that but for the subsequent conviction of *Wale* for having obtained these sheep by false pretences, no question could be raised as to the title of the plaintiff. But it is contended that by reason of such conviction the defendant is entitled to the benefit of the provisions of the 24 & 25 Vict. c. 96. s. 100, which enacts that where property has been obtained, *inter alia*, by false pretences, on conviction of the party so obtaining it, restitution shall be made to the party from whom it has been so obtained. But we are clearly of opinion that this enactment,—which is in these terms: "If any person guilty of any felony or misdemeanour, in stealing, taking, obtaining, extorting, embezzling, converting or disposing of, or in knowingly receiving any chattel, money, valuable security or other property whatsoever, shall be indicted for such offence by or on behalf of the owner of the property or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner"—has no application to such a case as the present. The language applies, and is obviously intended to apply, to cases, and to these only, in which possession has been obtained without the property passing. This was the construction put on the statute by this Court in *Lindsay v. Cundy* (9); and though the view there taken by the Court on the primary question, as to whether a contract had been made by the sellers with the person obtaining the goods, was reversed on appeal; the second ground of the judgment, which is the one immediately applicable to the present case, remains unshaken, and we have no hesitation in adhering to it. And it is strongly confirmed by the case of *Horwood v. Smith* (5), which was a case of sheep stolen and sold by the thief in market overt, and in which the thief was convicted of the larceny; yet it was held, that as the conviction did not take place till after the sale, the owner was not entitled to restitution under 21 Hen. 8. c. 11. In

*Moyes v. Newington, Q.B.*

the present case, as in the foregoing, there was no property in the prosecutor at the time of the conviction. It had been parted with by a contract, which though under the circumstances voidable, ceased on the sale before it had been avoided to be any longer voidable; and as to which, therefore, the right of the plaintiff had become indefeasible. It cannot have been the intention of the statute to defeat it, nevertheless, and by the mere conviction of the fraudulent purchaser to deprive the innocent buyer of the right which, according to the decisions in the series of cases already referred to, had become absolute in him.

*Judgment for the plaintiff.*

Solicitors—Crowder, Anstie & Co., agents for Holcroft, Knecker & Co., Sevenoaks, for plaintiff; S. F. Langham, agent for J. G. Langham, Uckfield, for defendant.

*his cattle on the same roads without any right to do so:—*

Held (affirming the judgment of the Queen's Bench Division), that the plaintiff could maintain an action against the defendant for depasturing the public road, inasmuch as that road "vested" in the local board, which thereby acquired such a property in the soil of the road as was necessary for the purpose of exercising the powers over the road given by the statute, and which therefore could give the plaintiff a title to the pasturage; but that he could not do so with respect to the private road, for the local board could not give him any title to the pasturage and he had not such possession as to enable him to maintain an action against the defendant for interfering with his enjoyment of the pasturage on that road.

Cross appeals from a decision of the Queen's Bench Division. The case is reported, 47 Law J. Rep. Q.B. 446.

The plaintiff having sued the defendant for damages for interference with his right of pasturage on the herbage at the sides of two roads in the parish of Cottingham, it was agreed that a special case should be stated, which will be found fully set out in the report of the case in the Court below.

The following summary will suffice for this report:—

The parish of Cottingham has always been a parish maintaining its own highways. Certain commissioners appointed for that purpose, set out certain roads in 1771, and, amongst others, they set out Endyke Lane and Cold Harbour Lane as private roads. Since 1818, Endyke Lane has been a public road and has been repaired by the parish; but Cold Harbour Lane has always remained a private road. The local board to whom was transferred in 1863 the office of Surveyor of Highways, and who became, in 1875, the urban authority for the district, was in the habit of letting to the plaintiff as well as to other persons, the right of pasturage on the sides of these two roads; but other persons had always insisted on their right to turn out their cattle to graze on these roads, and had refused to make any payment for doing so. In

*Mutter, Acington & B. g. Health & 1871. 291.*  
*Burgess, Northwick 50 & 36 & 224.*  
 [IN THE COURT OF APPEAL.]  
 (Appeal from the Queen's Bench Division.)  
 1878.  
 Nov. 30. } COVERDALE v. CHARLTON.\*  
 Dec. 2. }

Trespass—Urban Authority—Street vesting in—Meaning of "to vest"—Power to let Pasturage—Private Road—Possessory Title against Trespasser—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 144, 149.

The plaintiff was lessee, under a local board, the urban authority, of the right of pasturage over the herbage at the side of a public road which was a "street" within the meaning of the Public Health Act, 1875, and which, therefore, by section 149 "vested in and was under the control of" the local board. He was also lessee to the same extent of the herbage at the side of a private road, within the district of the board, and he turned out his cattle to graze on both roads. The defendant turned out

\* Coram Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

*Coverdale v. Charlton (App.), Q.B.*

1875, the defendant had been the lessee, under the local board, of the herbage of certain roads within the district; but not of Cold Harbour or Endyke Lanes, and he had refused to pay any rent, on the ground that other persons had depastured the herbage without his leave. Except under such letting, it did not appear that the defendant had ever, before the act complained of by the plaintiff, turned out cattle to graze on the sides of the roads. The plaintiff agreed in writing on the 19th of April, 1876, to rent from the local board the right of pasturage on the herbage on the sides of Endyke and Cold Harbour Lanes, and at once turned his cattle out to graze; the defendant thereupon turned out some cattle to graze on the same roads, and on his refusing to remove them, the plaintiff brought this action.

The Queen's Bench Division gave judgment for the plaintiff as to the right of pasturage in Endyke Lane, which was a public road, and gave judgment for the defendant as to Cold Harbour Lane, which was a private road.

Both parties appealed.

*Cave and Dodd*, for the defendant.—The appeal of the defendant is against the judgment of the Divisional Court as far as relates to the public road. The title of the plaintiff to the pasturage of this road is as lessee under the local board, so that he can only have such rights as the board can confer, and the title of the board is created and limited by statute. Section 149 (1) "vests" this road in the board, but

(1) By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4, the term street includes, *inter alia*, "any highway not being a turnpike road." By section 6 the urban authority in certain districts is the local board.

By section 57 certain of the Waterworks Clauses Acts are incorporated "with respect (where the local authority have not the control of the streets) to the breaking up of streets for the purpose of laying pipes."

By section 144, "Every urban authority shall, within their district, exclusively of any other person, execute the office of and be surveyor of highways, and have, exercise and be subject to all the powers, authorities, duties and liabilities of surveyors of highways," &c.

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it does not vest the property in the soil in the board. The same word is used in 11 & 12 Vict. c. 63. s. 68, by which the management of streets was vested in local boards, and in the Metropolis Management Act, 1855, 18 & 19 Vict. c. 120. s. 96, where roads are said to vest in vestries or district boards, and it has not been considered that the property in the soil passed by the operation of those Acts. If it did, then the arches and cellars under the street would pass, for the provisions of 41 & 42 Vict. c. 77. s. 27 (2), only declare that minerals under a highway are to belong to the person who was entitled to them before the road vested, under this section, in a local board. The local board has only such rights over these streets as the public and others than the owners of the soil had over them prior to their vesting in the board. It has only such rights as it requires for the due exercise of the powers and duties given to it by the Act. When an owner of land dedicates a part of it to the public as a highway, he does not part with such of his rights as are not inconsistent with the use of the

By section 149, "All streets being, or which at any time become, highways, repairable by the inhabitants at large within any urban district, and the pavements, stones and other materials thereof, and all buildings, implements and other things provided for the purposes thereof, shall vest in, and be under the control of, the urban authority. The urban authority shall from time to time cause all such streets to be levelled, &c., as occasion may require. They may from time to time cause the soil of any such street to be raised, lowered or altered, as they may think fit, and may place and keep in repair fences and posts for the safety of foot passengers. Any person who, without the consent of the urban authority, wilfully displaces or takes up, or who injures the pavement . . . or the trees in any such street," is liable to a penalty, in addition to which "he shall also be liable, in the case of any injury to trees, to pay to the local authority such amount of compensation as the Court may award."

(2) The 41 & 42 Vict. c. 77, enacts, by s. 27, that notwithstanding anything contained in section 149 of the Public Health Act, 1875, all mines and minerals of any description whatever under any disturnpiked road or highway which has or shall become vested in an urban sanitary authority by virtue of the said section, shall belong to the person who would be entitled thereto in case such road or highway had not become so vested.

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land as a highway—*St. Mary, Newington, v. Jacobs* (3), *Lade v. Shepherd* (4).

A. *Wills and Wilberforce*, for the plaintiff.—This public road is a "street" within the meaning of the statute. It "vests" in the board and the board can let the herbage to the plaintiff, so that the judgment of the Divisional Court is right as to this road. This "street" happens to be a green lane, but that makes no difference; the board could mow the grass so as to make it more convenient for passers and it has equal power to let the herbage. This road must vest in the board in such a way as to give it full powers to deal with the soil, so as to enable the road to be kept in good order. In *Taylor v. The Corporation of Oldham* (5), the Master of the Rolls held that a section which "vested" sewers in the corporation, vested in them the property in the subsoil of the road, and divested the owner of the soil of that property.

The plaintiff, however, seeks to reverse the decision of the Divisional Court as to the private road. It is admitted that the local board cannot give him any title to the pasturage of this road; but independently of this he has such possession of the pasturage at the side of this road that he can maintain this action; he has *jus possessionis*, and that entitles him to do so, for one who has *herbagium terre* can maintain trespass—*Coke's Littleton* 4b. The plaintiff turned out his cattle to graze, so that he was in possession, and this possession, however recent, gives him a good title against a trespasser—*Oatteris v. Cowper* (6), *Bristol v. Cormican* (7), *Rufland v. Shrewsbury* (8), *Heath v. Milward* (9).

Cave, in reply.—As to the claim of possession, the plaintiff has never been in actual exclusive possession, so that the adjoining owner is still in constructive

possession—*Jones v. Chapman* (10). The plaintiff has only been an intermittent trespasser, and so the Statute of Limitations will not run against the adjoining owner—*Smith v. Lloyd* (11).

[BRAMWELL, L.J.—We do not think you need argue that point.]

On the construction of the statute, *Hinde v. Chorlton* (12) is an authority. The judgment of Willes, J., shews that such a section as this must be construed, regard being had to the object of the statute, and that the word "vest" need not pass the freehold of the soil, and *Brumfit v. Roberts* (13) is to the same effect. Reference to section 57 (1) shews that the word "vest" is really equivalent to having the control of.

He cited also *Parsons v. St. Matthew, Bethnal Green* (14), *Gibson v. The Mayor of Preston* (15), *White v. The Hindley Local Board* (16).

BRAMWELL, L.J.—I think that this judgment should be affirmed. I confess that I do not consider section 149 of the Public Health Act, 1875 (1), to be easy to construe, and there is certainly some difficulty in understanding what the word "vest" in that section does mean. I should be inclined to follow the principle of construction referred to by Mr. Justice Willes in *Hinde v. Chorlton* (12), and to hold that the streets mentioned in section 149 (1) would vest in the local board without any right of property being thereby included. The word "vest" may mean that the property *usque ad cælum*, and down to the centre of the earth, is transferred to the person in whom the property is said to vest. I do not think that it means this

(10) 2 Exch. Rep. 803; s. c. 18 Law J. Rep. Exch. 456.

(11) 9 Exch. Rep. 562; s. c. 23 Law J. Rep. Exch. 194.

(12) 36 Law J. Rep. C.P. 79; s. c. Law Rep. 2 C.P. 104.

(13) 39 Law J. Rep. C.P. 95; Law Rep. 5 C.P. 224.

(14) 37 Law J. Rep. C.P. 62; s. c. Law Rep. 2 C.P. 66.

(15) 39 Law J. Rep. Q.B. 131; s. c. Law Rep. 5 Q.B. 218.

(16) 44 Law J. Rep. Q.B. 114; s. c. Law Rep. 10 Q.B. 219.

(3) 41 Law J. Rep. M.C. 72; s. c. Law Rep. 7 Q.B. 47.

(4) 2 Str. 1004.

(5) 46 Law J. Rep. Chanc. 105; s. c. Law Rep. 4 Ch. D. 295.

(6) 4 Taunt. 547.

(7) Law Rep. 3 App. Cas. 641.

(8) Brown. & G., part ii. p. 330.

(9) 2 Bing. N.C. 98.

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in the sections now under consideration. I do not think that the surface of these streets and all above and all below them, is vested in the urban authority, that is in the local board. It was said, during the argument, that we were bound to look at the general object and intent of the statute, and that if we found that some of its provisions caused damage to an individual, nevertheless that we must consider that the Legislature had contemplated that result, and that we must not be deterred by that fear from construing the statute, having regard to its general object and intent. No doubt that is a sound argument; but it is in the present case quite unnecessary to suppose that the whole of the soil of the streets and the freehold, with all the appurtenances, is intended to pass to the local board, and I cannot think that the word "vest," as used in this statute, is intended to have that meaning. I do not think that the section cited from the Act of last session (2) throws any light upon this case, for it only applies to mines and minerals. What, then, does the word "vest" mean in this statute? It is not a term of art; as used here, it would rather seem to be a new application of the word. It is, in short, a statutory expression. It is not sufficient to say that the streets "vest" in the local board, *qua* streets. I think, therefore, that we must say that the surface of the street, so far as it is used as streets usually are used, becomes "vested," under the operation of this section, in the local board, that is to say, that the streets, pavements, stones and other materials and buildings named in the section, "vest" in the local board for the purpose of being used in connection with the street, as streets are ordinarily used. I observe that section 149 goes on to make provision for the protection of trees in the streets under the urban authority. Now I do not think that the property in a tree which was already growing in the road would pass to the board, or that it would own such a tree in the same sense that it would own the trees it might at any time plant; if the property in such an ancient tree, if one may use the phrase, did pass, it would go some way

towards shewing that the urban authority has proprietary rights in the soil, and so would prove that it has a right of property in the herbage. It was suggested that the defendant's case was forwarded by section 57. I do not think so. It tells rather against him, for it appears to me to shew that where the local authority has not the control of the streets it was necessary to incorporate clauses of two Acts, so as to give a special power to lay down pipes for water, and if this be so, then it would seem to follow, that where the local authority has the control it is not necessary to give that special power. On the whole, I think that the word "streets" includes so much of the surface, and so much of the thickness or depth, as is usually needed for the ordinary works which the local authority would need to execute in or upon a street. With regard to the herbage, therefore, of Endyke Lane, I think that the local board had a right to let that which they did let to the plaintiff; and, therefore, that the defendant is liable to an action for interfering with the plaintiff's enjoyment.

I do not think, however, that the plaintiff has made out his case with regard to Cold Harbour Lane, which is a private way. It is difficult to see that he could be *de facto* in possession of the herbage of that lane, when he had no right to any part beyond that of which he was so actually in possession, that the acts of the defendant would be an interference with what was actually going on at a given moment on a particular part of the land. A man may have his beasts confined in a field, and he is then said to be, by means of those beasts, in possession of the whole field. The case is, however, different when a man puts his cattle to graze upon a common, for he is then, as was the plaintiff here, only *de facto* in possession of the particular places where the animals may actually be grazing.

It was further said that the lord of the manor had lost his "title," so that the local board were in actual occupation for the time being; and therefore, that the plaintiff, as their licensee, has a right to maintain this action against the defend-

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ant. But I do not think that any jury could rightly find there was such a discontinuance of possession by the lord of the manor as to admit the operation of the Statute of Limitations, so that the plaintiff cannot maintain this portion of his action, and the judgment of the Queen's Bench Division must be affirmed on both points.

BRETT, L.J.—It must be remembered that this action is brought under the system introduced by the Judicature Acts, and that there are not distinct forms of action now. In this action the plaintiff states facts which, he says, entitle him to a remedy, and he asks for that remedy or relief against the defendant. He does not, in form, say that he can maintain an action of trespass against the defendant in respect of both the lanes, the subject of this argument; but he does come here to say that he has a right to relief, and that is his contention. With regard to the first lane, which is called Endyke Lane, he says that he can sue because the property in the soil is in the local board, which has let the right of pasturage to him. As for the second lane, which is known as Cold Harbour Lane, the plaintiff admits that he has no right such as he has in the former case; but he submits that he had possession, and so that the defendant was a wrongdoer against whom he, the plaintiff, has a right to recover. Now it is not necessary for the plaintiff to shew that he could sue the defendant in trespass for his interference by turning cattle on the herbage in Endyke Lane, it is only necessary for him to shew that he had a right on which the defendant has encroached, and this is the first question which we have to consider. The second question is, whether the plaintiff was so in possession of the herbage of Cold Harbour Lane as to be able to maintain an action against the defendant as a wrongdoer.

Now the plaintiff's rights in Endyke Lane depend on the right which the local board had, and this brings us to the consideration of the Public Health Act of 1875 (1). It is admitted that Endyke Lane is a street within the meaning of that statute, and section 149 (1) is

that part of the statute which gives the local board, the urban authority, whatever title and right it possesses. We must give force to every part of the section, and we must give the ordinary legal meaning to the words used. We must interpret all the words, and give a meaning both to the words "shall vest in" and to the words "and be under the control of." So that we have to give a meaning to the words "shall vest in," which shall be in addition to, and not in derogation from, and which shall also be different from the words "and be under the control of."

To "vest" generally means to give the property in; but it is said that, if regard be paid to the terms of section 57 (1) of this Act, "to vest" will be found to mean "to be under the control of." If this were so, then the words "shall vest in" would be superfluous, and might as well be cancelled. I do not think that the words of reference in that section can be held to have the effect of striking out the enacting words contained in section 149 (1).

The argument for the defendant then proceeds to urge that the construction contended for by the plaintiff will result in giving the local board more than the Legislature intended, inasmuch as the result will be to give that board the houses, the cellars and the minerals; but when we have decided that to "vest" means to give the property in, then we must proceed to see in what the property is given. Now the property is given in the street, not in the land on which that street is made, and I think the case of *Hinde v. Chorlton* (12) is of assistance to us in this part of the case, for there it was decided that when a pew vested in the purchaser it vested in him not the soil and freehold of the pew, but the right to use the pew for the usual purposes of a pew; that is to say, for the purposes of divine service. So here the property in the street is vested in the board for the purposes of the street, using that word street in the ordinary sense of the word street in this statute, for a street in this Act of Parliament does not mean the houses in the street, it means that part of the street which is roadway or footway,

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that part on which the thoroughfare passes, that part which is between the houses. This section then gives to the board the whole of the surface of that part of the land. It is then said that this is not enough, nor is it; for I think that the word "street" in this Act includes more than the surface, it includes some depth, so much indeed as may be not unfairly required for the ordinary purposes of the street, that is to say, so much depth as is required for the water-pipes, the gas mains and the sewer systems. It would not, apart from any consideration of the recent statute, include minerals, for the depth of soil at which mines are worked was never needed or used for the ordinary uses of a street, nor does it include houses and buildings over and above the street.

The Legislature has, therefore, in my opinion, taken away the right of the owner in so much of the land as is required for the purposes I have mentioned, and has given the absolute property in so much to the local board, so that the board has the rights of an ordinary proprietor over that portion of the street, and it can therefore give the plaintiff a right over that part. It is not necessary to allege that the local board gave the plaintiff the possession of Endyke Lane, it gave him the right of pasturage there, and on that right the defendant has encroached, so that the plaintiff has a good cause of action against the defendant.

The case with regard to the second lane, Cold Harbour Lane, is different. The board had not the rights which it had in respect of Endyke Lane; but the plaintiff contends that he was in possession, and that the defendant is a wrongdoer, and therefore that he is in a position to recover against the defendant.

What then was the possession of the plaintiff? He in fact possessed the land and herbage by the mouths of his cattle, he had not the exclusive possession of the lane, for the public could pass along it and walk over the grass, the local board never intended to give the plaintiff possession of any particular space of land but only of the right of pasturage, just as the board might, had it been the owner,

have given him the right of agisting his cattle. The fallacy of the plaintiff lies in saying that the grazing by his cattle the herbage of this lane gives him the *vesturam* of the land in a legal sense. I am of opinion that the plaintiff had not any such possession of Cold Harbour Lane either by himself or by his cattle as is contended for, and if he was not so in possession of the land, then he cannot recover against the defendant in this action. I am therefore of opinion that the judgment of the Court below must be affirmed on both points.

COTTON, L.J.—I am also of opinion that both the appeal and the cross appeal must fail. The first question is, whether the local board had any right to the grass, that is to say, any right to the surface of Endyke Lane, which is a street as far as relates to the present case.

The authorities on which the plaintiff relied were cited rather as being guides to the mode in which such a section as that with which we have to deal should be construed, than as being authorities directly in point. *Hinde v. Charlton* (12) does not, in my opinion, support the contention of the defendant, for Mr. Justice Willes did not give any new meaning to the word "vest;" but he looked at the general intention and object of the statute to see what was the nature of the subject matter which was to vest, and I may say that I agree both with the principle which that learned Judge followed, and with the conclusion to which he came in that case. When, however, Mr. Justice Willes proceeds to quote *Stracey v. Nelson* (17) in support of the general proposition which he lays down, I must observe that the decision in that case by no means goes to the length which he would seem to suggest. The words in section 149 (1) are: "shall vest in and be under the control of;" now it is a sound rule of construction that when separate and distinct words are found in two parts of a sentence, a meaning must not be given to one part which will render inoperative the other words in the other part of the sentence.

(17) 12 Mee. & W. 588; s. c. 13 Law J. Rep. Exch. 97.

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It may be useful to refer to the history of the word "vest," as it is a word which has acquired a definite meaning, carrying with it definite legal consequences.

The word "vest" is found in the Lands Clauses Consolidation Act of 1845, where it is said in section 81 that conveyances "shall be effectual to vest the lands thereby conveyed in the promoters of the company," and there is a proviso to the same effect in section 100. So in the Trustee Act of 1850 (13 & 14 Vict. c. 60), section 3 provides that the chancellor may in certain cases make an order that "such lands be vested in" certain persons. Then again in the Bankruptcy Act of 1869 (32 & 33 Vict. c. 71) it is enacted by section 17 that "on the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed." So that it is clear that there is an established meaning in which the word "vest" is employed. I now turn to the Public Health Act under which this question arises. Sections 12 and 13 both contain the word "vest," and by the operation of those sections, the sewers become vested in the local board. Then by section 149 (1) the streets "vest in" the same authority, and that means, I think, that the street must, as a matter of property, pass to the local board, that is, the surface of the street passes, and some property in the soil is vested in the local board for the purposes for which the soil of a street is required by those who have to manage the street, so that the street as a material thing vests in the board.

As to the cross appeal, which relates to the private road, Cold Harbour Lane, it is admitted by the plaintiff, that the local board had no property in the soil of Cold Harbour Lane; but it is said that the plaintiff had such possession of the herbage of that private road, as to enable him to maintain an action, the form of which would, prior to the Judicature Act, have been in trespass, and that in this action he is entitled to recover against the defendant. The contention of the plaintiff is, that he has a right under the agreement between himself and the local board to the *pasturam terræ* and the *herbagium terræ*, and that that gives him the right of

maintaining trespass according to the rule laid down in Co. Lit. 4b, and therefore that he had by the use of a portion become entitled to the enjoyment of the whole of the herbage of this lane. But I think that this view is founded on a mistaken construction of the passage in Coke. Here the public is entitled to walk over this lane, that is conceded, and the plaintiff has only a limited right of enjoyment in the grass of the lane subject to the rights of others; he has not such a possession as would entitle him without any other right to maintain this action with respect to Cold Harbour Lane. I agree, therefore, that the judgment of the Queen's Bench Division ought to be affirmed on both points.

*Judgment affirmed.*

Solicitors—Henry Stirke, agent for J. S. Moss, Hull, for plaintiff; J. L. Morris, agent for Spurr & Son, Hull, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1878. { THE LEICESTER WATERWORKS COM-  
Dec. 3. { PANY v. THE ASSESSMENT COM-  
MITTEE OF THE BARROW UNION,  
AND NUTTALL, AND SHEFFIELD.

*Assessment Committee—Appeal to Sessions against Rate—Reference to Arbitration—Costs in Discretion of Umpire—Absence of Order under Baines's Act, authorising Reference—Action for Costs against Assessment Committee—Liability of Poor Law Guardians—Statutes 12 & 13 Vict. c. 45. ss. 12, 13; 22 & 23 Vict. c. 49. s. 2; 25 & 26 Vict. c. 103. ss. 1, 28; 27 & 28 Vict. c. 39. s. 2.*

[For the report of the above case, see 48 Law J. Rep. M.C. 41.]



*Allen & Ingham 482 Jb 2395*  
*Danford & McAnulty 52 Lj 62652*  
 [IN THE COURT OF APPEAL.]

*Lyle & Hume 52 Lj 387*  
 (Appeal from the Queen's Bench Division.)

1878. } PHILIPPS v. PHILIPPS AND  
 Dec. 19. } OTHERS.\*

*Harrison* Pleading—Action for Recovery of Land

Setting out Title—"Material Facts"—

*Jenkins* Rules of Supreme Court, 1875, Order

*52 Lj 387* XIX. rules 4, 18. Order XXVII. rule 1.

437 In an action for the recovery of land, where the plaintiff claims by devolution from an alleged predecessor in title, it is not necessary to set out the whole of the plaintiff's title in the statement of claim, but it must state the nature and effect of the documents under which the plaintiff claims, and such material facts in his pedigree as he relies upon to establish his right.

This action was brought to try the right to the possession of certain land.

The statement of claim was as follows:—

1. The plaintiff is a baronet and the heir male of the body of Sir Thomas Philipps, of Picton Castle, Knight, who was living in the year 1513. The plaintiff is also the heir male of the body of Sir John Philipps, of Picton Castle, Baronet, who died in or about the year 1629. The plaintiff is also heir at law of Sir Erasmus Philipps, of Picton Castle, Baronet, who died in or about the year 1697.

2. The plaintiff is also the heir at law of the first Lord Milford, who died in or about the year 1823, there being no legitimate descendants now living of Bulkeley Philipps, the uncle of the said Lord Milford.

3. The plaintiff is also eldest son of the late Sir James Evans Philipps, Baronet, who died in the year 1873, and whose residuary estate on his death became and was vested in the plaintiff by the last will and testament of the said Sir James Evans Philipps.

4. The plaintiff says, that under and by virtue of certain deeds, assurances, wills and documents, in the possession and control of the defendants, the plaintiff is entitled to the possession of the said pre-

mises and hereditaments claimed herein in the plaintiff's writs as such heir male, heir at law, residuary devisee or as being the person entitled to the baronetcy now held by the plaintiff.

5. In the alternative the plaintiff alleges that the said Sir Thomas Philipps, Sir John Philipps, Sir Erasmus Philipps, Lord Milford and Sir James Evans Philipps were at the times of their respective deaths seised in fee of the said premises and hereditaments.

6. The plaintiff in the alternative alleges that he is entitled to possession of the said premises and hereditaments, or some of them, under divers Crown grants, which are in the possession or control of the defendants.

7. The defendants are and lately have been in possession of the said premises and hereditaments, and have received the profits thereof, but refuse to give the plaintiff possession of the said premises and hereditaments, or to pay over or account for the said profits.

The plaintiff claims from all or some one or more of the defendants—

1. Recovery of possession of the said premises and hereditaments.

2. An account of all the rents and profits received by the defendants which may be due to the plaintiff.

3. Payment of the said rents and profits, with 5l. per centum per annum interest on the same, from the day when each was received till judgment.

The defendants took out a summons at chambers, calling on the plaintiff to shew cause why the above statement of claim should not be struck out or amended, as being so framed as to embarrass. The Master referred the application to the Judge at chambers (Field, J.), who refused to make the order. This decision was upheld by the Queen's Bench Division, the Court consisting of Mellor, J., and Huddleston, B., and against their judgment the defendants now appealed.

*Cave and Whitehorse*, for the defendants.—This statement of claim is in contravention of Order XIX. rule 4, which requires the material facts to be stated. Some of the facts stated are immaterial, and others are conclusions of law. That

\*Coram Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

*Philipps v. Philipps (App.), Q.B.*

the plaintiff is heir at law of Sir Erasmus Philipps is a conclusion of law. That he is heir male of the body of Sir Thomas Philipps is immaterial, except as pointing to some settlement which ought to have been set forth.

Paragraph 4 asserts the legal effect of certain documents. But the nature and purport of those documents should have been shewn in order to shew what is the real question at issue. See Order XXVII. rule 1.—*Harbord v. Monk* (1).

The difficulty is to say what are the material facts, and what is merely evidence of those facts. The material facts are those on which the plaintiff relies, e.g. the marriage of A. and B. may be a material fact. The evidence may be the marriage certificate, entries in the family Bible, and so forth. Rule 15 points to the conclusion that the plaintiff must set out his title; and rules 18, 20, 24 and 25 are all opposed to the style of pleading here adopted. The defendants should have the opportunity of admitting such facts as they do not dispute, or of demurring to the claim, neither of which they can do in the present case. The legal effect of the pedigree is not a "fact," which should be set out—*Hamer v. Flight* (2). There is no difficulty in setting out the pedigree itself. It might be appended in a tabular form, or pleaded as in *Vane v. Vane* (3). Nor can there be any difficulty in stating what Crown grants are relied upon. The plaintiff has set up a number of alternative and inconsistent claims, and the defendants cannot even guess upon what title he intends to rely.

*Kingdon, B. B. Rogers and Charles Bowen*, for the plaintiff.—The material facts on which the plaintiff relies are set out. What the defendants ask for is the evidence of those facts. The fact that the plaintiff is heir at law of an ancestor who died seised, *prima facie* shews a good title, which the defendants must displace by proving twenty years' adverse possession, or otherwise. As to setting out the na-

ture of the documents relied on, it is impossible, when the plaintiff is not in possession of the deeds. As a matter of pleading, however, it is immaterial whether the deeds are in the defendants' possession or the plaintiff's. This is a proceeding in ejectment, for possession. It is true, on the old writ of Formedon, the title had to be set forth, but that was not a writ of possession, but of right. Where the writ was possessory it was not necessary to set out the title. The material fact is the effect of the deeds. Title deeds are not the title, but only the evidence of it. It is enough to state the nature of the right claimed, e.g. "as heir at law of A. B."—*Delorne v. Hollingsworth* (4), and it is not necessary to set out the pedigree—*Ford v. Perring* (5). They referred to the form of bill in *Baker v. Harwood* (6) and *Daniel's Chancery Practice*, vol. i. pp. 302, 303.

BRANWELL, L.J.—I think this appeal should be allowed. I cannot but think that when the matter is examined it can be demonstrated that this statement of claim is contrary to the rules of pleading.

The plaintiff says he is heir male of the body of Sir Thomas Philipps, of Picton Castle, Knight, who lived in 1513. He further says that Sir Thomas Philipps died seised in fee of the premises. If that were the only statement, no title would be shewn, for it would not follow that because the plaintiff was heir male of Sir Thomas, and Sir Thomas was seised in fee, that therefore the plaintiff was entitled to the land. Those two paragraphs, therefore, by themselves are insufficient and demurrable. To prevent this the pleader adds a paragraph to the effect that, by virtue of certain deeds, wills and other documents the plaintiff is entitled as such heir male of Sir Thomas Philipps. That is a statement which, if true, shews a good title. If it stood alone it would shew it, for if the plaintiff is entitled, of course he can bring his action, and the statement is not demur-

(1) Weekly Notes, 1878, p. 104.

(2) 24 W. R. 346.

(3) 42 Law J. Rep. Chanc. 299; s. c. Law Rep. 8 Chanc. 383.

(4) 2 Cox Eq. Cas. 421.

(5) 1 Ves. 72.

(6) 7 Sim. 375.

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rabable. But it is not the statement of a single fact, but of fifty or may be 500 material facts and an allegation of all the legal consequences which would follow from those facts.

But Mr. Bowen says the effect of a deed is always a fact. I do not think it is to be regarded in that light. The right way for the plaintiff to state his claim is to set forth the purport of the documents on which he relies, and allege that the effect of them is to entitle the plaintiff. Then the documents can be looked at, and the question decided upon them. This statement, at all events, is insufficient; Mr. Bowen practically admits that it is embarrassing, but says that it cannot be helped, as the documents are in the possession of the other side.

Suppose, then, that instead of a general allegation, it had been stated that one of the persons named in the claim had made a certain deed, the effect of which was that the plaintiff was entitled. Would that be enough? I think not, for it would have stated, as a matter of fact, a conclusion of law, which ought to be shewn by a statement of the contents of the document. But, it is said, a case may be supposed in which it would be impossible to do otherwise, because the plaintiff might not know the contents of the document. The effect of that argument would be, that every pleading might be framed to embarrass, because, peradventure, in some supposable case, the plaintiff might not be able to help it. The same argument might be equally urged in actions on bills of exchange; in fact, there is no pleading which might not be so pleaded.

What then is the plaintiff's remedy? In my opinion instead of driving the defendant to make an application for particulars, he ought to make an affidavit shewing how it is that he cannot plead otherwise than in an embarrassing manner, and then ask for a postponement of the amendment of the claim till after he has had discovery of the documents in the defendants' possession. As a matter of fact when a defendant asks for particulars, and the plaintiff cannot give them because the materials are in the defendant's hands, it is a constant practice

for the plaintiff to file an affidavit to that effect, and have the summons for particulars adjourned until after discovery. The plaintiff cannot be permitted to frame an embarrassing claim on a mere surmise of right. Common sense is in favour of that rule, and we need not discuss the old practice in formedon and writs of right. Here we have a plain rule with a threefold object. First, to compel the plaintiff to state distinctly his cause of action, so that he may be bound down to it; secondly, to enable the defendant to object, if necessary, that the alleged cause of action is not sufficient in point of law; thirdly, that the defendant may not be driven to traverse generally all the allegations, but may be able to single out one point on which he relies to meet the plaintiff's claim, thereby saving trouble and expense; which clearly cannot be done here.

Then the plaintiff relies on Crown grants. What possible justification can there be for that paragraph? Why should he not have specified the Crown grant, which is in his own knowledge quite as much as in the defendant's? On the whole I consider that this is a fishing statement of claim, and the plaintiff might as well have said, "I am entitled somehow or other to the land, and I call on you to shew your title."

I may add that paragraph 4 is one which the plaintiff had no right to put into his claim. It does not disclose any fact material to the plaintiff's title, and is not traversable, and if it were met by a direct traverse that would be bad pleading in defence.

BRETT, L.J.—I also think that this statement of claim is embarrassing within the meaning of the rule. It is embarrassing, because the plaintiff has inserted in it a general statement which prevents the defendant from demurring, and at the same time has refrained from alleging the facts material to his case so as to enable the defendant to plead.

If the statement were merely demurrable, of course it would not be embarrassing. But it embarrasses because it gives the defendant no knowledge of the case the plaintiff is going to set up.

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*Philipps v. Philipps (App.), Q.B.*

One thing is perfectly clear, that in an action for the recovery of land the rules of pleading are just the same as in every other case. The 15th rule which provides that the defendant when in possession by himself or his tenant need not plead his title, shews that rule 4 applies generally to actions for the recovery of land.

The question is, therefore, what the plaintiff must state in his claim? It seems to me clear that the claim before us is wholly insufficient. It is not easy to express the rule as to what facts must be pleaded, and what may not. It is difficult to put it plainer than in the words of rule 4, that each pleading must contain a statement of the material facts, but not of the evidence of those facts. Erle, C.J., used to endeavour to express the rule of pleading in this way—that there were certain facts in each case which were the *allegata probanda* as distinguished from other facts which were merely the evidence of the material facts which had to be proved; and it was in accordance with that learned Judge's view that the rule was framed.

The facts, then, which are to be stated are those on which the plaintiff relies, but not necessarily all the facts which he must prove to support his cause of action. I hardly know how to state the matter differently, but there are various tests by which it can be practically shewn what is meant.

For instance, there are certain facts which must be stated in a special case, and certain others which being evidence merely need not be stated. Those facts must be stated which support the contentions of the parties; and these are precisely the facts which must be stated under the new system of pleading.

There is another test. If the parties are held strictly to the rules, no material fact may be proved which has not been stated in the pleadings, but other facts may be given in evidence from which the material facts may be inferred. The statement of claim, therefore, must contain every fact on which the plaintiff relies to prove his claim.

A difficulty arises in the case of a pedigree, and I cannot say that it is necessary

that the whole pedigree should in every case be set out, but I think that sometimes either the whole of it or a part, or certain facts contained in it must be set out. When the facts in the pedigree are facts on which the party relies to establish his rights, then those facts must be set out, but when the facts in the pedigree are merely the means of proving the facts on which he relies, then they need not.

To apply these rules to the present case. The plaintiff relies on several distinct rights alternatively, and it may be inconsistently. At all events he bases his claim on several different known legal rights, and he ought to set out the facts on which he relies with respect to each. If all he intended to rely on was the fact that his ancestor was seised, and that he was the descendant, he must set out those facts alone, then his claim would be demurrable at once. It is obvious that there are other circumstances or facts on which he means to rely. Take the first paragraph. He must rely on some settlement. Then he ought to state what that settlement was, and by whom it was made. Under rule 24 he might set out the effect of the document. Or if he were merely to give some account of its contents, and allege that he could not give the precise effect because the deed was in the hands of the defendant, he might be excused from greater particularity. Again, if he intends to rely on the seisin of some particular person in the pedigree, that is a fact on which he relies to prove his case, and ought to be set out. All the titles under which he claims are such that he ought to set out documents, except that mentioned in paragraph 1. As to the claim in paragraph 5, he would have to rely on the fact of the seisin alone, and could not go into the antecedent facts because he has not stated them.

As regards paragraph 4, Mr. Bowen in the first place said that his contention would be the same if the documents were in the plaintiff's possession; and, secondly, he laid great stress on the fact that the documents were in the hands of the other side.

But if the deed the plaintiff relies on is in his own possession, he ought to set it out, and if it is in the possession of the

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defendant, he ought at least to give some description or account of it.

It is urged that there might be a case in which the plaintiff actually knew nothing whatever as to the contents of the deed, and yet knew he was entitled under it. But he could not have that knowledge unless he had some further information. Take for instance the case of a written admission by the defendant. In that admission the plaintiff would have a fact on which he intended to rely; and he ought to state the fact that the defendant has admitted his right. If there has been no such admission, and the plaintiff has no information on the subject, in other words, if he does not know what the nature of his claim is, he ought not to make the claim at all.

The plaintiff has entirely omitted to state the facts he ought to state, and though he has put in a general statement to avoid a demurrer, yet he has prevented the defendants from knowing what his claim is. The statement of claim is therefore embarrassing and must be set aside.

COTTON, L.J.—The question in this case is not whether the statement of claim is demurrable, but whether it has so stated the case as to embarrass the defendants in their defence. For the purpose of seeing whether this is so or not, no reliance can be placed on the old forms of pleading. If we had to draw inferences from the old forms they would be adverse to the plaintiff, but we are dealing with an Act of Parliament and rules by which a new procedure has been substituted. By Order XXVII. rule 1, the Court may strike out or amend a statement of claim which may tend to prejudice, embarrass or delay the fair trial of the action; and all such amendments are to be made as may be necessary for determining the real question in controversy between the parties. Now, whether the action in this case is a possessory one or not, it is clear that the real question is whether the plaintiff is entitled to these lands or not. I cannot look upon it as merely a possessory action: of necessity the judgment would be a decision in favour of the title

of the plaintiff or against it. And any decree in Chancery on the subject would have been accompanied by a declaration of title.

There is no separate form of procedure in actions for the recovery of land. There is no different principle of pleading. If we refer to Order III. rule 2, we find that it is not necessary to set out on the writ the precise ground of complaint, the word "complaint" being used instead of claim. Then if the defendant requires it, a statement of claim must be delivered. Under Order XIX. rule 4 this statement must contain the material facts on which the plaintiff relies; and a further guide to the method of pleading is given by Order XIX. rule 18, which requires each party in any pleading to allege all such facts not appearing in the previous pleadings as he means to rely on; and to raise all such grounds of defence or reply, as the case may be, as, if not raised on the pleadings, would be likely to take the opposite party by surprise.

So we have this; in every case the plaintiff must set out the material facts on which he intends to rely in such a way as to prevent the opposite party from being taken by surprise.

Has the plaintiff done so? I think he has not. If he claims as heir male of Sir Thomas Philipps, there must be some deed of entail under which he claims. Then he ought to shew in his statement of claim the nature of the deed of entail, and whether he claims under the original *stirps*, or as representing a second *stirps*, the original one being extinct.

Or supposing the claim to be as heir at law, the statement ought to shew that some person was seised in fee from whom the estate devolved upon the plaintiff. But this statement of claim shews nothing of that kind. He does not say whether the plaintiff claims as ultimate tenant in tail or as heir at law by devolution from some particular person, or as devisee under some one's will.

It is perfectly clear that, to enable the defendant to meet the claim, the plaintiff ought to say at least something of this kind, that A. B. had seisin of the premises and died seised, and that on his death the title devolved on the plaintiff,

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or his ancestor from whom he claims. I do not mean to give that as a guide to the form in which this claim should be drawn, for I do not know the facts, and I cannot even guess what the nature of the claim may be; and therefore I decline to pledge myself to any opinion as to whether he ought to state the whole line of the pedigree, or how he ought to make out his heirship. What particulars must be stated depends on the facts of each particular case. But the facts must be stated in such a way as to put the defendant upon his guard, and shew him what case he has to meet.

Mr. Bowen put the case of a plaintiff who knew he had a title, but was not able to state with precision what that title was. But it must be remembered that these rules are laid down to protect the owners of estates from actions of ejectment brought without reasonable grounds. I do not say that is the case here; but if the rule which is established to prevent attacks on settled titles is hard in this instance on the plaintiff, that is the necessary consequence of bringing an action like the present. But there is no real hardship after all. If the plaintiff has any other ground for his claim than mere guess-work, he must have something he can allege, and upon which he can get discovery, as my Lord has said. But the plaintiff is entitled to prevent a mere fishing claim, and before discovery can be granted, the plaintiff must at least shew some reasonable case; for production of title deeds may easily lead to groundless attacks upon the defendants' title.

*Order absolute to strike out or amend the statement of claim.*

Solicitors—H. W. Reeves, for plaintiff; Iliffe, Russell, Iliffe & Cardale, for defendants.

[IN THE COMMON PLEAS DIVISION.]  
1878. } SMITH AND GALE, AND FRENCH v.  
Dec. 17. } RICHARDSON.

*Parties—Joinder of Plaintiffs—Claim by Indorsees of Bill joined with Claim by Drawer—Rules of Court, 1875, Orders XVI., XVII.*

S., indorsees of a bill of exchange, sued defendant as acceptor, the writ being specially indorsed under the Bills of Exchange Act. Defendant obtained leave to defend on an affidavit denying the acceptance. S. thereupon joined F., the drawer of the bill, as co-plaintiff, and the plaintiffs then delivered a joint statement of claim which alleged that F. sold goods to the defendant in respect of which 90l. was due on the 3rd of January; that on that day F. drew, and the defendant accepted a bill of exchange for 53l. 14s., which was dishonoured, and that afterwards another similar bill was given for the same sum with expenses, which F. indorsed to S.; that this last-mentioned bill became due on the 17th of August, but that "the defendant has not paid it nor has he paid for the said goods in respect whereof the said bills were drawn and accepted":—

Held, that this joint claim was embarrassing and must be struck out.

This was an opposed motion, on appeal from the Judge at Chambers.

The writ which was taken out by Smith and Gale, indorsees of a bill of exchange accepted by the defendant, was specially indorsed under the Bills of Exchange Act. The defendant obtained leave to defend on an affidavit stating that he never accepted the bill or authorised anyone to accept it on his behalf. The plaintiffs, Smith and Gale, thereupon took out a summons under which Master Gordon ordered that John French be added as plaintiff, and the joint plaintiffs then delivered the following statement of claim—

1. Between July, 1876, and January, 1878, the plaintiff John French sold and delivered to the defendant certain goods, and received from the defendant on account thereof certain payments, and on the 3rd of January, 1878, there was due from the defendant to the plaintiff

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John French, a sum of upwards of 90*l.* in respect of the said goods.

2. On the 3rd of January, 1878, the plaintiff French drew a bill of exchange upon the defendant for 53*l.* 14*s.*, part of the said 90*l.*, payable to the said plaintiff's order three months after date, and the defendant accepted the same.

3. The said bill was duly presented for payment at maturity, but the defendant did not pay the same or any part thereof, and the said plaintiff John French incurred notarial and other expenses through the dishonour of the said bill.

4. On the 14th day of May, 1878, and after the said bill of exchange was dishonoured as aforesaid, and after the said plaintiff French had incurred the said expenses the said plaintiff, John French, drew another bill of exchange upon the defendant for 59*l.* 17*s.* 10*d.*, payable three months after date in lieu of and in substitution of the previous bill, and the defendant accepted the same.

5. The plaintiff French indorsed the last-mentioned bill to the plaintiffs Smith and Gale.

6. The said bill became due on the 17th day of August, 1878, but the defendant has not paid it nor has he paid for the said goods in respect of the price whereof the said bills were drawn and accepted.

7. The plaintiffs have incurred notarial and other expenses in and about the dishonour of the said bill. The plaintiffs' claim is for 60*l.* 0*s.* 4*d.*

On a summons taken out by the defendant, Master Gordon ordered that this statement of claim should be struck out or amended on the ground that it was embarrassing, that it did not correspond with the claim on the writ, and that the plaintiffs were not entitled to join the claim for goods sold with the claim on the bill. Field, J., at chambers, affirmed the order of Master Gordon, and dismissed the appeal. Against this the plaintiffs now appealed.

*A. G. McIntyre*, for the plaintiffs, in support of the appeal.—Where a writ is issued under the Bills of Exchange Act, and leave to defend has been obtained, the action thenceforward proceeds under the Judicature Act—*Norris v.*

*Beasley* (1) per Denman, J., following *Oger v. Bradnum* (2), and an anonymous case before Lindley, J., reported Weekly Notes, 1876, at p. 23, where an application similar to the present appears to have been acceded to. This statement of claim is authorised by Order XVI. rule 1, of the Judicature Act, by which "all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally or in the alternative." If the defendant did not accept the bill French would be entitled to recover under the claim for goods sold; if the defendant accepted the bill, Smith and Gale would be entitled to recover on the bill. In the converse case of joining a defendant under Order XVI. rule 3, where the words of the rule are similar to those of Order XVI. rule 1, it has been held in an action by a lessee of land, for trespass to his land committed by the defendant under an alleged right of way, that the plaintiff might join his lessor as defendant, and claim against him, in case the right of way was established, damages for breach of quiet enjoyment—*Ohild v. Stenning* (3); see also *The Honduras Railway Company v. Lefevre* (4).

*Dickens*, for the defendant.—The claim is embarrassing; the defendant would be unable to pay money into Court to French's claim because that would be no answer to the action on the bill by the indorsees, and he would be unable to pay money into Court to Smith and Gale's claim as that would be no answer to the action for goods sold. In order to join alternative claims of this description, there must either be identity of matter and different parties, to which Order XVI. applies; or identity of parties and a different subject matter, to which Order XVII. applies: see the note to Wilson's Judicature Act, 2nd edit. p. 187, where the learned author sums up the result of his

(1) 46 Law J. Rep. C.P. 169; s. c. Law Rep. 2 C.P. D. 80.

(2) 45 Law J. Rep. C.P. 273; s. c. Law Rep. 1 C.P. D. 334.

(3) 46 Law J. Rep. Chanc. 523; s. c. Law Rep. 5 Ch. D. 695.

(4) 46 Law J. Rep. Exch. 391; s. c. Law Rep. 2 Ex. D. 301.

*Smith v. Richardson, C.P.*

reasoning on these rules. In the present case there is neither identity of matter nor of parties. *Child v. Stenning* (3) was decided under Order XVI., and in that case the foundation of the action was the land, in respect of which the plaintiff claimed alternative relief. There were different parties but there was identity of matter. In the present case there is nothing common to both, as in that case or as in *The Honduras Railway Company v. Lefevre* (4).

*A. G. McIntyre, in reply.*

[DENMAN, J.—How is this joint claim to be tried at Nisi Prius?]

The first question to be tried would be, was the bill accepted? But in case of any confusion, Order XVII. rule 1, by which a Judge may order separate trials in case several causes of action cannot conveniently be tried together, would prevent any confusion.

[LOPES, J.—He might then be liable to pay both.]

The statement of claim would estop any double liability. The amount of the bill only is claimed, or the money could be kept in Court till after the trial—Order XXX. rule 3. This objection could have been made when the application to join French was made. Section 24, sub-section 7 of the Judicature Act distinctly directs that all matters in controversy may be determined, and multiplicity of legal proceedings avoided. If in the present instance the joint claim is not allowed there will have to be another action.

DENMAN, J.—I am of opinion that this appeal should be dismissed, on the ground on which the learned Judge at chambers affirmed the previous decision of the Master, namely, on the ground that it is embarrassing, for looking at the circumstances of the case, and the statement of claim, I think it is an embarrassing claim. The action, which originally was commenced by Smith and Gale, indorsees of a bill of exchange, against the acceptor, was commenced under the Bills of Exchange Act, appearance has been entered, and an order has been obtained to add a third plaintiff, French, who, in the statement of claim,

says that he sold and delivered to the defendant certain goods, for part payment of which he drew a bill on defendant, which was accepted by the defendant, and indorsed by French to Smith and Gale, that the defendant has not paid the bill, nor for the goods in respect of the price whereof the bill was drawn and accepted. Several points have been argued, on which I do not consider the decision in this case depends, and on which, therefore, it is not necessary to give an opinion. It has been argued that an action, commenced under the Bills of Exchange Act, and appearance entered, thenceforward proceeds under the Judicature Act. In support of this proposition the case of *Norris v. Beazley* (1) was cited, in which it seems I expressed, extra-judicially, an opinion that under such circumstances the Judicature Act did come into play. I do not wish to recede from that opinion, and I see no reason why, in a simple ordinary case of an action by A. against B., such a doctrine should not apply, but it is difficult to say that such a doctrine would extend so far as to bring in a new plaintiff by virtue of the Judicature Act. Another point which was argued was, whether in any case the plaintiff French could be brought in and added under Orders XVI. XVII. of the Judicature Act. Here again I do not think it necessary to decide this, though there certainly is considerable force in the argument which has been founded on Mr. Wilson's observation in the last edition of his Judicature Act, Order XVI. It is difficult to see how a plaintiff suing for the original consideration of a bill of exchange has any relation to the subsequent indorsee for another consideration; they appear to be independent parties and totally different causes of action.

But even if that were not so, I think the learned Judge at chambers was right in saying that this statement of claim could not be allowed without leading to embarrassment on the part of the defendant, and putting him in difficulty. He would be puzzled to know how to pay money into Court, and to apportion his rights against the several plaintiffs, and he would be liable to be prejudiced in the



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cause, by the power of French to go into difficult questions of the original consideration, questions of sample, conduct of parties and other matters wholly inconsistent with the question of acceptance, or the bare accounts between the indorsee and the defendant.

Under all these circumstances, whatever the rights under the Bills of Exchange Act, and however much the action is common to the other parties, I think the Master and the learned Judge at chambers were right in refusing this statement of claim to be made, because it was embarrassing between the parties. The statement of claim must, therefore, be struck out.

The counsel for the plaintiffs relied on the fact that the defendant was aware of this addition of French as plaintiff at an earlier stage of the proceedings, and it may be that the defendant could have resisted the application to add French at the time it was made. The defendant did not do so, but that does not, in my judgment, prevent him from coming here afterwards, and saying that it is embarrassing.

LOPES, J.—It is not necessary for me to express an opinion on many of the matters which have been discussed. Having regard to the facts of the case, and the consequences which would follow on the trail of this joint statement of claim, I am clearly of opinion it would be embarrassing if allowed. I might add that there is here no identity of parties or cause of action, and I should have said, if called on to do so, that this is a case not intended by Order XVI., XVII.

*Judgment for the defendant.*

Solicitors—J. G. Shearman, for plaintiff; Charles Robinson, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1878. } LAX AND ANOTHER v. THE  
Dec. 12, 21. } MAYOR, ETC., OF DARLINGTON.

*Negligence—Duty of Owner of Market—Dangerous Erection in Market Place—Rights of Frequenter of Market.*

The defendants, owners of a market for the sale of cattle, had, some three years before action, erected some railings round a statue in the street of the town where the market was held, and near to the site which the plaintiff, who was in the habit of bringing cattle to the market, occupied and paid a toll for. A cow of the plaintiffs' was killed in trying to jump the railings, and in an action brought against the defendants to recover damages for her loss, the jury found that the railings were of insufficient height:—

Held, by LUSH, J., on further consideration, that the plaintiff was entitled to recover; on the ground that the owners of the market were under an obligation to keep the market place free from danger to those who lawfully frequented it; and that by erecting the railings of insufficient height they had been guilty of a misfeasance, resulting in damage to the plaintiff, who was not a mere licensee of a particular site, but entitled to use the whole of the market-place subject to the regulations and controul of the owners.

This was an action tried before Lush, J. at Newcastle, and was brought to recover compensation for the loss of a cow, occasioned by the alleged negligence of the defendants as owners of the market at Darlington in respect of certain railings erected by them in the market-place, and upon which the cow was spiked in an endeavour to jump over them.

The only question left to the jury was whether the railings were kept negligently in not being of a sufficient height, which the jury answered in the affirmative.

Lush, J., reserved for further consideration the questions arising upon this finding, namely, whether the corporation was under any obligation to have the fence at such a height as that cattle could not jump over it; and whether there was any legal duty on them to keep this part of the market-place in any par-

*Laz v. Mayor of Darlington, Q.B.*

ticular condition; and whether if the plaintiff came to the market he must not take the place in such state as he found it in, being a mere licensee.

*Cave and Edge*, for the plaintiffs.—The defendants themselves erected these railings, and it is not as if they had merely taken to something erected by others. Then they are the urban sanitary authority, and as such are liable for any misfeasance—*Foreman v. The Mayor of Canterbury* (1). They cited also—*Clayards v. Dethick* (2); *Thompson v. The North Eastern Railway Company* (3); *Coverdale v. Charlton* (4); *White v. The Hindley Local Board* (5).

*Herschell and Hugh Shield*, for the defendants.—The plaintiffs were licensees only, this not being a highway over the whole of which the public would have a right, but a market-place which must be accepted as it is by those who come to it. The railings had been erected for three years—*Gautret v. Egerton* (6). They cited also *Wilkinson v. Fairrie* (7); *Bolch v. Smith* (8); *Indermaur v. Dames* (9).

*Cave in reply.*

*Our. adv. vult.*

The following judgment was (on December 21) delivered by

LUSH, J.—This action is brought to recover compensation for the loss of a cow, which came to its death from an attempt to leap over a spiked fence erected by the defendants round a statue which they had erected in the market-place of Darlington.

The defendants are the owners of the market, which is held for the sale of

cattle, and the plaintiff Bainbridge had for many years brought his cattle there for sale. The market is held in the public street. The plaintiff had regularly occupied with his cattle a given site, for which he paid toll, and the statue had been erected near to that site between two and three years before the accident happened.

The only point contested at the trial was whether the spiked railing was or was not of sufficient height from the ground.

The top of the spike was 2 feet 6 inches from the stone in which the bars were set, and this the jury found was insufficient, and the railing being spiked, was consequently dangerous to cattle having a propensity to leaping. It was not contended that the plaintiff was guilty of any negligence in not properly looking after or managing his herd.

The point made at the trial, and which has since been argued, was, that the corporation was under no obligation to have the fence at such a height as that cattle could not or would not be tempted to leap it; that the plaintiff was a licensee who must take the market as he found it; that there was plenty of room for him to stand his cattle elsewhere (which for aught that appeared was a fact), and that as the danger was not concealed but one obvious and apparent, he placed the cattle there at his peril.

I am of opinion that neither of these objections is tenable. The franchise of a market like that of a port is granted for the benefit of the public, and every one has as good a right to frequent the market for selling and buying the marketable commodities as he has to traverse a public highway. The grantee of a market, especially when he takes a toll for his own benefit, does, I think, incur an obligation to maintain the market in a state reasonably fit for the purpose for which it was granted. See the observations of Bayley, J., in *Prince v. Lewis* (10). I see no reason why, if he erects in the place which he appropriates to the market any obstruction which causes danger to the property or the persons of those who frequent the market for a law-

(1) 40 Law J. Rep. Q.B. 138; s. c. Law Rep. 6 Q.B. 214.

(2) 12 Q.B. Rep. 439.

(3) 2 B. & S. 106; s. c. 31 Law J. Rep. Q.B. 194.

(4) 47 Law J. Rep. Q.B. 446.

(5) 44 Law J. Rep. Q.B. 114; s. c. Law Rep. 10 Q.B. 219.

(6) 36 Law J. Rep. C.P. 191; s. c. Law Rep. 2 C.P. 371.

(7) 1 Hurl. & C. 633; s. c. 32 Law J. Rep. Exch. 73.

(8) 7 Hurl. & N. 736; s. c. 31 Law J. Rep. Exch. 201.

(9) 36 Law J. Rep. C.P. 181; s. c. Law Rep. 2 C.P. 311.

(10) 5 B. & C. at 371.

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ful purpose, he should not be liable to an indictment as much as the person who places a dangerous obstruction in a public highway. Of course, when the danger is, as it was in this case, obvious and apparent, a person who heedlessly and without reasonable care to avoid it, incurs damage, cannot maintain any action, because he is the author of his own wrong; but he is not a contributor to his own wrong by going to the market. The owner or the person who in legal phraseology is lord of the market, has no right to say to him, "You might have gone to some other market, and as you chose to come here with your cattle, you elected to run the risk." Nor can the owner of a port excuse himself for erecting a dangerous obstruction to the navigation by saying to the shipowner, "You might have gone to some other port." The subject using a port or a market is not a mere licensee; he is exercising a right as one of the public for whose benefit the port or the market was erected, and is entitled to have a free and safe passage in the one case and a safe standing place in the other.

I was impressed at the time with an argument urged by Mr. Herschel. Suppose, he said, that the market was situate on the bank of a river or lake, is the owner responsible for cattle brought there if they run into the water and drown themselves?

If the specific spot were designated in the charter by which the market was granted, so that the grantee had no option to hold it elsewhere, I am inclined to think he would even in that case be bound to fence for the protection of cattle, but if no place was designated and he voluntarily selected so dangerous a spot I should say certainly he would.

This case, however, does not require that question to be answered. The charge against the corporation is of misfeasance, not of nonfeasance. The erection which constituted the danger in this case, was an artificial erection by them, by which they rendered a safe market an unsafe one; that was a wrongful act. Nor do I think it is competent to the defendants to object that the plaintiff chose to continue standing his cattle in the

place he had been accustomed to use long before the statue was erected. Every part of a market-place is open to buyers and sellers, subject to the reasonable control and regulation of the lord of the market; and the selection of the spot in question is as much the act of the corporation as of the plaintiff, for they regularly charged and received toll for the use of that specific site. Besides, it is impossible to say that the damage would not have happened if the herd of which the cow formed part had been stationed at some other part. But whether it would or not is not in my judgment material. The defendants had done a wrongful act in placing the spiked railings in the cattle market so low as to be dangerous to the cattle.

This was the immediate cause of the injury, and they cannot say that the plaintiff was guilty of negligence in using that part of the market which they assigned to him, though it was in proximity to the danger, he not being guilty of any negligence which immediately conduced to the accident. See *Olayards v. Dethick* (2); *Thompson v. The North Eastern Railway Company* (3). I therefore give judgment for the plaintiff for the agreed amount, 22l. 14s. 6d., and costs.

*Judgment for the plaintiff.*

Solicitors—Chester, Urquhart & Co., agents for Clayhills, Darlington, for plaintiff; A. Scott Lawson, agent for Hugh Dunn & Watson, Darlington, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1878. } PAUL AND ANOTHER (*appellants*)  
Nov. 16. } *v. SUMMERHAYES* (*respondent*).

*Trespass—Hunter in pursuit of Fox—Noxious Animal—Assault—Game—Statute, 1 & 2 Will. 4. c. 32. ss. 2, 35.*

[For the report of the above case, see 48 Law J. Rep. M.C. 33.]

## [IN THE COURT OF APPEAL.]

1878. }  
Nov. 12. } FAIRCLOUGH v. MARSHALL.\*

*Mortgagor and Mortgagee—Right of Mortgagor to sue in respect of Injury to Mortgaged Property—Joinder of Parties—Nonjoinder no Bar to Action—Judicature Act, 1873 (36 & 37 Vict. c. 66), sect. 25. sub-sect. 5—Order XVI. rules 13, 17.*

*A mortgagor in possession of the beneficial interest in a covenant can sue for an injunction against the person on whom the burden of the covenant lies, to restrain a breach of the duty thereby imposed, without joining the mortgagee as plaintiff in the action.*

*The nonjoinder of a necessary plaintiff is no bar to an action, and therefore when a plaintiff is wanting judgment ought not to be entered for the defendant, but the proper party should be joined under Order XVI. rules 13, 17.*

This was an appeal from a judgment of Manisty, J., after argument on further consideration. The case was tried at Durham Summer Assizes, 1877, and the following facts were proved:—

In the year 1868, Mr. Marshall Fowler was the owner of certain copyhold lands in the manor of Houghton. These lands he parcelled out under a building scheme, and sold in lots to various purchasers. By the conveyance of each plot, Fowler reserved to himself a rent-charge, covenanting in each case to stand seised of the particular plot with intent that he should have an annual rent-charge issuing out of the land, and subject thereto in trust for the purchaser, his heirs and assigns. The conveyances also contained a covenant by each purchaser that no building to be erected on the particular plot should be used as a public-house or as a beerhouse. A Mr. Steel became the purchaser of one of the plots which was conveyed to him on the terms above stated by a deed bearing date the 14th of December, 1868, and such plot after several mesne assignments became vested in the defendant, who had notice of the covenants to which the land

was subject. On the 13th of March, 1876, the plaintiff purchased Fowler's interest in nineteen of the plots, including that in the occupation of the defendant, then known as 110, Ward Street, Bishopwearmouth. For this purpose he borrowed money of Messrs. Robert Scott Briggs & C. J. Briggs, and the conveyance, which bore date the 24th of November, 1876, was made to the Messrs. Briggs.

By this deed, after reciting that at their request Fowler had contracted with the plaintiff for the absolute sale to him of annual ground rents, and the benefit of the covenants and conditions contained in the conveyances of the several plots, and that the purchase-money had been paid by the Messrs. Briggs at the plaintiff's request, Fowler conveyed all the annual ground rents and the full benefit and advantage of the covenants and conditions contained in the before-mentioned conveyances to the Messrs. Briggs. The deed contained a covenant by the plaintiff for the repayment of the purchase money to the Messrs. Briggs, and a covenant by them to convey to him on such repayment.

After the conveyance to Messrs. Briggs, the plaintiff, finding that the defendant had established a beerhouse on the premises No. 110, Ward Street, called upon him to desist from such use of the house, as contrary to the covenant contained in the deed of the 14th of December, 1868, and on his refusing to do so, brought this action, claiming damages and an injunction.

At the trial the jury were discharged by consent, and the case was adjourned for further consideration. It came on for argument before Manisty, J., at Westminster, on December 7 and 8, 1877.

*Hemming, Wilkey Wright and Granger, appeared for the plaintiff.*

*Herschell and McOlymont, for the defendant.*

It was contended on the part of the defendant that the right to sue on the covenants was vested in the Messrs. Briggs, and that the plaintiff had no such right, and that supposing the plaintiff had any right of action, he could not sue without joining the mortgagees.

\* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

*Fairclough v. Marshall, App.*

In delivering judgment,

MANISTY, J., after stating the facts above set out, proceeded as follows—The effect of the conveyance to the Messrs. Briggs was the same as if there had been two deeds, one a conveyance to Fairclough of the rent-charge and benefit of the covenants, and the other a mortgage of the same to the Messrs. Briggs. If that be so, the relative position of the parties is this, that the plaintiff stands in the position of Fowler, and the defendant in that of Steel.

Now it is a question whether either the benefit or the burden of the covenants in the deed of the 14th of December, 1868, run with the land. But this case belongs to a different class, in which the purchaser takes land with notice of a covenant to which it is subject, and is therefore bound in equity to perform the covenant. This, however, is not, perhaps, material in my view of the case, for I have come to the conclusion that the plaintiff is not in a position to enable him alone to maintain this action, and I will state my reasons for this conclusion very shortly.

Several cases have been referred to as to the rights of persons having a legal interest in the property such as the plaintiff has, apart from any right to sue on the covenant, to prevent any person, standing in the position of the defendant, from breaking the covenant. One of those cases in which the authorities are carefully considered and the result of the cases accurately stated is the case of *McLean v. McKay* (1).

In that case there was a plot of land, part of a larger parcel which was sold. The owner of the land sold it and entered into an agreement with the purchaser that an adjoining plot of land should never be sold, but should be left for the benefit of both parties and their successors. The Committee of the Privy Council rejected the words "that it should never be sold," but held that the rest of the covenant might stand, and held that there was a binding agreement that the land should be left open for the benefit

of both parties, which gave the holder for the time being of the vendor's land the right to enforce the obligation by an injunction. "It was not contended," Sir Montague Smith says, "that this was a covenant which would run with the land so as to enable the covenantee to maintain an action in a Court of law upon it; but that it was an agreement by the vendor, selling a part of a larger estate, with the vendee, affecting the enjoyment of the land he sold, and putting a restriction upon himself in dealing with the land he retained; that it was an agreement affecting the lands of both, binding on those who might hold the land of the covenantor, to observe the obligation; and giving a right to those who held the land of the vendees, in whose favour the obligation was made, to enforce it." He then refers to *Tulk v. Moxhay* (2) and other cases, and says—"It creates an equity which binds the present respondent, and the appellant, who has the estate of the original vendor, is entitled to come to a Court of Equity to remove the structure which was placed upon it with a mandatory injunction." So the law is very clear, whether the covenants run with the land or not, if a person purchase property with notice that it is subject to certain restrictions, and he seeks to evade those restrictions, a Court of Equity will grant an injunction to restrain the violation of the arrangement.

The sole question, therefore, in this case is, whether the plaintiff has a sufficient interest in the property to maintain the action. I believe that before the Judicature Acts the Courts of equity would invariably have required the mortgagees to join in an action like the present. The mortgagees might have maintained it alone; but the mortgagor, in order to enforce such a right as this, must have joined the mortgagees, who have a very substantial interest in the property.

*A fortiori*, since the passing of the Judicature Acts, I should think that the joinder of all parties interested would be necessary. For although section 25, sub-

(1) Law Rep. 5 P.C. 327.

(2) 2 Phil. 774.

*Fairclough v. Marshall, App.*

section 5 of the Judicature Act, 1873, (3) was intended to enable the mortgagors in possession to do certain things which they could not have done before, namely, to sue for possession, yet the section is in part declaratory, for it says that the mortgagor in possession may sue for trespass, which he could have done without the aid of the Judicature Act. Then it further says "or other wrong." Now I do not intend to express any opinion as to whether those words would include the present case; but supposing it were held by a liberal construction that they could, they are followed by a qualification,—“Unless the cause of action arises upon a lease or other contract made by him jointly with another person.” Now it is somewhat difficult to say what is meant by these words, but I cannot help thinking that they mean this,—that if upon the deed which gives the mortgagor the right which he is seeking to enforce, it appears that that right is shared by some other persons, then those other persons must be brought before the Court, just as before the Act passed.

It may be this is the construction of that section. But entertaining, as I do, the opinion that, independently of the Judicature Act, the old Court of Chancery would not have entertained this suit without the mortgagees being joined as parties, I certainly think that *a fortiori* since the passing of that Act the mortgagees are necessary parties. I therefore come to the conclusion that there is not such an interest in the plaintiff here as would entitle him to maintain this action. There are many points which will be open if the case goes further, but I decide

it for the present on that point, and on that point only.

Against this decision the plaintiff now appealed.

*Hemming* (*Willey Wright* and *Granger* with him), for the plaintiff.—It is admitted that if the plaintiff had full possession of the estate conferred by the conveyance from Fowler, he could have brought this action, and the question is, whether the fact that he is mortgagor in possession prevents him from suing. It is not necessary that all the persons who may be interested in the observance of the covenant should be before the Court. It is quite enough to shew that the plaintiff is entitled to the benefit of it, and that the defendant must bear the burden. There are *a fortiori* cases in which actions have been brought where the interest of the plaintiff has merely been that of an adjoining owner. The case is within the principle laid down by Lord Cottenham in *Tulk v. Moxhay* (2), notes to *Spencer's Case* (4). There are no cases in which the mortgagor is shewn to have sued without the mortgagee; but that is because it was never supposed that he could not. There must have been many owners of encumbered estates in the same position as this plaintiff. The right of action in this case is clearly given by section 25, sub-section 5 of the Judicature Act, 1873 (36 & 37 Vict. c. 66); the mortgagor in possession may sue in respect of "trespass or other wrong." The wrong complained of here is not a breach of covenant, but a breach of duty on the part of a purchaser, with notice of the obligation. If, however, the mortgagees ought to have been joined, an order should have been made to join them, instead of judgment being entered for the defendant.

*Herschell* and *M'Olymont*, for the defendant.—This is not the ordinary case of a mortgage from the plaintiff to Messrs. Briggs. The conveyance is, in terms, an assignment of the benefit of the covenants, as well as a conveyance of the estate from Fowler to the Messrs. Briggs,

(3) By section 25, sub-section 5 of the Judicature Act, 1873, a mortgagor entitled, for the time being, to the possession or receipt of the rent and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof, shall have been given by the mortgagee, may sue for such possession or for the recovery of such rents and profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person.

(4) 1 Smith L. C., 6th edition, 73.

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the plaintiff having merely an equity of redemption. It is right that the benefit of the covenant should belong to the mortgagee, and that he should have an option whether it should be enforced or not. The enforcing of such a covenant as this might materially diminish the value of the security. The 25th section of the Judicature Act, 1873, gives the mortgagor in possession the right to sue in certain cases. All other cases are therefore excluded, and the present action is not for a "trespass or other wrong," i. e., other wrong in the nature of a trespass, within the meaning of the section. If the mortgagor cannot bring this action alone, the Court was right to dismiss the suit, for very possibly the mortgagees would have objected to the enforcement of the covenant, in which case the Court could not grant an injunction.

[COTTON, L.J.—Cannot we give an interim injunction until the mortgagees interpose?]

That might seriously damage the mortgagees' interest.

*Hemming* in reply.—The mortgagee should not be joined unless it is shewn that he is likely to be damnified. While he remains out of possession, and lets the mortgagor have the management of the property, he must be taken to concur in the mortgagor's act.

BRAMWELL, L.J.—With the greatest respect for my learned brother Manisty, I do not see how his judgment in the present case can be supported.

Let us see what is the state of the question before us. In the first place, if the conveyance from Fowler had been made to Fairclough in the terms in which it was made to the Messrs. Briggs, and if there had been no borrowing, and no relation of mortgagor and mortgagee, it is admitted that the plaintiff could have maintained this proceeding. But it is said, the conveyance having been made to the Messrs. Briggs with a mere reservation to the plaintiff of a right to have a conveyance when he pays off the debt, the plaintiff is not in a position to maintain this action, or if he can maintain it at all, he cannot do so without

joining the Messrs. Briggs. It has been urged that this is not the ordinary case of a mortgagor and mortgagee; for a mortgagor is in the position of a man who has had an estate, and has parted with it; while here the plaintiff has never possessed any estate. But if we look to the substance of the thing, and not the form only, we shall see that this is, in point of fact, a mortgage. It is recited that the plaintiff has purchased the estate; the conveyance is made to the Messrs. Briggs because they have lent the purchase-money, and then there is a covenant to convey the property to the plaintiff on payment of the money, which is precisely like the ordinary covenant to re-convey; and then there is a covenant to pay the mortgage money. In substance there is no distinction, and we ought to treat it as an ordinary mortgage, so that, as far as that is concerned, the plaintiff is entitled to bring this action.

Then can he maintain the action without joining the mortgagees, who have never interfered nor claimed a right to interfere in any way with the management of the estate? It is not shewn that the value of their security will be impaired by the injunction asked for, and, so far as the substantial question in the case is concerned, the whole difficulty has arisen out of the surmise of counsel as to the position of the mortgagees in a certain supposed case.

As far as we can see, Fairclough stands in the position of beneficial owner of the property, subject to an incumbrance for the benefit of the Messrs. Briggs. This action is brought in respect of a covenant which the plaintiff wishes to maintain, and which the defendant has broken. The action could clearly be maintained, if the sale had been to Fairclough, in respect of a duty incumbent upon the defendant. First then, need Messrs. Briggs have been joined before the Judicature Act was passed? I think I can answer with very considerable confidence, that undoubtedly they need not have been so joined; and I think when we look at the principle of the thing, with which the Court of equity deals, that that rule is proper and reasonable, if they need not be joined as plaintiffs, it

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is clear it cannot be necessary to join them as defendants, for no remedy is sought or can be obtained against them. Whether they ought to have been made defendants or not, if they had interfered, and suggested the alleged breach of duty, is a point we need not discuss. I cannot help thinking it is a very doubtful matter. The plaintiff might say, "All I want is a remedy against the wrong doer; if he is not a wrong doer because he is acting under the direction of the mortgagees, let him set that up as a defence." But I am quite sure that Order XVI. rule 13 would justify us in making an order against Marshall, which would at all events bind him, if not any other possible defendant. I see no reason for making Messrs. Briggs defendants; and if there had been, that rule would have obviated the necessity of doing so. I think, therefore, that this action was rightly brought by the plaintiff as sole plaintiff against the defendant as sole defendant, and therefore the case must go down again to Mr. Justice Manisty to be dealt with further.

I will add one word as to section 25, sub-section 5 of the Judicature Act, 1873. I do not think that sub-section has any application to this case. It only applies to cases where the mortgagor could not, either in his own name or in conjunction with the mortgagee, have brought an action. And I may further observe that as by that sub-section the mortgagor may sue for possession or rents and profits, or in respect of trespass or other wrong, if the word "wrong" means wrong independent of any contract or duty, it follows that the mortgagor may sue for rents and profits, but not for breach of covenant to insure against fire or to repair. I do not think this can have been meant; and perhaps hereafter that consideration may induce some Court to put some other construction on the word "wrong."

BRETT, L.J.—This is a suit for an injunction to restrain the defendant from using certain premises in a manner inconsistent with the contract of his vendor, of which the defendant had notice. It is not disputed but that there was an ori-

ginal covenant between Steel and Fowler, nor that the defendant has his estate by devolution from Steel. But, as I understand, it is argued in the first place that the plaintiff has no interest in this matter because he is not in the position of equitable owner by devolution from Fowler, subject to a mortgage to the Messrs. Briggs, but that the Messrs. Briggs, both at law and in equity, are the true owners of the property. The objection, then, would go this length, not merely that the mortgagees ought to have been joined, but that the plaintiff ought not to be a plaintiff in the action at all. Now it seems to me that this contention cannot be maintained. Fowler was the owner of a certain interest in the property. A contract was made between Fowler and the plaintiff, in which the intention was to sell the property to the plaintiff, and a price was fixed between them. It is not denied that the contract was between them, but it is said that at the request of the plaintiff, who had to borrow money to complete the purchase, the conveyance was made direct to Messrs. Briggs. But in that conveyance there is a recital of the borrowing, and a right given to the plaintiff, on payment by him of the money to Messrs. Briggs, to come into possession as if the conveyance had been made to the plaintiff himself. Whatever may have been the form of the deed, the contract being clear, and the right to redeem clear, the plaintiff is equitable owner of Fowler's interest, by devolution from Fowler, and has mortgaged that interest. The plaintiff, therefore, is the representative of Fowler's interest, and the defendant of the interest of Steel. If, therefore, there were no mortgage, on the principle of *Tulk v. Moxhay* (2), the defendant would be rightly made defendant, and the plaintiff would be entitled to the relief he asks. But it is said that because of the mortgage, the Messrs. Briggs ought to be made parties. It was stated on behalf of the defendant, that the mortgagees need not be joined. Mr. Herschell on the contrary says, that no authority to that effect has been or can be produced. It would be difficult to act on such reasoning; but we have



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the highest possible authority for saying that by the practice of the Court of Chancery the mortgagee in such cases need not be joined. It has further been argued that, as a matter of principle, there is no reason why he should; a position much fortified by the rule of Chancery practice, and one which seems to me to have been fairly made out. And I think it rests upon a most important doctrine, namely, that when a mortgagee has not taken possession, and has done nothing, but has left the property in the hands of the mortgagor, the mortgagor has a right, as long as the mortgagee remains inactive, to put in force all the rights of property which he has as between himself as equitable owner and the occupier, without reference to the mortgagee. If that be so, the mortgagee need not be made a party.

But even if that doctrine were wrong, the utmost that can be said is, that the mortgagees ought to be parties as well as the mortgagor. It would not be the case of an action brought by the wrong person, but of an action wanting a necessary plaintiff. But that is not a ground on which the suit should be dismissed, and the utmost that should have been done was to delay the trial that the mortgagees might be joined. Whether they should be made parties by their own application, or under Order XVI. rule 13, is immaterial. The judgment must be wrong if the objection taken was want of parties. Therefore, if we deal with the case as if sub-section 5 of section 25 were not applicable, the plaintiff has a right to sue alone; or, at most, the Court should have ordered the mortgagees to be joined. With regard to sub-section 5 of section 25, that is not an enactment to prevent people from suing who could have sued alone before the Act, but to enable those who could not. It is an enabling, not a disabling, section. Therefore, on all points, the judgment of Mr. Justice Manisty cannot be supported; and the case must go back to him for the consideration of the other matters in question.

COTTON, L.J.—In this case Mr. Justice Manisty decided in favour of the defendant; and though there were other questions raised, he put his judgment

distinctly on this ground, that, in his opinion, the plaintiff had not sufficient interest to bring the action, *i.e.* not that others ought to be joined as plaintiffs, but that the plaintiff had no interest in the property. Is that, then, a correct view? It is urged that the mortgagees are not the plaintiffs, and that the plaintiff as mortgagor has no interest in the estate. But that argument, in my opinion, cannot prevail. We are here to recognise equities, and to deal with substance rather than form. It is not the mortgagees who are the owners, but the mortgagor. The mortgagor is the beneficial owner, subject to the incumbrance, and the plaintiff is in the position of a mortgagor having the beneficial ownership of a rent issuing out of the land and certain other benefits. This suit is not brought to enforce a covenant; but on the ground that the defendant having purchased land with a notice of restrictions as to its use, is not in a position to use it in violation of those restrictions; and anyone entitled to have the benefit of the restricting covenants may come to a Court of equity to restrain the defendant, not on the ground that he is breaking a covenant which runs with the land, but on the ground that he is dealing with the land inequitably. Here the plaintiff has an interest in the performance of the covenant. That disposes of the first ground of objection. In my opinion, whether the mortgagees ought to have been joined or not, the plaintiff had sufficient interest to bring this action. Ought he, then, to have joined the mortgagees? If he ought, judgment ought not to have been given for the defendant, but the Judge ought to have directed under Order XVI. rule 13, or 17, that the mortgagees should be served with notice or joined as defendants. These rules especially provide for the joinder of parties; rule 17, where it appears to the Court that the question ought to be determined with reference to some third person, and rule 13, where necessary parties have not been joined. In such cases the Judge may order the necessary parties to be added; but he should not give judgment for the defendant.

Let us now consider the two grounds

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upon which it has been said that the mortgagees ought to have been joined. First, it is said that all parties interested ought to be joined. But in suits of this character it is not generally necessary that all parties interested should be before the Court. This is decided by the case of *Western v. McDermot* (5). Any one of the parties interested may sue. Then is it necessary, having regard to the interest of the mortgagees?

The exact relation of mortgagor and mortgagee, when the mortgagee is not in possession, is not very clearly defined. But it is sufficient to say that if the mortgagee does not assert his right to possession, and the mortgagor is left to manage the property, he has a right to insist, without reference to the mortgagee, on the observance of any obligations the non-observance of which would injuriously affect the premises. The mortgagee can come in if he likes. If, to restrain the act of which the plaintiff complains would have damaged the mortgagee's security, or even if there was any substantial question of that kind, the Court might have said, "We cannot decide without hearing the mortgagees. Make them parties, and give them an opportunity of stating their views." But in this case all this is the merest surmise. In a case of this sort, unless there is a probability that the relief for which the plaintiff, as mortgagor, sues, will injuriously affect the interest of his mortgagee, the mortgagee ought not to be brought before the Court on a mere suggestion of a possibility that he may be prejudiced. Therefore, I am of opinion, that in the present case the mortgagees need not be brought before the Court. The learned Judge was wrong in saying the plaintiff had no interest, and the case ought to go back to Mr. Justice Manisty, that the remaining points may be dealt with.

*Judgment reversed.*

Solicitors—J. Scott & Clark, for plaintiff; Bel-  
frage & Middleton, agents for W. M. Skinner,  
Sunderland, for defendant.

(5) 36 Law J. Rep. Chanc. 76; s. c. Law Rep.  
2 Chanc. 72.

[IN THE COURT OF APPEAL.]

1878. } THE ECCLESIASTICAL COMMIS-  
Nov. 21, 22. } SIONERS FOR ENGLAND v.  
Dec. 10. } ROWE.\*

*Limitations, Statute of—Action for the Recovery of Land—Ecclesiastical Commissioners on succeeding to Estates of Ecclesiastical Corporation—3 & 4 Will. 4. c. 27. ss. 2, 29; 3 & 4 Vict. c. 113. s. 57.*

*The Statute of Limitations (3 & 4 Will. 4. c. 27) fixes, by s. 2, twenty years as the limit within which a claimant can sue to recover land; but provides, by s. 29, that deans and other ecclesiastical corporations sole may do so within sixty years.*

*By 3 & 4 Vict. c. 113. s. 57, the Ecclesiastical Commissioners are to have, for the purpose of recovering lands vested in them as successors to ecclesiastical corporations sole, all the rights and powers which belonged to those to whose estates they have succeeded.*

*Certain decanal estates vested in the Commissioners in 1854; in 1877 they sued to recover possession of part of these estates from the defendant, who had been in possession adversely to the plaintiffs for more than twenty and less than sixty years:—*

*Held, that the claim of the plaintiffs was barred, the Statute of Limitations being a restrictive and not an enabling statute; that the rights of the plaintiffs to sue to recover land are defined by s. 2 of the Statute of Limitations; and that they cannot sue for this purpose after the lapse of twenty years, although those to whose estates they succeed could have done so within sixty years.*

*Appeal from the judgment of Mellor, J., given on further consideration after a trial without a jury.*

*The plaintiffs, in whom the estates of the deanery of St. Asaph were vested in 1854, brought an action in 1877 to recover possession of two pieces of land alleged to have been allotted in 1827 in right of two different premises held by lessees under the Dean of St. Asaph. The defendant admitted the claim of the*

\* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

*Ecclesiastical Commissioners v. Rowe, App.*

plaintiffs as to one of the pieces of land, but defended the action as to the other.

The statement of claim alleged that this piece of land, described as 137A, had been allotted in 1816 in right of a lease of the George and Dragon under the then Dean; that the lease of this house was renewed from time to time till 1848, when it was demised by the then Dean for twenty-one years from November, 1847; that the estates of the Dean of St. Asaph vested in the plaintiffs in 1854, that the plaintiffs purchased the leasehold interest in the property from the then lessee in 1859, and they now claimed possession of the piece of land allotted in 1816.

The defendant denied that the piece of land in question ever formed part of the decanal estates, and also alleged that the claim of the plaintiffs was barred by the Statute of Limitations (1).

The case having been reserved for further consideration, the following judgment was given:—

(1) 3 & 4 Will. 4. c. 27. s. 2, enacts that “after the 31st day of December, 1833, no person shall . . . bring an action to recover any land . . . but within twenty years next after the time at which the right . . . to bring such action shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right . . . to bring such action shall have first accrued to the person . . . bringing the same.”

Section 29—“Provided always, and be it further enacted, that it shall be lawful for any . . . dean . . . or other spiritual or eleemosynary corporation sole . . . to bring an action or suit to recover any land . . . within such period as hereinafter is mentioned next after the time at which the right of such corporation sole or of his predecessor to . . . bring such action or suit shall have first accrued (that is to say) the period during which two persons in succession shall have held the office or benefice in respect whereof such land . . . shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies and such term of six years, taken together, shall amount to the full period of sixty years; and if such times, taken together, shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will, with the time of the holding of such two persons and such six years, make up the full period of sixty years, and . . . no action . . . shall be . . . brought at any time beyond the determination of such period.”

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MELLOR, J.—In this case I direct the verdict to be entered for the plaintiffs. The allotment, as set out in paragraph 2, to the representatives of Robert Morris, in right of a lease of the George and Dragon and other premises under the said Dean, does not affect the right of the Dean of St. Asaph, and was probably a true description of the persons interested in the lease of the George and Dragon when the claim was sent in; and considering the subsequent dealings of the Dean of St. Asaph with the George and Dragon, I am of opinion that unless the defendant has a sufficient bar to the plaintiffs' claim by enjoyment of more than twenty years of the allotment 137A, the plaintiffs are entitled to recover. I find that the defendant had possession of the allotment 137A adverse to the title of the plaintiffs for upwards of twenty years, but not for sixty years; and I am of opinion that the Ecclesiastical Commissioners have, under the 3 & 4 Vict. c. 113. section 57, the same right during the same period of obtaining possession of the allotment 137A which the holder of the Deanery of St. Asaph would have had in respect of the same. I therefore find my verdict for the plaintiffs, and give judgment accordingly.

The defendant appealed.

*Herschell* and *M. Lloyd*, for the defendant.

*McIntyre* and *O. Higgins*, for the plaintiffs.

[The arguments were directed for the most part to the question of the parcels of land allotted, and to the right of a reversioner to an allotment made in respect of a lease; but as the Court gave no opinion on this point they do not become material. The argument raised on the Statute of Limitations is, with the facts of the case, fully set out in the judgment of the Court.]

*Our. adv. vult.*

The judgment of the Court was (on Dec. 10) read by

COTTON, L.J.—This was an appeal of the defendant from a judgment of Mr. Justice Mellor in favour of the plaintiffs after a trial without a jury. The action

X

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was brought to recover two closes of land, called 137 and 137A, which at the time when the action was brought were in the possession of the defendant. After the action was brought the defendant admitted the title of the plaintiffs to the parcel of land No. 137, but defended the action so far as it sought to recover 137A. In the year 1808 an Act was passed authorising the enclosure of certain common lands in the parish of St. Asaph. In the year 1827 the commissioner (acting in the execution of this Act) made his award, whereby the parcel of land in question was awarded as follows:—

“To the personal representatives of Robert Morris, late of St. Asaph aforesaid, innkeeper, deceased, assigned and allotted in right of the lease of the George and Dragon and other premises in St. Asaph under the said Dean of St. Asaph.”

Though the award was not completed until 1827, it appears that the allotment was made in 1816. The George and Dragon, in respect of which the allotment was made, was the property of the Dean of St. Asaph, and until the year 1820 was held under a lease granted by the then Dean of St. Asaph to two persons named Lloyd, as trustees for the next of kin of Robert Morris. This lease was in the year 1820 sold to Hugh Jones, who in 1820 obtained, on the surrender of the old lease, a new lease. There were several leases of the George and Dragon made after 1820, but none of them included the allotment now in question. By the 3 & 4 Vict. c. 113 (2) the estates of

all deans passed to the Ecclesiastical Commissioners; but under the 75th section of the Act this was to be subject to the right of every dean then living to the estates of his deanery during his life; and it appears from the statement of claim that the Dean of St. Asaph living at the time when the last-mentioned Act passed died in April, 1854, and that thereupon the plaintiffs became entitled in possession to the estates of the deanery.

It is admitted that the freehold and reversion of the George and Dragon formed part of the estates of the deanery, and the plaintiffs in the year 1859 purchased the then subsisting lease of that inn and acquired possession thereof. But they never obtained possession of the allotment now in question, and this action was not commenced until the year 1877. Two questions were raised on the part of the appellant, the defendant in the action. First, that the plaintiffs had not shewn that the Dean of St. Asaph ever had any title to the allotment in question; and secondly, that if this was decided in the plaintiffs' favour, the Statute of Limitations was a bar to this action. Mr. Justice Mellor found as a fact that the defendant had been in possession adverse to that of the plaintiffs for twenty years but not for sixty years, that is, that the right of the plaintiffs to bring the action accrued more than twenty years, but not sixty years before the issuing of the writ, and he decided the question of title and the question raised under the Statute of Limitations in favour of the plaintiffs. The question whether the Dean of St. Asaph ever had any title to this allotment is not free from difficulty. Neither the private Act which has been already mentioned, nor the general Act in force when the award was made (41 Geo. 3. c. 109), contain any express enactment as to the title of a reversioner to an allotment made to his tenant in respect of his lease. We have not been furnished with a copy of the award, and there is no evidence as to the circumstances under which the allot-

(2) The Ecclesiastical Commissioners were created by 6 & 7 Will. 4. c. 77, with power to hold real estate.

By 3 & 4 Vict. c. 113. s. 50, the estates of deans and other ecclesiastical corporations which have not been suspended are vested in the Ecclesiastical Commissioners. By section 75 the life estates of existing corporations are preserved.

By section 57, “The Ecclesiastical Commissioners for England shall, for the purposes of . . . obtaining possession of all lands, tithes or other hereditaments vested in or accruing to them . . . have and enjoy all rights, powers, remedies at law and in equity which belonged or belong or would belong or have belonged to the holder of the deanery, canonry, prebend, dignity or office, or the rector of the rectory in respect of which such

lands, tithes and other hereditaments . . . are by or under the provisions of this Act to be paid or to accrue to and be vested in the said Commissioners.”

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ments mentioned in the award were made to the dean, and as we are of opinion that the Statute of Limitations affords a good defence to the action even assuming that, under the award, the reversion of the allotments made in right of the George and Dragon vested in the dean, we think it better not to give any opinion on this question.

As regards the defence of the Statute of Limitations, the plaintiffs contend that Pears, from whom the defendant bought in 1863, had been in possession of the allotment in question as tenant of the dean. If this point was raised at the trial Mr. Justice Mellor found as a fact against the plaintiffs, and we are of opinion that there is no ground for disturbing his finding, if any, on this point, and further that the evidence shews that the plaintiffs' contention in this respect is not well founded. In our opinion the allotment referred to in the deed relied on by them is that described in the statement of claim as 137, in respect of which no question now arises. But then it is urged on behalf of the plaintiffs, that the Dean of St. Asaph would, under section 29 of 3 & 4 Will. 4. c. 27, have been able to bring his action within sixty years from the time when his right to do so first accrued; and that the effect of 3 & 4 Vict. c. 113. s. 57 was to give the plaintiffs the same time to bring their action. Mr. Justice Mellor found, and it is conceded by the defendant correctly, that the defendant had not been in possession for sixty years, and he decided as a matter of law that under these circumstances the plaintiffs' action was not barred by the statute. We are unable to agree with this decision.

The plaintiffs are within the 2nd section of 3 & 4 Will. 4. c. 27, unless they shew any statutory enactment which exempts them from the statutory bar of twenty years. The plaintiffs contend that the combined effect of the 37th section of 3 & 4 Vict. c. 113, and of section 29 of the Act of 3 & 4 Will. 4. c. 27, gives them such exemption. It is urged that section 29 of the Act of Will. 4. gives deans and other corporations sole mentioned in it, such a privilege in the nature of a right or power as by section 57 of the Act 3 &

4 Vict. c. 113, vests in the Ecclesiastical Commissioners. But this in our opinion cannot be maintained. The 29th section it is true begins with the words, "Provided always it shall be lawful," words which, if taken without reference to the rest of the statute in which they occur, look as if they conferred a right and power on the corporations therein named. But the statute is not one which confers any right in law. On the contrary, it restricts the rights, powers and remedies which independently of its provisions owners of property would possess, by prescribing a limited time within which they must enforce the rights and pursue the remedies which they, independently of the Act, possess. Although the 29th section seems to be enabling, yet in truth this and the 2nd section are statutory enactments, that deans and other ecclesiastical corporations sole shall not bring any action to recover land except within the period mentioned in section 29, and that all other persons shall not do so except within twenty years from the time when the right first accrued.

It was much pressed upon us that the consequence of holding that the Ecclesiastical Commissioners are within section 2 of the 3 & 4 Will. 4. c. 27 would be that, at the time of the passing of the 3 & 4 Vict. c. 113, the Ecclesiastical Commissioners might have no power to recover property belonging to the deanery for which the then dean would have forty years to sue, and that it could not have been intended that the Ecclesiastical Commissioners should thus lose property which the dean could have recovered. It is probable that the attention of Parliament was never directed to the point, and that there was no intention either way. But the supposed inconvenience is much lessened by the fact that, during the life of a dean living at the time when the Act of 3 & 4 Vict. c. 113, passed, the dean and not the Ecclesiastical Commissioners would be entitled to bring an action to recover the property of the deanery, and during this period the Ecclesiastical Commissioners might make enquiries as to the property of the deanery, and might arrange with the dean to recover any pro-

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perty in those cases where, though an action by them would be statute-barred, the dean could still bring an action.

In our opinion the decision on this point in favour of the plaintiffs would lead to this result, that the Ecclesiastical Commissioners could always bring an action to recover land vested in them under 3 & 4 Vict. c. 113, even that of which they at one time had possession, at any time within sixty years from the time when the right to do so first accrued, and that they would not be barred from bringing an action to recover lands acquired by them under the last-mentioned Act till the lapse of the period mentioned in section 29 of the Act of 3 & 4 Will. 4. c. 27, while they would be barred by the lapse of twenty years from bringing an action to recover other estates derived from persons not mentioned in section 29.

These are inconveniences at least as startling as that suggested by the plaintiffs as the result of a decision that twenty years is a bar. But the question is not one of convenience or inconvenience. It is whether there is sufficient to prevent an action by the Ecclesiastical Commissioners being barred by the limitation contained in section 2 of the Act. We are of opinion that there is not, and that an action brought by them is barred not by the period given by section 29, but by that enacted in section 2 (3).

*Appeal allowed, and judgment given for the defendant.*

Solicitors—Field, Roscoe & Co., agents for Rowe & Pemberton, Liverpool, for appellant; Jennings, White & Buckston, for respondents.

(3) 37 & 38 Vict. c. 57, which came into force on the 1st of January, 1879, repeals in part 3 & 4 Will. 4. c. 27, and fixes twelve years as the time within which land may be recovered.

1878.  
Dec. 12, 21. }

MOORE v. ROBINSON.

*Landlord and Tenant—Imperilling License of Beer-house—Forfeiture of Tenancy—Beer-house conducted in Absence of Licensed Person—Married Woman's Property Act, 1870 (33 & 34 Vict. c. 93. s. 11)—Right of Married Woman to bring Action of Trespass—"Property."*

*Under the Married Woman's Property Act, 1870, a married woman can maintain an action in her own name against a wrongdoer for her expulsion from a beer-house, in which she carried on business apart from her husband, and for loss of profits, stock in trade and fixtures, which she had purchased with her separate earnings, it being a remedy for the protection of her property within the meaning of section 11.*

*A married woman living apart from her husband had accumulated enough of her separate earnings to purchase the goodwill and stock of a beer-house, which was taken for her by S., to whom the license was transferred, and who agreed with the landlord not to do anything to imperil the license on pain of forfeiting the tenancy and the fixtures. S. executed a declaration of trust in favour of the plaintiff, and handed it to her with the license indorsed in blank; and she carried on the business. S. having gone away to sea, the defendant, the landlord, served a notice at the house, requiring him to remove his goods by the following day, and on the following day entered and took possession, turning the plaintiff and her furniture out of the house:—Held, on action brought to recover damages for the expulsion, that, in the absence of evidence that the house had been improperly conducted, the absence of S., the licensed person, did not cause the license to be imperilled so as to create a forfeiture, and justify the entry by defendant.*

This was an action of trespass brought by a married woman to recover damages for having been turned out of a beer-house without notice by the landlord, and was tried before Lush, J., on the North-Eastern Circuit, at the Summer Assizes of 1878. Two points arose, which the learned Judge reserved for further con-

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sideration: one being the question whether the plaintiff, who had purchased the house out of her separate earnings, was entitled, by virtue of the Married Woman's Property Act, 1870, to bring the action, and the second, whether, upon the facts proved, there had been a forfeiture, which justified the defendant in turning her out.

*Cave and Edge* (on Dec. 12) argued for the plaintiff.

*Herschell and Aspinall*, for the defendant.

The facts and arguments appear sufficiently from the judgment, which was (on Dec. 21), after time taken to consider, delivered by

LUSH, J.—This action is brought by a married woman, living apart from her husband, for damages for being expelled from a beer-house, which she claimed to be hers, and for loss of profits and of stock and fixtures therein.

It appeared that she was married in 1865; that some time in 1874 she left her husband, and has not since lived with him; that with the savings from her own work, while they lived together, she, after the separation, took a beer-house, and that from the profits of the business she carried on there and elsewhere, she accumulated enough to purchase the goodwill and stock of the beer-house in question.

A person of the name of Smith took the house for her of the defendant, and entered into an agreement in his own name for a yearly tenancy, the plaintiff paying to the outgoing tenant 70*l.* for the goodwill, stock and fixtures. The license was transferred to Smith in the usual way.

The agreement, which was dated the 8th of March, 1877, contained the following stipulations: "Provided that the said John Smith shall not at any time convert the said beer-house and premises into a private dwelling house, but on the contrary shall conduct and manage the same in a proper and orderly manner, and use his best endeavours to extend the custom and business thereof, and shall annually and at all times apply for, and use every effort to obtain all such licenses

at his own expense, as shall be necessary for keeping open the said premises, and shall not do, or suffer to be done, any offence, matter or thing against such license, or in or upon or about the said demised premises, whereby such license might be imperilled, or the certificate of the magistrate required for obtaining a renewal of such license, be refused, suspended or forfeited, or by reason of any such offence, matter or thing, the said John Smith might be or be liable to be fined by such magistrate, and in case the said John Smith shall do or permit or suffer any of the said acts, matter or things agreed by him not to be done, permitted or suffered, then and in such case, and thereupon or at any time thereafter, it shall and may be lawful for the defendant to put an end to and determine the letting, and to enter upon and retain possession," &c. It was further agreed that the fixtures should be absolutely forfeited by Smith to the defendant in the event of a breach of any or either of the stipulations. The plaintiff carried on the business with the assistance of her daughter. On the 4th of May Smith executed a declaration of trust, and handed the same to the plaintiff, together with the license endorsed in blank. The defendant alleged, and I think there is every reason to believe that he thought the plaintiff was Smith's wife.

Smith was a seafaring man, and after signing the declaration of trust and handing over the license, he went to sea, and was absent about six or seven weeks. He went away a second time for the same purpose, and after a short stay in the beer-house, went away again. The last departure was about the 3rd of September. The defendant, who carried on business in the adjoining house, thereupon, on the 6th of December, served a notice, addressed to Smith, requiring him to remove his goods by twelve o'clock the next day, and on the following day he entered and took possession, removing the furniture to a neighbouring warehouse. Upon this state of facts two questions arose, first, whether the right of re-entry had accrued; and secondly, whether the plaintiff can maintain the action in her own name. It is agreed that if the

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entry was wrongful, and the plaintiff is entitled to recover for the expulsion, the verdict shall be entered for 100*l.*, with costs. If the entry was rightful, and the plaintiff is entitled to sue for the goods taken possession of by the defendant, the verdict shall be for 15*l.* without costs.

It was not suggested that the beer-house had not been properly conducted, or that Smith or the plaintiff had committed any offence against the license, or done or suffered to be done anything in or upon or about the demised premises, "whereby the license might be imperilled or the magistrate's certificate be refused, suspended or forfeited."

The carrying on the business by the plaintiff in Smith's absence, and especially after he had left for the third time, seems to have been considered by the defendant as an act which imperilled the license. It is not clear whether Smith left on the last occasion with an intention to return or not, but the plaintiff and he had quarrelled, and, in fact, he had not returned to the plaintiff up to the date of the trial, and it may not unreasonably be inferred that he left with an intention to abandon the premises. It is not necessary to say what would have been the effect if the plaintiff had continued to carry on the business for a period longer than would be required to make an application to transfer the license to herself or some other person, for the defendant entered three days after Smith left, and before there was time to make any such arrangement. I am therefore of opinion that the entry cannot be supported on the ground that anything had been done up to this time which imperilled the license.

It was further contended that the stipulation binding Smith to "use his best endeavours to extend the custom and business" of the house, bound him by implication to reside continually on the premises and conduct the business in person. I cannot accede to this view.

It was not shewn or suggested at the trial that any means were neglected to extend the business, or that Smith could have done better if he had remained continuously on the premises; and it would be straining the words beyond their fair import to hold that the tenant of such

a house was thereby obliged always to attend to the business in person. The entry and expulsion were therefore unjustifiable.

The only other question which was argued was, whether the plaintiff was entitled by virtue of the Married Woman's Property Act, 1870, to maintain such an action as this. I am of opinion that she is. The words of the 11th section are, "A married woman may maintain an action in her own name for the recovery of any wages, earnings, money and property by this Act declared to be her separate property, and she shall have in her own name the same remedies both civil and criminal against all persons whomsoever, for the protection and security of such wages, earnings, money and property, and of any chattels, or other property, purchased or obtained by means thereof for her own use as if such wages, earnings, money, chattels and property belonged to her as an unmarried woman, and in any indictment or other proceeding it shall be sufficient to allege such wages, earnings, moneys, chattels and property to be her property." The lease, goodwill, stock and fixtures were purchased with her earnings for her own use, and it cannot, I think, be doubted that the word "property" is large enough to cover all these and was intended to cover every description of property in which she had invested her earnings.

The entry of the defendant being wrongful, could she not have maintained ejectment? I think she certainly could; that is a "remedy" for the protection of her property, and a person who can maintain ejectment can bring an action of trespass, which is a substituted remedy for ejectment, whereby the value of the property is sought to be recovered instead of the property itself. It was true, as was argued by Mr. Herschell, that the 11th section is less comprehensive than the 21st and 26th sections of 20 & 21 Vict. c. 85, which enables a woman who has obtained a protecting order to sue on contracts, and for wrongs and injuries, as well as for "property," and it might be that a married woman in the position of the plaintiff might not



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be able to bring an action unconnected with property as an action of libel in her own name—See *Rameden v. Brearley* (1). But as regards the present cause of action, the rights given to the one are as comprehensive as those given to the other. It would be an unreasonable construction of the words of the Act to hold that a married woman may sue in detinue for her goods and not in trover or trespass for their conversion.

However the action may be framed, the object of it is to protect the property. On this ground it was held in *Summers v. The City Bank* (2), that a married woman who carried on business separately from her husband, and who kept a banking account, might maintain an action against her banker for damages for not presenting a bill of exchange deposited with them for that purpose, for not giving her notice of its dishonour, and for dishonouring her cheque, she having funds in their hands to meet it.

My judgment is therefore for the plaintiff for 100*l.*, which, as the defendant has since died, is by agreement to be entered as of the 10th of July last, the day when the action was tried, with costs.

*Judgment for the plaintiff.*

Solicitors—Jno. Seaife, agent for Duncan & Duncan, South Shields, for plaintiff; H. C. Coota, agent for H. A. Adamson, North Shields, for defendant.

1878. }  
Dec. 7. }

MIGOTTI v. COLVILLE.

*Action—False Imprisonment—Computation of Time—One Calendar Month—Expiration of Time of Imprisonment.*

[For the report of the above case, see 48 Law J. Rep. M.C. 48.]

(1) 44 Law J. Rep. Q.B. 46; s. c. Law Rep. 10 Q.B. 147.

(2) 43 Law J. Rep. Q.P. 261; s. c. Law Rep. 9 Q.P. 680.

*Castle Downton 49 L.J. 627*  
*Blair v. Parke 52 L.J. 112*  
*Expt. Webster 52 L.J. Ch. 376*

[IN THE COURT OF APPEAL.]

1878. }  
Dec. 3. }

BLOUNT v. HARRIS.\*

*Bill of Sale—Affidavit—Attesting Witness—Sufficiency of Description.*

In the attestation clause to a bill of sale, the attesting witness was described as "B. O., solicitor, Bloomfield Street, London." In the affidavit filed with the bill, the attesting witness described himself as "of Bloomfield Street, in the city of London, solicitor," and the affidavit concluded, "I reside at Grove House, Acton, in the city of London."—

Held, that the description in the affidavit of the attesting witness's residence, though inaccurate, was sufficient, as it was not calculated to mislead persons of ordinary knowledge and intelligence.

This was an appeal from a decision of Field, J., reported 47 Law J. Rep. Q.B. 596.

The plaintiff claimed certain goods under a bill of sale.

For the defendant it was contended that the bill of sale was invalid for the following reasons:—

In the attestation clause to the bill of sale the attesting witness was described as "Edward Clark, solicitor, Bloomfield Street, in the City of London."

The affidavit filed with the bill of sale, under 17 & 18 Vict. c. 36, s. 1, began thus: "I Edward Clark, of Bloomfield Street, in the City of London, solicitor, make oath and say as follows": and concluded, "I reside at Grove House, Acton, in the city of London."

It was proved at the trial that there were three places called Acton in England, the well known place in Middlesex, and two small villages in Suffolk and Cheshire respectively.

FIELD, J., on further consideration, gave judgment for the plaintiff, holding that the description in the affidavit of the attesting witness's place of residence, though inaccurate, was sufficient, since no one could be misled by it in the case

\* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

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of a solicitor carrying on business in London.

On appeal—

*Willey Wright*, for the defendant, cited *Brodrick v. Scale* (1), *Murray v. Mackenzie* (2), *Collins v. Goodyer* (3), *Jones v. Harris* (4), *Hewer v. Ooz* (5), *Thorpe v. Brown* (6), *Larchin v. The North Western Deposit Bank* (7), *Briggs v. Boss* (8).

*Grantham and Crispe*, for the plaintiff, were not called upon to argue.

BRAMWELL, L.J.—I am of opinion that this judgment should be affirmed. It is really not of very great use to cite cases on the point, though no doubt the cases have gone far to mitigate the rigour of the law. I think the description of the witness in this case will just about do and no more; and for these reasons:—Acton, in the city of London, is a description which any one of ordinary knowledge and intelligence would know to be impossible. There are no "Balings," "Actons" or "Holloways" in the City of London. It is a contradiction in terms, so that any one who sees it must say it cannot be meant; and that is a justification for rejecting the words "in the city of London" altogether. Then the question arises whether Grove House, Acton, is in itself sufficient? I think there might be some difficulty in holding that it would be so in the case of Acton, in Suffolk; why then should it be sufficient in the case of Acton, in Middlesex? Because Acton, in Middlesex, is the Acton people would generally speak of; and when we bear in mind that the solicitor who says he lives at "Grove House, Acton," says also that he carries on business in the city of

London, in all reason it must be inferred that the metropolitan Acton is meant. If we thought people would be likely to be misled by the description, it would be otherwise, but it must be remembered that the question is not, whether any one has been actually misled, but whether the description is calculated to mislead.

BRETT, L.J.—I am of opinion that this description is sufficient, on the authority of *Hewer v. Ooz* (4). It seems to me that the identity of the man named in the affidavit with the man named in the bill of sale, is sufficiently made out. We may refer from one to the other. In both the bill of sale and at the head of the affidavit, the witness is described as a solicitor, carrying on business in the city of London. In the affidavit the witness swears, "I reside at Grove House, Acton," adding "in the city of London." Now if there were an Acton in the city of London, the description clearly would not do, for it would be misleading. The certain test of the sufficiency of the description is not, whether some particular individual derived from it the means of knowing where the witness lived, but whether it was sufficient to lead persons of ordinary care and intelligence to a right conclusion. If there was an Acton in the city of London, as well as in Middlesex, no one could tell that the Acton in Middlesex was intended, or if there were any other Acton near London the description would not do for the same reason. But it was proved that there was no Acton in the city of London, and only one Acton in the immediate neighbourhood of London or in any of the adjacent counties. It is true there were proved to be two other Actons, one in Suffolk and the other in Cheshire. But when we add to the description, that the witness carried on business in the city of London, there can be no doubt what is meant. Therefore, the description is sufficient, unless altered by the addition. This might be so if the addition was possible, but if it is impossible it cannot mislead, and may be rejected as an addition of nonsense to a sensible description. In *Hewer v. Ooz* (4), an accurate description was followed by a nonsensical addition. The

(1) 40 Law J. Rep. C.P. 130; s. c. Law Rep. 6 C.P. 98.

(2) 44 Law J. Rep. C.P. 313; s. c. Law Rep. 10 C.P. 625.

(3) 2 B. & O. 563.

(4) 41 Law J. Rep. Q.B. 6; s. c. Law Rep. 7 Q.B. 157.

(5) 3 E. & E. 428; s. c. 30 Law J. Rep. Q.B. 78.

(6) Law Rep 2 H.L. 220.

(7) 44 Law J. Rep. Exch. 71; s. c. Law Rep. 10 Exch. 64.

(8) 37 Law J. Rep. Q.B. 101; s. c. Law Rep. 3 Q.B. 268.

*Blount v. Harris, App.*

residence of the witness was said to be "New Street, Blackfriars, in the county of Middlesex." "New Street, Blackfriars," was right, and "the County of Middlesex" was wrong. But, as Blackfriars was perfectly well known, it was held that the absurd addition "in the county of Middlesex" might be rejected as surplusage. Therefore, without inventing a new class of exceptions, or altering the principle of former decisions, I think on the authority of *Hewer v. Cox* (4) we are not called upon to overrule the present decision.

COTTON, L.J.—I also think that the decision of Mr. Justice Field in this case ought not to be set aside. In the attestation clause to the bill of sale the witness is properly described, and that description is not contradicted in the affidavit. The description, Grove House, Acton, in the city of London, is not properly applied to any place at which the witness does not reside, and therefore would not lead persons to seek him in a wrong place. I think, therefore, the addition "in the City of London" may be rejected as impossible and absurd. The question then arises, is Grove House, Acton, a sufficient description in itself? It is objected that there are three places in England called Acton. But we must take the description of the witness's residence together with the rest of the affidavit and the bill of sale itself. And it is clear that any one who reads either the affidavit alone or the affidavit and bill of sale must come to the conclusion that the Acton intended is the well known Acton near London.

*Judgment affirmed.*

Solicitors—Noon & Clarke, for plaintiff; G. R. Harrison, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1878.	{	BOWEY v. BELL.
July 1.		BROOKS v. ISRAEL.
Dec. 2, 21.		NORTH v. BILTON.
		SIDDONS v. LAWRENCE.

*Costs — Practice — Order LV. — Order Depriving successful Plaintiff of Costs — Divisional Court, Jurisdiction of over Costs.*

*Order LV. provides that, "where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial, for good cause shewn, the Judge before whom such action or issue is tried or the Court shall otherwise order":* —Held, that where no application has been made to the Judge at the trial to deprive a successful plaintiff of his costs, it is nevertheless competent to the defendant to come to the Divisional Court which has jurisdiction, for good cause shewn, to make an order that costs shall not follow the event. But such application to the Court must be made promptly.

These were cases which came before the Court upon the application of the several defendants against whom, on the trials of the respective actions, verdicts had been given by the juries, with one farthing damages, and who now moved for orders to deprive the plaintiffs of costs, under Order LV. rule 1.

The actions had been tried at various times, but in each instance, before the decision of the House of Lords, on the 6th of June, 1878, in *Garnett v. Bradley* (1), reversing the judgment of the Court of Appeal in the same case.

The House of Lords decided that, by Order LV., the statutes of 21 Jac. 1. c. 16. s. 6 and 3 & 4 Vict. c. 24. s. 2 (Lord Denman's Act) were repealed with respect to actions not triable in a County Court, which are tried by a jury, and that a successful plaintiff, without regard to the amount of damages he may recover, is entitled to his costs in the absence of any order to the contrary. The judgment of the Court of Appeal in *Garnett v. Bradley* (2) being therefore then recognised as

(1) 48 Law J. Rep. Exch. 186; s. c. Law Rep. 3 App. Cas. 944.

(2) 46 Law J. Rep. Exch. 545; s. c. Law Rep. 2 Ex. D. 349.

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law, no application was made at the trial, by any of the defendants, to the Judge before whom the actions were tried, to deprive the plaintiffs of costs.

No sooner was final judgment given in the House of Lords than the plaintiffs carried in their costs for taxation, and the defendants came to the Divisional Court, contending that, notwithstanding there had been no application made at the trial to the Judge, the Court had now upon good cause shewn by the defendants, power to "otherwise order."

The case of *North v. Bilton* was argued before Mellor, J., and Manisty, J. (on the 1st of July), by *Horace Smith*, for the defendant, and *J. O. Lawrence* (*Bruce Russell* with him), for the plaintiff, when the Court took time to consider their judgment.

There being other cases raising the same point, the Court ordered them all to be argued together before three Judges during the Michaelmas sittings. Accordingly (on the 2nd of December), before Mellor, J., Pollock, B., and Manisty, J., the following cases were heard :—

**BOWEY v. BELL.**

*Littlel and Petheram*, for defendant.  
*Herschell and Edge*, for plaintiff.

**BROOKS v. ISRAEL.**

*Crispe*, for defendant.  
*Wightman Wood*, for plaintiff.

**SIDDONS v. LAWRENCE.**

*O. A. Cripps*, for defendant.  
*W. Graham*, for plaintiff.

*Our. ado. vult.*

The judgments of the Court, in all the four cases, were (on the 21st of December) read by Manisty, J.

**BOWEY v. BELL.**

**MANISTY, J.**—This was an action for slander, which came on for trial before Lord Justice Bramwell and a jury on the 25th day of March, 1876, when a verdict was found for the plaintiff, with damages one farthing. Judgment was given for the plaintiff on the same day.

No application was made to the learned Judge by either party with respect to costs, and no further proceeding was taken in the action till the 20th of March, 1877.

On the 30th of January, 1877, the Common Pleas Division of the High Court of Justice decided, in the case of *Parsons v. Tinling* (3) (which was an action for libel) that Order LV. in Schedule I. of the Judicature Act, 1875, repealed the previous law as to costs in an action for slander, and entitled the plaintiff to the costs of the action, notwithstanding the nominal amount of his damages, unless upon application made at the trial for good cause shewn, the Judge before whom the action was tried, or the Court, should otherwise order.

In consequence of that decision, the plaintiff Bowey, on the 20th of March, 1877, entered up judgment, and proceeded to tax his costs.

The Master taxed his costs at one farthing, and the plaintiff took out a summons to have the taxation reviewed. That summons was referred to the Court by Field, J., and it came on for hearing in the Queen's Bench Division on the 30th of May, 1877, when the Court ordered the taxation to be reviewed.

The defendant appealed against that decision.

On the 2nd of June, 1877, the Court of Appeal, by a majority of two Judges out of three, decided in the case of *Garnett v. Bradley* (2), which was an action for slander in the Exchequer Division, that the statute 21 Jac. 1. c. 16. s. 6 was not repealed by Order LV., and that consequently the plaintiff was only entitled to one farthing for costs.

On the 13th of June, 1877, the Court of Appeal, upon the authority of *Garnett v. Bradley* (2), reversed the decision of the Queen's Bench Division, made in the present action on the 30th of May, 1877.

On the 6th of June, 1878, the House of Lords reversed the decision of the Court of Appeal in *Garnett v. Bradley* (1), and decided that, in the absence of any order to the contrary made by the Judge at the

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trial, or by the Court, the costs follow the event in all cases where an action for slander or libel, or any case not triable in a County Court, is tried by a jury.

On the 20th of June, 1878, the Court of Appeal gave the present plaintiff (Bowey) leave to appeal to the House of Lords against their decision of the 13th of June, 1877, and that appeal is pending.

On the 27th of July, 1878, the defendant Bell gave notice that this Court would be moved on Thursday, the 1st day of August next, or so soon after as counsel could be heard, for an order that the costs of this action should not follow the event, but that the plaintiff should pay the costs of the action, or that each party should pay his own costs. That motion came on to be heard before my brothers Mellor, Pollock and myself on the 2nd of December, 1878.

The questions we have to decide are, first, whether, having regard to the fact that no application or order as to costs was made at the trial, this Court has jurisdiction to make any such order as is now asked for by the defendant? 2nd., whether, assuming this Court to have such jurisdiction, it ought to exercise it, having regard to the time which has elapsed since the trial, and the decisions which have been made, and the proceedings which have taken place in the meantime?

As to the first question, we are of opinion that the Court has power to entertain the present application, notwithstanding no application was made to, and no order as to the costs made by the Judge at the trial. It is unnecessary to decide whether, if the Judge at the trial had made an order as to the costs under Order LV., this Court could have reviewed his decision, unless he gave leave to appeal (see section 49 of the Judicature Act, 1873), but in the absence of any such order, we think it is competent to either party to apply to this Court (under Order LV.) to make such order as it may think fit as to the costs of the action. See *Baker v. Oakes* (4), *The Ge-*

*neral Steam Navigation Company v. The London and Edinburgh Shipping Company* (5).

As to the second question, we are of opinion that this Court ought not now to interfere.

At the time when this action was tried (namely, in March, 1876), there was a very general impression that a plaintiff receiving one farthing damages in an action of slander could recover only one farthing for his costs by virtue of the statute 21 Jac. 1. c. 16. s. 6, and all parties seem to have acted for a considerable time upon the notion that such was the law.

But it must be borne in mind that from the 30th of January, 1877, when the Common Pleas Division decided that a plaintiff who recovers a farthing damages in an action of libel or slander tried by a jury, is entitled to his costs, unless an order to the contrary is made at the trial by the Judge who tries the cause, or by the Court, down to the 2nd of June, 1877, when the Court of Appeal in *Garnett v. Bradley* (2) overruled that decision, no application was made by the defendant to deprive the plaintiff of his costs, and that it was not till after the House of Lords on the 6th of June, 1878, in the case of *Garnett v. Bradley* (1) declared the law to be as laid down in *Parsons v. Tinsling* (3), and after the plaintiff had obtained leave to appeal to the House of Lords in this case, that the present application was made.

Under these circumstances we are of opinion that the application is too late and ought not to be entertained. The motion will, therefore, be dismissed with costs.

#### BROOKS v. ISRAEL.

MANISTY, J.—This was an action for slander tried before Mr. Justice Lopes on the 13th and 14th of February, 1878, when the jury found a verdict for the plaintiff with one farthing damages.

No application was made at the trial as to costs.

No further proceeding was taken by either party until after the House of

(4) 46 Law J. Rep. Q.B. 246; s. c. Law Rep. 2 Q.B. D. 171.

(5) 47 Law J. Rep. Exch. 77; s. c. Law Rep. 2 Ex. D. 467.

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Lords, on the 6th of June, 1878, decided in the case of *Garnett v. Bradley* (1) that in the absence of any order to the contrary, a verdict for one farthing damages in an action of slander carries costs.

On the 18th of June, 1878, the plaintiff gave notice of taxation of his costs, which were taxed on the 26th at 114*l*.

On the 24th of June, at the instance of the defendant, Mr. Justice Lopes stayed the proceedings to give the defendant the opportunity of applying under Order LV. Judicature Act, 1875, for an order depriving the plaintiff of his costs.

On the 26th of June the defendant gave notice of motion to that effect, and the same came on for hearing before my brothers Mellor, Pollock and myself on the 2nd of December.

It was objected on the part of the plaintiff that this Court could not entertain the application for several reasons; first, because no application was made at the trial to the learned Judge who tried the cause; second, because the application was too late; third, because Order LV. Judicature Act, 1875, has been repealed by section 17 of the Appellate Jurisdiction Act, 1876, and rule 9 of Order LVIII., 1876.

1. We are of opinion and have already so decided, in *Bowey v. Bell*, that this Court can entertain the present application, notwithstanding no application was made to the Judge at the trial.

2. We think that under the circumstances of this case the application is not too late.

3. We are of opinion that Order LV. has not been repealed. We think it never could have been intended to substitute another single Judge for the Judge who presided at the trial, and there is nothing in the language of the 17th section of the Act or of rule 9 Order LVIII. which, expressly or by implication, repeals Order LV.

The case must consequently stand for further consideration on the merits.

NORTH v. BILTON.

MANISTY, J.—This was an action for slander which was tried before Cleasby, B., with a jury on the 2nd of April, 1878,

when a verdict was found for the plaintiff with one farthing damages.

The plaintiff applied to the learned Judge at the trial to certify for his costs, but the Judge refused.

No application was made by the defendant under Order LV. Judicature Act, 1875.

No further proceeding was taken by either party until after the decision of the House of Lords on the 6th of June, 1878, in *Garnett v. Bradley* (1).

On the 20th of June, 1878, plaintiff gave notice to tax his costs, and they were taxed on the 21st at 80*l*. 3*s*. 2*d*.

On the 27th of June the defendant gave notice of his intention to apply to this Court for an order depriving plaintiff of his costs.

That motion came on to be heard before my brother Mellor and myself on the 1st of July, when it was objected that this Court had no power to entertain the application, and that the application was too late. We are of opinion that the Court has the power to entertain the application, and that it is not too late.

The case will therefore stand for further consideration on the merits.

SIDDONS v. LAWRENCE.

MANISTY, J.—This was an action for a malicious prosecution tried before Cleasby, B., with a jury, at Oakham, on the 19th of March, 1878, when a verdict was found for the plaintiff with one farthing damages.

The plaintiff applied for a certificate to entitle him to costs, which the learned Judge refused to grant.

No application as to the costs was made by the defendants.

No further proceeding was taken by either party until after the decision by the House of Lords in the case of *Garnett v. Bradley* (1) on the 6th of June.

On the 22nd of June plaintiff delivered his bill of costs for taxation, which was adjourned to enable the defendant to instruct counsel.

On the 3rd of July the plaintiff's costs were taxed at 67*l*. 19*s*. 3*d*.

On the 6th of July a summons was taken out before Cleasby, B., to stay

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execution, which was heard before Lindley, J., in the absence of Cleasby, B., on circuit, on the 23rd of July, when his Lordship stayed execution for twenty-eight days, the defendant undertaking to apply within fourteen days for an order to deprive the plaintiff of costs.

On the 23rd of July the defendant, in pursuance of that undertaking, gave notice of motion for an order under Order LV., Judicature Act, 1875, that the plaintiff should bear and pay his own costs of the action. That motion came on to be heard before my brothers Mellor, Pollock and myself on the 2nd of December, when it was objected that the Court had no power to entertain the application, and that the application was too late.

We are of opinion that neither of these objections can be sustained, therefore the case will stand for further consideration on the merits.

Solicitors—Marland, agent for Bell, Nottingham, for plaintiff, in *North v. Bilton*; Hardisty & Rhodes, agents for Hibbert, Mansfield, for defendant; Shum & Crossman, for plaintiff; Oliver & Botterell, for defendant, in *Bowey v. Bell*; S. J. Robinson, for plaintiff; O. O. Humphreys & Son, for defendant, in *Brooks v. Israel*; Beaumont & Warren, agents for Atter & Brown, Peterborough, for plaintiff; P. R. T. Toynbee, agent for Toynbee, Larkan & Co., Lincoln, for defendant, in *Siddons v. Lawrence*.

[IN THE QUEEN'S BENCH DIVISION.]

1878. { THE GUARDIANS OF THE POOR OF  
Dec. 11. { THE BARTON BEGIS POOR LAW  
UNION (appellants), v. THE  
CLERK OF THE PEACE FOR THE  
COUNTY OF BERKS (respondent).

*Poor Law—Criminal Lunatic—Order for Maintenance on Parish of Settlement—Settlement of Married Woman being a criminal Lunatic—Date at which Settlement to be computed—9 Geo. 4. c. 40. s. 54, and 3 & 4 Vict. c. 54. s. 7.*

[For the report of the above case, see 48 Law J. Rep. M.C. 51.]

[IN THE EXCHEQUER DIVISION.]

1878. }  
Nov. 19. } JAKEMAN v. COOK.

*Bankruptcy—Discharge—Promise on new Consideration to pay old Debt—32 & 33 Vict. c. 71. s. 49.*

*The defendant having been indebted to the plaintiff, and having been released from the debt by discharge in bankruptcy, promised the plaintiff, for a new consideration, to pay the debt:—Held, that the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 49, did not render this promise invalid.*

This was an appeal (by case agreed on between the parties) from the County Court of Yorkshire, holden at Sheffield, in an action upon a promise by the defendant, that if the plaintiff would supply the defendant with meat on credit, the defendant would pay the plaintiff the amount of a debt from himself to the plaintiff, from which he had been released by discharge in bankruptcy (1). It was contended for the defendant that the promise was invalid under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 49 (2); the Judge of the County Court held that the promise was valid, and gave judgment for the plaintiff. The defendant appealed.

*Bray*, for the defendant.—No doubt, at common law, a promise, even without new consideration, to pay a debt the remedy for which has been barred, or a

(1) The debtor's affairs had been liquidated by arrangement and not in bankruptcy; but the argument of the case was upon the footing that liquidation by arrangement was for the purpose of the case equivalent to bankruptcy.

(2) The Bankruptcy Act, 1869, section 49, enacts that, "An order of discharge" . . . "shall release the bankrupt from all" . . . "debts provable under the bankruptcy," other than certain debts there mentioned; and that "an order of discharge shall be sufficient evidence of the bankruptcy, and of the validity of the proceedings thereon, and in any proceedings that may be instituted against a bankrupt who has obtained an order of discharge, in respect of any debt from which he is released by such order, the bankrupt may plead that the cause of action occurred before his discharge, and may give this Act and the special matter in evidence."

*Jakeman v. Cook, Exch.*

promise, upon new consideration, to pay a debt which has been itself extinguished, is good. But bankruptcy legislation has introduced a new principle, and under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71) s. 49 (2), read in the light of preceding legislation, this promise is invalid. By 6 Geo. 4. c. 16. s. 131, it was enacted that no bankrupt after certificate should, upon any promise or agreement not in writing, be liable to pay any debt from which he had been discharged by his certificate. By 7 Geo. 4. c. 57. s. 61, it was enacted that no insolvent debtor should be liable to be sued upon any new contract or security for payment of any debt in respect of which he was entitled to the benefit of this Act; and it was held in *Evans v. Williams* (3), approved in *Ambrose v. Cook* (4), that under this enactment a new contract or security was invalid, though upon new consideration. By 12 & 13 Vict. c. 106. s. 204, it was enacted that no bankrupt after certificate should, upon any promise or agreement (not saying as in 6 Geo. 4. c. 16. s. 131, any promise or agreement not in writing) be liable to pay any debt from which he had been discharged by his certificate; and in accordance with *Evans v. Williams* (3) it was held in *Kidson v. Turner* (5), that, under this enactment, a bond given by a bankrupt for a debt barred by his certificate was invalid, although a bond requires no consideration. By 24 & 25 Vict. c. 134. s. 161, it was enacted that an order of discharge should discharge the bankrupt from all debts provable under his bankruptcy, save as therein provided; and by section 164 it was enacted that, after discharge, the bankrupt should not be liable to pay any debt provable under the bankruptcy, on any contract, promise or agreement, verbal or written, made after adjudication. The existing enactment, 32 & 33 Vict. c. 71. s. 49 (2), shews no intention of departing from the policy of those preceding enactments, now repealed; and consequently the promise is invalid under its

provision that an order of discharge shall release the bankrupt from all debts provable under the bankruptcy, other than certain debts there mentioned, and that in any proceedings against a bankrupt in respect of any debt from which he is released by his order of discharge, the bankrupt may plead that the cause of action occurred before his discharge, and may give this Act and the special matter in evidence. *Heath v. Webb* (6) is a strong authority in favour of the defendant; it is true that in that case the promise sued on was not founded upon any new consideration; but both the Judges gave reasons for their decision which strongly support the contention for the defendant. Lord Coleridge, C.J., said (7), "The present Act, in its general scope, was obviously intended to make bankruptcy proceedings more completely effect the object of winding up a man's previous liabilities and giving him an altogether fresh start; I am not prepared to hold that, as it were by a side wind, and by reason of the omission of particular provisions with regard to the effect of such promises as these, the Act has reversed the whole course of legislative policy on this subject since 6 Geo. 4. c. 16." And Lindley, J., said (8) the Act shewed an evident intention that the bankrupt should be more completely discharged from his liabilities than under previous Acts.

*Woolf*, for the plaintiff, was stopped by the Court.

KELLY, C.B.—It is incumbent on us if we find that the existing Act, the Bankruptcy Act, 1869, section 49 (2), differs, as I think it does, materially from former Acts, to look merely to the Act of 1869, and general principles, together with the objects of bankruptcy legislation, including the objects which the legislature appears to have had in view in past legislation, but not attributing to the legislature in its present enactments intentions which belong only to its past

(3) 1 Cr. & M. 30; s. c. 2 Law J. Rep. Exch. 41.

(4) 2 Hurl. & N. 73; s. c. 26 Law J. Rep. Exch. 278.

(5) 3 Hurl. & N. 581; s. c. 27 Law J. Rep. Exch. 492.

(6) 46 Law J. Rep. C.P. 89; s. c. Law Rep. 2 C.P. D. 1.

(7) See the end of his judgment.

(8) 46 Law J. Rep. C.P. 93; s. c. Law Rep. 2 C.P. D. 8.



*Jakeman v. Cook, Exch.*

enactments. Now the objects which the legislature may be supposed to have had in view in the repealed enactments which have been relied on for the defendant, are two-fold: first, the affording of due protection to the debtor; secondly, the prevention of fraudulent preference of one creditor over another. The words of the present Act being such as they are, is there any reason for attributing to the legislature, in enacting it, an intention, with a view to either of those objects, of rendering such a promise as the present invalid? It seems to me that neither of those objects would justify such an intention. The prevention of fraudulent preference is out of the question; and the affording of due protection to the debtor, is, to my mind, far from requiring such an intention. It is material to bear in mind that for the debtor's own protection it may be most important that he should have power to bind himself by such a promise as the one sued on; he may, being without money, have need to obtain credit, and the power of binding himself, for a new consideration, to pay debts which have been barred by his bankruptcy, may be to him a most valuable help in obtaining credit. It certainly appears to me that there is nothing contrary to justice or public policy in allowing such an action as this to be maintainable. The words of the present Act are in themselves far from shewing any intention of prohibiting such an action. And the argument for the defendant has by no means satisfied me that, on the ground of previous legislation, any such intention ought to be imported into the Act.

CLERKBY, B.—I am of the same opinion. We have a contract to this effect:—If you will continue to supply me with meat on credit, I will pay you a debt from which I have been released by bankruptcy. In such a contract there is clearly nothing against law unless it be by virtue of some special enactment. Is there any such special enactment? It is said that the Bankruptcy Act, 1869, section 49, is a special enactment of such a character; and in support of that contention we have been referred to *Heather v. Webb*

(6). But in that case the promise was without any new consideration, and the cause of action therefore arose before discharge.

*Judgment affirmed.*

*Bray* asked for leave to appeal, which was refused.

Solicitors—Layton & Jaques, agents for D. H. Porrett, Sheffield, for plaintiff; J. Cotton, agent for Tattershall, Sheffield, for defendant.

[IN THE COURT OF APPEAL.]

(*Appeal from the Exchequer Division.*)

1878. } HIGHTON AND OTHERS v. TRE-  
Nov. 27. } HERNE AND ANOTHER.\*

*Practice*—*Appeal from Order absolute for New Trial*—*Interlocutory Appeal*—*Enlargement of Time*—*Rules of Supreme Court, 1875*—*Order LVII. Rule 6*—*Order LVIII. Rule 15.*

*An order absolute for a new trial is an interlocutory order, an appeal from which must be brought within twenty-one days from the date thereof, under Order LVIII. rule 15.*

*Where a party failed to appeal from such interlocutory order within twenty-one days, under the mistaken belief that such order was final, and that an appeal might be brought at any time within twelve months,—Held, that such mistake was not a circumstance which would justify the Court in enlarging the time for appealing after the expiration of the twenty-one days under Order LVII. rule 6.*

In this action at the trial a verdict was found and judgment given for the plaintiff for the sum of 4,500*l.*

On the 11th of May the defendants obtained in the Exchequer Division a rule nisi for a new trial, which was made absolute on the 19th of June.

Against this order the plaintiffs resolved to appeal, but in consequence of the advice of counsel that the plaintiffs had a year

\* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

*Highton v. Treherne (App.), Exch.*

to appeal in, no appeal was brought within the twenty-one days prescribed by Order LVIII. rule 15.

*Willis* now moved the Court of Appeal on behalf of the plaintiffs, that the time for appealing against the judgment of the Exchequer Division should be extended to the 1st of December, under Order LVII. rule 6.

*Cock*, for the defendants, cited *The International Financial Society v. The City of Moscow Gas Company* (1) and *In re Mansel* (2).

BRAMWELL, L.J.—I think this appeal ought to be refused; and I say so without regret, for I think the appeal in this case is one of those which seldom succeed, and probably the plaintiff is better off than if the appeal had been allowed, and I am not sure he has not been guilty of some laches. But whether we regret it or not, we are bound by the cases that have been cited. If it were not for what I have already said I should regret this decision, for I cannot think it a reasonable thing, and I am very sorry that it should be held, that where there has been a *bona fide* mistake, a party should be punished for that mistake, not according to the degree of laches or according to the mischief that he has done, but to the extent perhaps of the full amount of his claim. In the present case, supposing the plaintiff to be entitled to final judgment, the penalty laid upon a mistake in the construction of a rule is 4,000%. I cannot help thinking the rule ought to be that if the Court finds that a mistake has been made without gross carelessness or dishonourable conduct, the Court should set it right by expediting proceedings, or by an order as to costs, or in some such other way as they may think fit. No one can have a greater respect than I have for the authority of Lord Justice James, but I cannot agree with him in the present instance. Suppose the solicitor were to die suddenly in the course of the proceedings. I cannot see what difference there would be, as far

as the party is concerned, between delay so occasioned and delay occasioned by a blunder on the part of the solicitor. If the party has relief in the case of death, why not in the case of a blunder? If it is said that the rule is of no avail if it is to be dispensed with in cases where a solicitor has made a mistake, it must be borne in mind that the rule is made for cases in which no mistake has been made. With profound respect, therefore, I must say, that if I thought serious damage would result to the plaintiff, it would be with the greatest reluctance that I should follow the cases that have been cited, and I sincerely hope that whenever need of it arises, this matter will be taken further, and an authoritative rule laid down to guide us.

BRETT, L.J.—In cases where a suitor has suffered from the negligence or ignorance or gross want of legal skill of his legal adviser he has his remedy against that legal adviser, and meantime the suitor must suffer. But where there has been a *bona fide* mistake, not through misconduct nor through negligence nor through want of reasonable skill, but such as a skilled person might make, I very much dislike the idea that the rights of the client should be thereby forfeited. It seems to me obvious that the Court has jurisdiction to enlarge the time under some circumstances. Therefore, why not on the present occasion? It has been said that when the time for appealing is past, the person who would be respondent has a vested right to retain his judgment. But obviously it is not an absolute right, and I am perfectly confident that the practice of all the Courts has been to treat it as not an absolute right, though the Courts are chary of enlarging the time when the time allowed by the rule has run out. If at the time of the mistake, the profession in general had been in doubt on the point, I should have thought that would be a special circumstance, such as would take the case out of the decisions by which we are bound, and if I thought there had been no negligence I should have thought it right to depart from the ordinary rule. But many months ago

(1) 47 Law J. Rep. Chanc. 258; s. c. Law Rep. 7 Ch. D. 241.

(2) 47 Law J. Rep. Chanc. 870; s. c. Law Rep. 7 Ch. D. 711.

*Highton v. Treherne (App.), Exch.*

there was a clear decision on the point, and there has been no general mistake of the profession on the subject. This, then, was the mistake of an individual, though in no way dishonourable nor the result of negligence nor of want of reasonable skill; and as the point has already been decided by one Division of this Court, we ought not to grant an extension of time for appealing. It is a matter of necessity that we should strictly adhere to the rule laid down by the other Division, so that there may not be one rule at Lincoln's Inn and another here, which would put an end to all regularity of procedure. Therefore, on the decided cases, I think we ought not to grant an extension of time to appeal in the present case.

COTTON, L.J.—I am very unwilling that by the mistake of his solicitor one of the parties in a cause should be prevented from obtaining his rights, but it is most important that both Divisions of this Court should be guided by the same rule; and it has been laid down by the other Division that such a mistake as the present is no reason for an extension of time, and therefore I think we ought to refuse this order.

It is said, indeed, that the defendant has, after the proper time for appealing has elapsed, a vested right to the judgment. But if this is to be considered an absolute rule, it could with equal propriety be urged on all occasions where a mistake has been made. A better instance could not be given than is to be found in the case of *Burgoine v. Taylor* (3), where through the mistake of a solicitor's clerk no counsel were briefed on one side, and the cause was heard *ex parte*, and afterwards the case was restored to the list, and re-argued. The Master of the Roll said that all of us are liable to make an occasional slip. But if the other party had a vested interest in the consequences of the slip, the judgment in that case could not have been set aside.

*Order refused.*

Solicitors—Button & Co., for plaintiffs; Treherne & Wolferstan, for defendants.

(3) 47 Law J. Rep. Chanc. 542; s. c. Law Rep. 9 Ch. D. 1.

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[IN THE COMMON PLEAS DIVISION.]

1878. } BLAKE v. THE ALBION LIFE  
Nov. 25, 26. } ASSURANCE SOCIETY.

*Evidence—Action to recover back Money obtained by Fraud—Evidence of similar Acts with other Persons.*

The plaintiff sought to recover from a life assurance company the premium he had paid for insuring his life with the company, on the ground that he had been induced to effect such insurance by the fraud of a person who had various fictitious names, and who, with the knowledge and connivance of the company, pretended that he would lend the plaintiff money if he so insured his life with the company, but who, when such insurance was effected, imposed such conditions on the plaintiff before he would lend the money as had the effect intended by him of preventing the loan from being made.

In support of such case the plaintiff produced at the trial evidence of other persons who had in a similar way been induced to insure their lives with the said company under the pretence of a loan which, in like manner, was never made, and which evidence went to shew that the transaction with the plaintiff was one of a class of transactions of the same nature:—

Held, that such evidence was admissible.

This was an action to recover 59l. 6s. 3d., which the plaintiff alleged he had been fraudulently induced to pay to the defendants (an insurance company, registered under the Companies Act, 1862) for effecting a policy on his life under the following circumstances:—

In November, 1874, the plaintiff saw an advertisement in a daily newspaper, inserted by one Henry Howard, offering to lend money upon personal security. The plaintiff applied by letter to the said Henry Howard for a loan of 1,500l., and received in reply a letter, of which the following is a copy:—

"11, Euston Square, London, N.W.,  
"21st Nov., 1874.

"Dear Sir,—I can entertain your application for an advance of 1,500l. for seven or fourteen years, at four per cent. interest per annum, interest payable half-

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yearly; the 1,500*l.* to be repaid in one sum at the end of the term.

"You will have to insure your life in an insurance office, to be selected by me, for 1,500*l.*, and deposit the policy as collateral security, the policy to be returned to you upon repayment of the money advanced, when you can either sell or keep it for the benefit of your relatives. Let me know, per return of post, if this meets your views.

"Yours truly,

"H. Howard."

"Mr. W. H. Jex-Blake."

The plaintiff thereupon called at the office of the said H. Howard, where he saw the manager only, who agreed for Howard to lend the 1,500*l.* on the condition that the plaintiff would insure his life in the defendant's office, and deposit the policy of insurance with Howard as security for the said loan. No other security was then mentioned, and the plaintiff accordingly applied to the defendants' company, who effected a policy of insurance on his life upon his paying them the said sum of 59*l.* 6*s.* 3*d.* Instead of advancing the 1,500*l.* as agreed, the said H. Howard sent to the plaintiff, for his approval, certain draft securities, which consisted of the following:—A bill of sale of furniture, a guarantee of two sureties for repayment of the loan, an assignment of the policy, a bond for the amount, and a declaration as to debts to be made before a bench of magistrates for the division of the county in which the plaintiff resided. None of these matters were mentioned when the loan was agreed to be made, and in consequence of the plaintiff being unwilling to comply with them, the loan was never made.

The statement of claim alleged that the arrangement between the defendants' company and the said H. Howard was that the said H. Howard should be the pretended lender of the money, and as if the said H. Howard had no connection with the office of the defendants' company.

The statement of claim concluded with the following paragraphs:—

"10. After the receipt of the said sum

of 59*l.* 6*s.* 3*d.* by the defendants the same was divided between the defendants and the said Henry Howard.

"11. The said Henry Howard, as the defendants well knew, was wholly unable from his circumstances to pay any sum of money recovered from him, and, with the knowledge and contrivance of the defendants, changed his name and address from time to time.

"12. The said policy of insurance was effected by the plaintiff, and the said premium was paid only for the purpose of procuring the said loan as aforesaid, and for no other purpose whatsoever, of which the defendants always had knowledge, and there never has been any consideration whatever for the defendants retaining the said sum of 59*l.* 6*s.* 3*d.*, and the said policy before this action lapsed.

"13. Every matter and act done by the said Henry Howard, or his manager, was done for and on behalf, and with the sanction of, and was ratified by, the defendants; and the said Henry Howard and his manager were in all things their agents to carry out the contrivance to procure them the premium of 59*l.* 6*s.* 3*d.*, there being no intention at any time either by the said Henry Howard or the defendants that the said loan of 1,500*l.* should be advanced.

"14. The plaintiff claims the said sum of 59*l.* 6*s.* 3*d.*, and also expenses he has been put to in endeavouring to procure the advance of the said sum of 1,500*l.*

"15. The plaintiff further prays that the said policy of insurance may be declared void and cancelled on the ground that the premium was obtained by fraud, as in the statement of claim appears."

The defendants traversed all the material allegations in the statement of claim, and the cause was tried before Lord Coleridge, C.J., in the Middlesex Hilary Sittings of 1878, when the plaintiff gave evidence of the advertisement of Howard, of the contract for the loan, and of his insuring his life at the defendants' office, and how the proposed loan went off, as above detailed. He then sought, by the evidence of a number of persons who had in like manner, by similar advertisements, been induced by proposed loans to effect life insurances with the

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defendants' company, and to pay the premiums for the policies without ever obtaining such loans, the transaction in each case being similar to that of the plaintiff, though the proposed lender varied in name, at one time being Howard, at another time Thomas Gard, at another time Wood, at another time Rogers, at another time Williams, and at another time Brown.

There was evidence that, although the name of the lender was changed, the man was the same in all cases, and that he received from the defendants' company, as a commission fee, 50l. per cent. on the amount of premium paid for insurance, and that he was seen frequently in the company's office with Northcote, the secretary; also that cheques for Rogers were sent to him by the company, under cover to Wood, at 11, Euston Square, and bore afterwards the indorsement of Wood upon them. This evidence of other transactions with other persons was objected to by counsel for the defendants as inadmissible in this action against the defendants. It was, however, received by the learned Judge, and the jury found a verdict for the plaintiff for the amount claimed.

In Easter Sittings a rule *nisi* for a new trial, on the ground of the improper reception of this evidence, was obtained by

*McIntyre*, for the defendants, on the authority of the opinions expressed by some of the members of the Court, when an application was made and granted to strike out several passages from the plaintiff's statement of claim—*Blake v. The Albion Life Assurance Society* (1).

Against this rule,

*Willis and Tindal Atkinson* shewed cause.—The evidence was admissible, for it shewed that the person who went by the name of Howard, or Wood, and other names, was an agent of the defendants, and next, because it shewed that such person was carrying on a fraudulent course of dealing with the knowledge of the defendants, and in which they shared the profits. The ad-

missibility of such evidence is not affected by the decision of the Court in the case of *Blake v. The Albion Life Assurance Society* (1), on the application to strike out paragraphs which shewed that the transaction with the plaintiff was only one of several others of a similar kind, by which other persons were fraudulently induced to pay premiums to the defendants for effecting policies on their lives. The Court did not allow those paragraphs to stand, as they amounted only to evidence which could not be pleaded, and were likely to prejudice the defendants and embarrass the trial of the cause. It is true Lord Coleridge, C.J., and Brett, L.J., seem to be of opinion that the facts stated in those paragraphs would not be admissible in evidence in chief; but those opinions were unnecessary for the decision of that case, and perhaps they were intended only to go to this extent, that a person would not be allowed to shew that he had been defrauded by A. B. by proving that A. B. had defrauded somebody else, and which those learned Judges seemed to think was the effect of the objected paragraphs; for Brett, L.J., said there to counsel, in the course of the argument, "You seek to infer that the defendants cheated the plaintiff by shewing that they have cheated other persons."

There are several authorities for allowing evidence to be given of other acts, in order to shew the intention of the party who does them—*The Queen v. Francis* (2), *The Queen v. Forster* (3), *The Queen v. Blake* (4). In that last case, Patteson, J., says: "It is laid down that you must establish the fact of a conspiracy before you can make the act of one the act of all. But you are not bound to bring the parties into each other's presence; the concert may be shewn by either direct or indirect evidence;" and Williams, J., says: "It follows that the existence of a conspiracy may be shewn by the detached acts of the individual conspirators." It is said on behalf of the defendants that

(2) 43 Law J. Rep. M.C. 97; s. c. Law Rep. + 2 C.O. 498, 128

(3) Dear, C.O. 456; s. c. 24 Law J. Rep. M.C. 134.

(4) 6 Q.B. Rep. 126; s. c. 13 Law J. Rep. M.C. 131.

(1) 45 Law J. Rep. C.P. 663.

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though the evidence in the present case might be admissible against the secretary or other officers of the defendants' company, it was not admissible against the company, which was a corporation, and would not be liable therefore for the fraud of its agents; but that is not so, and a corporation is liable for fraud committed by its agents in the course of their employment, and by means of which the corporation has derived a benefit—*Barwick v. The English Joint Stock Bank* (5), and *Mackay v. The Commercial Bank of New Brunswick* (6).

*McIntyre and Patchet*, for the defendants, in support of the rule.—The evidence which was objected to was inadmissible. The Court had on a former occasion struck out paragraphs from the statement of the plaintiff's claim which shewed a course of business by persons said to be agents of the defendants similar to what it was the object of this evidence to prove. Those paragraphs were struck out as containing statements immaterial to the issue between the parties. It was evidence of *res inter alios acta*, and not admissible in this action; and such was the opinion of two of the learned Judges on that occasion, as appears in the report of *Blake v. The Albion Assurance Society* (1).

[LORD COLERIDGE, C.J.—My dictum there, that the paragraphs which were objected to contained a statement of facts which were not even evidence in chief, may be supported if it can be construed as meaning that it is no evidence to prove that a man has committed one crime to shew that he has committed some other crime. But if it is to be understood as meaning that evidence cannot be admitted to prove other acts of fraud as links in the chain tending to prove the committal of the particular fraud in question, then I am ready at once to concede that such dictum cannot be supported.]

No doubt, with respect to the offence of uttering counterfeit coin, evidence may be given of passing bad coin on another

occasion, but that is in order to prove the scienter; but evidence of a committal of a burglary in A. is no evidence that a burglary was committed by the prisoner in B., nor to prove a larceny can evidence be given of the committal of a previous larceny.

[GROVE, J.—That is because the larceny is complete in itself, and one larceny is not connected with another.]

So one fraud cannot be proved by the proof of another fraud by the same person.

[GROVE, J.—The cases of *The Queen v. Garner* (7) and *The Queen v. Geering* (8) are authorities to shew that even on a trial for murder other acts of poisoning are allowed to be proved. Suppose the name of Howard or Wood, &c., is altogether fictitious, and that there was no real person at all, might not the evidence be then admissible to shew that the defendants got money from persons by the use of fictitious names?]

If the charge were that on a particular occasion the defendants deceived A. B. by the use of a fictitious name, surely evidence would not be admissible that defendants deceived somebody else by the use of some other fictitious name. The principle on which a company *qua* company can or cannot be affected by the fraud of its agents was considered by the House of Lords in *The Western Bank of Scotland v. Addie* (9). Lord Cranworth there dealt with the case of *Ranger v. The Great Western Railway Company* (10), and said: "If it is supposed that in what I said," when that case was decided by the House of Lords, "I meant to give it as my opinion that the company could in that case have been made to answer as for a tort in an action for deceit, I can only say I had no such meaning." . . . "An attentive consideration of the case has convinced me that the true principle is that these corporate bodies, through whose agents so large a proportion of the business of the country is now carried on, may be made responsible for the frauds of those

(5) 36 Law J. Rep. Exch. 147; a. c. Law Rep. 2 Exch. 259.

(6) 43 Law J. Rep. P.C. 31; a. c. Law Rep. 5 P.C. 394.

(7) 3 Fost. & F. 681.

(8) 18 Law J. Rep. M.C. 215.

(9) Law Rep. 1 Sc. App. 146.

(10) 5 H.L. Cas. 72.

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agents to the extent to which the companies have profited from these frauds; but that they cannot be sued as wrongdoers by imputing to them the misconduct of those whom they have employed."

[LORD COLERIDGE, C.J.—The present action is not an action of deceit. It is not an action for damages, but to recover back the money which has been received.]

The money cannot be recovered back because the plaintiff has had a benefit. *Restitutio in integrum* was claimed in *The Western Bank of Scotland v. Addie* (9), but it was held that it could only be had where the party claiming it is able to put those against whom it is claimed in the same condition as that in which they were when the contract was entered into. That cannot be done here, for the plaintiff kept and had the benefit of the policy for the year for which he was insured. The case of *Barwick v. The English Joint Stock Bank* (4) is not approved of by Bramwell, L.J., in *Weir v. Bell* (11).

GROVE, J.—I regret that I have first to deliver judgment, as the evidence is very long, and my Lord, from having tried the cause, would be more familiar with the facts than I am, and be better able to state them.

I rather expected, when the argument came on, that we should have had two classes of objection, the one as to the evidence of other acts done, viewed in its totality, and the other as to certain parts of such evidence, which, even assuming the evidence in the case of the former to be admissible, would not in itself be admissible. We have not, however, had any argument presented to us as to the latter point; and, therefore, we have only to consider whether the evidence of other acts done, under the circumstances of this case, was admissible in evidence.

The action is to recover back money which the plaintiff alleges was procured from him fraudulently by persons connected with the management of the defendants' company, and by which means money was put into the coffers of the company.

The nature of the fraud was this—The plaintiff says he saw an advertisement, offering to lend money upon personal security, and that he thereupon wrote to and got an answer from one Howard who had inserted the advertisement, stating that 1,500*l.*, the sum the plaintiff wished to borrow, would be lent him at 4*l.* per cent. interest, upon this condition, namely, "You will have to insure your life in an insurance office, to be selected by me, for 1,500*l.*, and deposit the policy as collateral security, the policy to be returned to you upon repayment of the money advanced, when you can either sell or keep it for the benefit of your relatives." Now, without going through the further details of the statement of claim, it is enough to say that the plaintiff proposed to borrow this money, and that he paid the premium of 59*l.* 6*s.* 3*d.* to the defendants' company, with whom, at the request of Howard, he effected a policy of insurance on his life. The plaintiff then applied for, but did not get, the loan, or any money at all, but found that many other conditions were required of him which were not stipulated for, either in the advertisement or in the letter of Howard. Not being able, or not being willing, to fulfil these additional conditions, the plaintiff sought to get his money back. He was out of pocket 59*l.* 6*s.* 3*d.* and his expenses, and the only thing he had got was a policy of insurance, which I think we may assume from the verdict of the jury (though no question arises on that now) would not have been paid if he had died during the year he was insured; so that, in fact, he had had no consideration for his money, and the whole was a fraudulent transaction.

Now I will assume that Howard was a real person, who was employed by the defendants' company to induce persons to insure in the company's office, for which they were to pay premiums under the pretence of obtaining a loan of money, and that then conditions were to be required which the proposed borrowers would probably not comply with, so that the proposal for a loan would go off, and the money paid by way of premium would remain in Howard's hands, or with the

(11) 47 Law J. Rep. Exch. 704; s. c. Law Rep. 3 Ex. D. 238.

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defendants' office, with which he was connected. Now that is the nature of the fraud stated in the plaintiff's statement of claim. The plaintiff says that the arrangement between the defendants' company and Howard was that Howard should be the pretended lender of money to the plaintiff, and that the defendants' company and Howard fraudulently induced the plaintiff to pay the sum of 59*l.* 6*s.* 3*d.*, and he claims, not damages, for the deceit, but virtually a rescission of the contract, and that the money he so paid should be repaid to him. The action is, therefore, an action for money had and received by the defendants' company, that is to say, for money obtained from the plaintiff by fraud, either by the company itself or by those connected with it, and which money the company got the benefit of. Now I have no doubt that whatever question there may be as to whether an action can be maintained against an incorporated company for deceit, where the deceit has been by an agent of the company, without the knowledge of the company, that where the company has obtained money through the fraudulent acts of its agents, the person defrauded may recover back his money from the company. Therefore, what the plaintiff has to prove in this action is, that he paid the money sought to be recovered back, through the representation of those who were acting for the company, that the transaction was fraudulent, and that the money got into the coffers of the company, and was retained by it. Now there was evidence here that the money went into the coffers of the company, and therefore if it was obtained by the fraud of the managers of the company, the plaintiff would be entitled to recover. But the difficulty is, as to the way in which he is to prove that fraud, when the transaction on the face of it looks honest or, at all events, only equivocal. Take the present as an isolated case, and the evidence would be that one Howard, whom the plaintiff believed to be a real person, obtained money from the plaintiff, and broke his undertaking in one sense by asking for greater securities than he had at first asked, and that the plaintiff could not

get it back. There would also be evidence that Howard was to get a very large percentage, fifty per cent., for introducing the business to the company. These would be all the elements of fraud which could be shewn of the transaction *per se*, and there would be nothing so pregnant with fraud that a jury might properly be expected to find a verdict of fraud in the case as against the defendants. Then the plaintiff offered other evidence to shew that the policy was a sham policy, that the loan was never intended to be made, and so on, which would not appear on the face of the transaction between Howard and the plaintiff, and further, that Howard was a fictitious name, that it was a name for some other person, or possibly for no person at all, but a mere fictitious name used by the defendants' company. On behalf of the defendants it is said that the plaintiff cannot give such evidence, that he cannot shew general transactions carried on by the managers of the company, by which the company have in this and in other similar cases put forward a fictitious name, and have thereby obtained, under promises of loans, moneys by way of premiums for insurances, that the loans have never been made, that the amounts paid for the policies have been never returned, and that in all, or in nearly all, such cases the policies have been never renewed, but have been allowed to drop. The question is whether such evidence was admissible or not and I am of opinion that it was admissible. One great element of fraud is the intention of the party. Did the company do all this through their managers with intent to defraud the plaintiff of his money? That was a question for the jury to consider. Possibly, to my mind, you could never prove fraud at all if you were only allowed to shew what was the particular transaction, and were not allowed to go behind it and to shew what had been done by the same party in a number of other similar cases. Is there any rule of law which renders this inadmissible in evidence? I think that there is not. I think that where the offence alleged is such that it cannot be brought home to the person charged with committing it without shewing with what in-



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tent the act was done, the law permits evidence of other acts done by the same person. Take the common case of uttering counterfeit coin, and there are other cases, nay, even cases of murder, where evidence of other acts have been admitted in order to shew the purpose and intent of doing the act in question, as for instance, to prove that the poison was administered intentionally and not accidentally. There is no different rule as to this, so far as I am aware, in criminal than there is in civil cases, if anything, the rule is more strict in criminal cases. Now in the present case I will assume that Howard committed the fraud, and that the action is against him. I apprehend in that case that it could not be disputed that the plaintiff could give evidence of other acts of Howard with other persons of the same character as that by which he obtained money from the plaintiff, in order to shew that Howard, in doing what he did, intended to commit a fraud. Then, if that be so, can this evidence be given as regards a third party? If the evidence had been only to shew that the managers of the defendants' company had been guilty of similar frauds, but which were unconnected with the fraud on the plaintiff, it might not have been admissible, and that was what was probably passing in my Lord's mind when this case came before this Court on the rule to strike out statements of other transactions from the statement of claim. Be that, however, as it may, that is not this case. The question here is, whether you cannot give such evidence when you identify the frauds with the person by whom they were committed. Suppose Howard be shewn to be connected with the defendants' company, and that it be proved that Howard committed a number of these frauds, and that the company knew that they were frauds, and that Howard did them for the use of the company, and that the company or their managers received the profit derived thereby, such evidence would then, I think, be admissible, because that which might be an innocent, or at least a doubtful transaction, taken as a single transaction, would become otherwise when

in a number of other such transactions a similar sham was shewn to have been gone through, and that the company had by the same means pocketed sums of money, for then the possibility of any mistake which might have happened if this had been the first case would be removed, and the jury might infer that in this case also the company intended by means of the fraud to put the plaintiff's money into their pocket. I certainly see no reason why such evidence should not be admitted.

There is another branch of the subject. Howard may be a real person and the agent of the defendants. But he may be a fictitious person, and certainly the evidence shews that the name was altogether fictitious. Then in that view it appears to me the evidence would be admissible on another ground, because the defendants or their managers obtained the plaintiff's money by the use of a fictitious name. One transaction might possibly be explained, but is it not, therefore, open to the plaintiff to shew that the name "Howard" was only one of the fictitious names; that the defendants have dealt with A. by an agent under the name of "Howard," that they have dealt with B., by an agent, under the name of "Gard," that they have dealt with C., by an agent, under the name of "Rogers," and with D., by an agent, under the name of "Brown." Is not all this evidence to shew that the use of a fictitious name was fraudulent and not a mistake? How can the fraud be shewn but by shewing the fact that the defendants did deal with fictitious names, that the same person who acted for them under the name of Howard was called Gard, Rogers and half a dozen other names? I am at a loss to see how such evidence is not admissible. There was here, moreover, evidence upon which a jury might well be satisfied that Northcote, the secretary, at all events, well knew that these names were fictitious, and it appears to me, therefore, that upon this ground also the evidence was admissible. Take now the case in another point of view. Suppose there was no real person at all under all these names, but that all the names were fictitious and there was no one to whom they could

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be applied, that a clerk or porter was kept at the house in Euston Square who merely forwarded the letters addressed there to Howard, Gard or any of the other names to the defendants' manager. Is not a party in such an action as this entitled to shew that the party with whom he contracted was a fiction and that there was really no one but the defendants' manager who always corresponded with him under a fictitious name? I can see nothing against the admissibility of such evidence to shew that the defendants pretended to contract as if there were these fictitious persons for the purpose of getting the money without danger of discovery and without being themselves liable. I think the evidence was admissible to connect these fictitious names with the defendants, and to shew that the defendants were the principals, and the more it is examined the more apparent I think it will be that it is admissible.

On the other point, to which I adverted at the commencement, I might have some doubt if this were an action for deceit. The nature of the claim, however, is not so founded; it is not for deceit but for the return of the money which was obtained from the plaintiff by deceit, and which according to the evidence got into the hands of the defendants. All, therefore, which we have to decide is that the plaintiff can bring this action against the company for the money they received and which was obtained from the plaintiff by the fraud of the company's agent, and that the company are liable to repay the benefit they have obtained through the fraud of their agent though they may not be liable in damages in action for such fraud. I am, therefore, of opinion that the evidence was rightly received, and that this rule should be discharged.

LINDLEY, J.—I am of the same opinion, and after the very exhaustive way in which my brother Grove has gone through the case, I propose to make but very few observations upon it. The action is brought to recover the sum of 59*l.* 6*s.* 3*d.* which the company have received. The plaintiff says it was obtained under these circumstances—"I was induced by the

fraud of a person called Howard to pay that money to you, and at the time you took the money you knew that I had been so induced by Howard's fraud to pay it, and therefore you cannot keep it." Now the question is how such a case as that is to be proved? We are asked on behalf of the company to shut out all the evidence which shews the nature of the business which the company carried on, to confine it simply to what took place between the plaintiff on the one side, and Howard and the company on the other. That is to say to exclude all the light which would shew the nature of the transaction. Now there is no principle for doing anything of the kind, and to ask us to do it is somewhat startling. The plaintiff was perfectly justified in proving what took place between him and Howard and the company. As to that nothing could be more plain and straightforward, and there was no appearance of fraud about it or anything of the kind. But then the plaintiff proposed to adduce evidence to shew that this transaction was one of a "fraudulent class," and was he or was he not to be precluded from doing that? I apprehend he was perfectly at liberty to put his case in that way, and if he can do so at all he can only do it by going into a great number of other transactions having some connection in common with one another. I quite agree that, in order to prove that I have committed a fraud upon A., it is not sufficient or even relevant to prove that I committed a fraud upon B., C. and D., but let it be shewn that the fraud on A. is one of a class of other transactions of the same nature, then I disagree altogether with that proposition.

Now what the plaintiff must make out is that Howard, whoever he may be, induced him to part with this money upon the false pretence that he would get a loan if he did certain things. Is he to be at liberty, or is he not, to shew the falsity of that pretence by proving that Howard was in the habit of carrying on business in that way, that is to say that he got money from other persons under similar false pretences of loans which he never intended to procure, and which he never did procure.

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Then also may not the plaintiff shew that the directors and managers of the defendants' company knew perfectly well that that was the mode in which Howard transacted his business, and that that was the mode in which he induced people to come to the defendants' office to insure. I confess if that evidence is to be excluded it must be by reason of some strict rule of which I am ignorant, and which has not been pointed out. The question really comes to this; can you or can you not throw light upon the true nature of a transaction which taken by itself may be innocent or may be fraudulent? It appears to me that you may, and that it is not sufficient to say you cannot because you cannot give evidence of frauds on other people. The true answer is that you may shew that the transaction is one of a class having features in common, the feature in common being the false pretence and a knowledge of that false pretence on the part of the defendants' company, and the moment that is done the plaintiff's case is established.

With respect to the other point, viz., as to how far companies may be liable for the frauds of agents, it does not seem to me to be necessary to consider it. All we have to consider is, whether this evidence is admissible in an action of this kind, and for the reasons I have given, in addition to those of my brother Grove, I am of opinion that the rule must be discharged.

LORD COLERIDGE, C.J.—I am of the same opinion. Many questions, both interesting and difficult, have been raised, which, when it becomes necessary, will be decided, but now, and for the purposes of this case, I do not think it necessary either to decide or even to consider them.

The rule has been obtained upon one single ground, and the only question is, whether the evidence was improperly received or not? There is really no other point for us to decide. Now, it is obvious that in order to arrive at a proper conclusion on that point, it is essential to look at the statement of claim in support of which that evidence was tendered. It is not necessary to consider

now whether there are objections to the statement of claim, for what the Judge at the trial has to deal with is the statement of claim as it stands.

Now the general outline of the alleged fraud was of this description:—There is an insurance company and there is a person who is not, by his outward appearance, connected with the insurance company as an agent, a person who has been called by various names, and whom for the present purpose it is convenient to call by the name of Howard, whether that may be his real name or not, as to which I do not stop to enquire. Howard issues advertisements offering to lend money, and the plaintiff is induced by one of these advertisements to enter into a negotiation with him for a loan of money. Howard, as part of the terms for the loan, insists upon an insurance, at any rate for a year, in the defendants' company, and that the insurance should be effected and the premium paid before the negotiation is completed. The policy is, accordingly, effected and the premium is paid, and outwardly there is no connection between Howard on the one part, and the insurance company on the other. After the payment of the premium and the receipt of the policy by the plaintiff, conditions, which the jury found to be unreasonable, and which nobody could have been expected to accede to, were added to the terms upon which, according to the advertisement, the money was to be advanced, and so the negotiations fell through, and no money was advanced; but the premium had been paid, and the action is brought to recover back the money that had been so paid under those circumstances.

Now, obviously, as thus stated there is nothing in the case that might not be perfectly *bona fide*. If, instead of the Albion (the character of which is now known), Howard had desired an insurance to be effected in any insurance company of undoubted reputation, and that had stood alone, the plaintiff would have lost his money and would not have been able to have recovered it from the insurance company. There is no doubt that if the matter had so stood alone and this had

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been an isolated transaction, no jury would have found a verdict for the plaintiff. But the plaintiff became in time satisfied that there was an intimate connection between Howard and the defendants' company, and that the transaction between him and Howard was well known to the company; that the company and Howard never contemplated that the plaintiff should have any benefit, but that the only thing was to be a payment of a premium by the plaintiff which was to be divided equally between Howard and the company; and further it came to the plaintiff's knowledge that this was the course of business which had been pursued for years, and by which the company had been largely benefited. That is the substance of several of the paragraphs in the statement of claim, and if that could be made out it would be an abominable fraud. The only way of shewing it would be by shewing that the transaction was not an isolated one but was one of a class which had been effected for years through the same means and with the knowledge of the defendants. It is said that the rules of evidence do not allow this to be shewn. No doubt, for many years the English law of evidence excluded almost every one as a witness who knew anything about the transaction. The law, however, has been very much altered in this respect, and now the general rule, with a few exceptions, is, that every thing which throws light on the matter is to be allowed to be given in evidence. It would, I think, seem most ridiculous to any one but an English lawyer, that the evidence in dispute in this case should not be received. Still, of course it must be shewn on what ground such evidence is admissible, and I think it is admissible on two grounds. The money is sought to be recovered back from the company because it was obtained through the fraud of the agents of the company. Therefore, two things are necessary to be established, viz., agency and fraud, that is to say, that those who effected the contract by which the money was obtained were the agents of the company, and that the means by which the con-

tract was effected were fraudulent. Now the agency in this case, except as regards Howard, and so far as regards only the secretary and managing director of the company, was beyond all controversy. There is no doubt that they were the agents of the company to effect its business, and it is clear that the company is responsible for what they did in the ordinary discharge of their said agency. Then as to Howard, it seems to me that it was competent to the plaintiff to shew by this evidence the agency of Howard, and not the less so because in the course of proving it facts were shewn which were to the prejudice of the defendants. No rule exists to exclude it, because the evidence must have that tendency to prejudice, and I think it was clearly admissible to prove the agency of Howard. Now the nature of the evidence was this:—An advertisement by either Howard or Wood or some other name, offering to lend money,—the evidence of a witness who answered such advertisement, the receipt by the company of the premium for the insurance of such witness's life, and the dividing of the premium between the company and the person who passed under the name of Howard, Wood and many other names, and evidence that these names were various aliases, and that this person was constantly in very close communication with the managing director and secretary, and sometimes other directors of the company, and that cheques drawn in favour of Wood or Rogers, or of these other different names, were all endorsed by Wood. All this to my mind shewed that Howard was Wood, and that he was well known to the directors of the company and was the agent of the company. The moment that Howard is shewn to be the same person as Wood, with six or more different names, and that under these names the business has for some time been conducted fraudulently and to the benefit of the company, it is idle to say that such evidence is not receivable as evidence of the agency. But that alone is not sufficient, because it must be shewn here that the acts were done with the

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knowledge of the company and for their benefit. That is established by the same evidence as establishes the agency, and which I need not repeat. Then there remains the question, were these acts fraudulent? Supposing this particular case stood alone, no one could say that there was conclusive or, perhaps, even strong evidence of fraud on the part of the company, but when it is shewn that the same person, under six or seven different names, is the agent of the company, and that all the acts of such person ended in getting money for the company without any benefit to the persons paying, it seems to me that their fraudulent character is proved, and then the two points which the plaintiff had to make out, namely, that Howard was the company's agent, and that he committed the fraud by which the company obtained money and was benefited, are established.

The evidence is, therefore, I think, receivable, and it does not fall within the rule which excludes *res inter alios acta*. Does it then come within the authority of this case of *Blake v. The Albion Life Assurance Society* (1), when it came before this Court on an application by the defendants to strike out certain statements in the statement of claim? So far as regards the decision of the Court on that occasion, I think that there is no doubt that it was right and that the paragraphs which were there objected to by the defendants were properly struck out. They are statements of *res inter alios acta* without any attempt to connect them with steps necessary to make them *res inter partes*. Whether the language of two of the Judges who decided that case was sufficiently cautious it is not for me to say, but with regard to what was then before the Judges, I do not know that such language was incorrect. If it could fairly bear the construction put upon it by Mr. McIntyre, and which at one time I thought perhaps it could, I should not hesitate to say that it ought not to be upheld and that I would at once withdraw it, but I think it is open to a more lenient construction, which I hope it may have whenever it

may be hereafter cited. For the reasons which have been given, I think the evidence was properly received and that, therefore, this rule should be discharged.

*Rule discharged.*

Solicitors—Jas. Robinson, for plaintiff; George Blagden, for defendants.

*The Li Ch'apin v. P. D. 23.*

[IN THE COMMON PLEAS DIVISION.]  
1878. } LADY MACDONALD v. LADY  
Nov. 12. } CARINGTON.

*Practice—Counter-claim—Order XVII. rules 5 and 9; Order XIX. rule 3; Order XXII. rule 9.*

*Order XVII. rule 5, which empowers a claim against a person as executor to be joined with a claim against him personally, does not include a counterclaim, and a defendant will not be allowed in an action by a plaintiff in his own right to join a counter-claim against the plaintiff in his representative character as executor or administrator with a counter-claim against him personally, especially if it will embarrass the trial of the action.*

*Where, however, such a counter-claim can be amended by striking out so much of it as relates to the claim against the plaintiff in his representative character, the Court, under Order XXII. rule 9, will order it to be so amended instead of ordering it to be struck out altogether.*

The plaintiff is the widow of the Right Honourable Godfrey William Wentworth Lord Macdonald, and the defendant is the widow of the Right Honourable John Lord Carington, and is the sole executrix of his will.

It appeared from the plaintiff's statement of claim, that certain hereditaments and premises in the county of Buckingham which had been limited and settled to the use of the Honourable Richard Hare

*Macdonald v. Carington, C.P.*

and the Rev. Charles Hudson, and their heirs, during the joint lives of the said Lord Macdonald and the plaintiff, in trust for the separate use of the plaintiff, without power of anticipation, and subject to certain uses and limitations in favour of the said Lord Macdonald for his life, to the use of the plaintiff and her assigns for life, were by an indenture of lease, dated the 10th of May, 1856, made between the said R. Hare and C. Hudson of the first part, the plaintiff of the second part, the said Lord Macdonald of the third part, and the said Lord Carington of the fourth part, demised to the said Lord Carington, for the term of twenty-one years, from the 25th of March, 1856, at the yearly rent of 3,800*l.*, and the said statement of claim set out a covenant to repair, which the said Lord Carington had by the said indenture entered into with the said R. Hare and C. Hudson and "the person for the time being entitled to the premises thereby demised in possession."

The statement of claim stated that the said Lord Macdonald died on the 25th of July, 1863, and that the plaintiff was the person for the time being entitled in possession to the premises so demised, that the said Lord Carington entered into and was possessed of the said premises for the said term, and afterwards died on the 17th of March, 1868, and that after his death all his estate and interest therein vested by assignment in the defendant, who entered into and became possessed thereof for the residue of the said term. The said statement of claim set out several breaches of the said covenant to repair by the said Lord Carington during his life, and by the defendant since his death, and concluded with a claim for 5,500*l.* damages for the breaches, as well from the defendant as executrix of the said Lord Carington as from her in respect of her own default.

The defendant delivered a statement of defence, set-off and counter-claim, in which by way of set-off and counter-claim she alleged that the plaintiff was the sole executrix of the will of the said late Lord Macdonald, and that at the time of the lease of the 10th of May, 1856, the demised premises were in the possession of the

said late Lord Macdonald. The said counter-claim contained statements of many matters relating to the title to the demised premises which it is not necessary to set out for the purposes of this report. It is sufficient to state that it alleged that prior to and at the date of the said lease negotiations had taken place between the late Lord Macdonald, the plaintiff and the late Lord Carington, for the purchase by the late Lord Carington from the plaintiff or the late Lord Macdonald, of the fee simple of the demised premises, and that it was thereupon agreed by and between the late Lord Carington and the late Lord Macdonald, with the sanction and assent of the plaintiff, that the said premises should be demised to the late Lord Carington by the lease of the 10th of May, 1856, and that the late Lord Macdonald should further execute an indenture of the 10th of May, 1856, which was accordingly executed by and between the late Lord Macdonald and the late Lord Carington, which, after reciting the said lease, contained certain covenants which were fully set out in the said counter-claim, and one of which in effect was that if the said late Lord Carington, his executors, administrators or assigns should at any time during the said term created by the said lease be desirous of purchasing the said demised premises in fee at the price of 100,000*l.* and should give notice in writing of such desire to the person entitled to the said premises in possession, and pay such price, then that the proper parties should execute deeds for conveying the inheritance in fee of the said premises to the said late Lord Carington, or to such person as he should direct, but that no breach of such covenant should give a right of action if the said late Lord Macdonald and every person claiming or deriving title through him, at the request and costs of the said late Lord Carington, his executors, administrators or assigns, should do all such acts as might be necessary for effectually conveying the said inheritance in fee as aforesaid. The defendant stated that the plaintiff was a person claiming and deriving title through the late Lord Macdonald, within the meaning of such cove-

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nant. The defendant also stated that the late Lord Carington before his death, and the defendant, as executrix, after his death, were each during the said term desirous of purchasing the demised premises as agreed, but that before any breach by the defendant or the late Lord Carington, the plaintiff wrongfully refused to be bound by the said covenants, and wrongfully rescinded and put an end thereto, and refused to carry out the same. The said counter-claim set out various breaches by the plaintiff of the covenants, and it also alleged that the late Lord Carington and the defendant, as executrix as aforesaid, had, with the knowledge of the late Lord Macdonald and of the plaintiff, expended between 70,000*l.* and 80,000*l.* on the faith of the performance by the plaintiff of the said covenants; that at the time of the making of the said indenture the late Lord Carington had informed the plaintiff and the late Lord Macdonald of his intention that such sum should be so expended, and that the said indenture was intended by the plaintiff and the late Lord Macdonald and the late Lord Carington to protect the late Lord Carington and his estate from losing the benefit of such expenditure.

The counter-claim and set-off, after stating that by such expenditure the demised premises had risen to the value of 170,000*l.* or 180,000*l.*, and that the defendant had been unable to obtain a conveyance of the said premises, concluded as follows:—"And the defendant in her own right or in the alternative as executrix as aforesaid, claims to set off against the plaintiff's claim, if any, so much of the damages caused by the said breaches of covenant as may be equal thereto, and further counter-claims against the plaintiff either as executrix of the late Lord Macdonald or otherwise.

"1. 80,000*l.* damages for the breaches aforesaid.

"2. Interest thereon at 5*l.* per cent. per annum, from the date thereof till judgment.

"3. Such further or other relief as the Court shall think fit."

The plaintiff applied to Field, J., at chambers for an order under Order XXII.

rule 9, that such counter-claim might be excluded. The learned Judge refused to make any such order.

*Mellor (Russell Griffiths with him)*, for the plaintiff, now moved for such order, on appeal from the learned Judge.—The case of *Isherwood v. Oldknow* (1) is an authority that the plaintiff is assignee within the statute 32 Hen. 8. c. 34, and entitled, as such, in her own right to maintain this action for breach of the covenant which was made by Lord Carington in the lease of May, 1856. The counter-claim is against the plaintiff in the alternative as executrix of the late Lord Macdonald or otherwise. A defendant cannot plead a counter-claim in respect of a plaintiff's liability as executrix in answer to an action by such plaintiff, brought in respect of what she is entitled to in her own right and not in her representative character. At all events there is no power to join such counter-claim with one against the plaintiff personally. Order XVII. rule 5, is restricted to claims and does not include counter-claims. It says, "Claims by or against an executor or administrator as such may be joined with claims by or against him personally," and there is this proviso, "provided the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator." That shows that the rule is intended to apply only to cases in which the estate is the same out of which the rights of both parties may arise. It cannot apply to such a case as the present. Under Order XIX. rule 3, a defendant is allowed to set off or set up by way of counter-claim, any right or claim whether it sound in damages or not, "and such set-off or counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action both on the original and on the cross claim." These last words are referred to by Kelly, C.B., in *Blake v. Appleyard* (2), as limiting the

(1) 3 M. & S. 382.

(2) 47 Law J. Rep. Exch. 407; s. c. Law Rep. 3 Ex. D. 195.

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effect of the previous words, which declare that a counter-claim shall have the same effect as a statement of claim in a cross action. The counter-claim, therefore, must be of such a nature as to allow the Court to pronounce one judgment. That cannot be done where, as here, the rights of the parties are different, and where the counter-claim against the plaintiff as executrix can be no answer to a cause of action accruing to her in her own right. In *Padwick v. Scott* (3) Hall, V.C., struck out a counter-claim as tending to delay and embarrass the plaintiff where, in an answer to a claim by the plaintiff personally, the defendant by counter-claim sought to set off a claim against the plaintiff as executor which could not be decided without an administration suit. The case of *Hodson v. Mochi* (4), which may be cited by the other side, is very different from the present case, as there the plaintiffs' claim was as executors, and the counter-claim, which was allowed, was also against them in their same character as executors.

*O. Bowen*, for the defendant.—The counter-claim substantially is a claim against the plaintiff in her individuality, and not as executrix, and so Field, J., at chambers considered it to be. If the Court thinks that the claim against the plaintiff as executrix, cannot be maintained as an answer to the action by way of counter-claim, the defendant would elect to abandon so much of the counter-claim as relates to a claim against the plaintiff as executrix.

[LINDLEY, J.—The case of *Newell v. The National Provincial Bank of England* (5) is a decision of this Court against the counter-claim being so maintainable. DENMAN, J.—Moreover, if the joining of the two claims in the counter-claim was in our opinion embarrassing to the trial, we should not allow them to be joined.]

Though under these circumstances, if the defendant had to elect, the election would

be to give up the claim against the plaintiff as executrix, yet why should she be put to such election? The defendant has a double claim against the plaintiff, a claim against her personally, and also a claim against her as executrix, and all that the defendant has done in this counter-claim has been to state those claims, and it was the intention of the Judicature Act that this should be done, and there is nothing embarrassing to the plaintiff by the defendant relying on one as well as on another of these counter-claims. The case of *Padwick v. Scott* (3) is rather more in favour of the defendant than of the plaintiff, for Vice-Chancellor Hall in that case seemed inclined to think that Order XVII. rule 5 applied to counter-claims. A counter-claim is a claim. The wording of Order XIX. rule 3 is large enough to enable the counter-claim to embrace any claim which may be the subject of a cross action, and though the judgment to be pronounced is to dispose finally of the whole case, namely, both the claim of the plaintiff and the cross claim of the defendant, it need not be as to both a judgment of the same sort.

*Mellor*, in reply, cited *Treleaven v. Bray* (6).

DENMAN, J.—I must own that in the course of the argument my mind has fluctuated a great deal as to what is the true effect to be given to a counter-claim under the rules under the Judicature Act. I think, however, that to give it the power which it is assumed to have by the defendant's counsel, one must read Order XIX. rule 3 before Order XVII. rule 5. It might then be apparently contended that, as Order XIX. rule 3 says that "such set-off and counter-claim shall have the same effect as a statement of claim in a cross action," the other order which would then follow, namely, Order XVII. rule 5, which gives power to join claims against an executor as such with claims against him personally, would include counter-claims as well as claims. But I do not think that such was the intention of these orders. There may be good reason for allowing a person who has

(3) 45 Law J. Rep. Chanc. 350; s. c. Law Rep. 2 Ch. D. 736.

(4) 47 Law J. Rep. Chanc. 604; s. c. Law Rep. 8 Ch. D. 569.

(5) 46 Law J. Rep. C.P. 285; s. c. Law Rep. 1 C.P. D. 496.

(6) W. N. (1875) 224.



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a claim, either in his personal or representative character, as executor or administrator, to sue in the alternative, or for a person so to defend in the alternative, yet it does not follow that a defendant can by way of counter-claim claim a right to set off anything which he may have against a plaintiff, whether against him personally or in his representative character. It appears to me that some strong authority is necessary before I hold that "counter-claims" are included in "claims" under Order XVII. rule 5. The only vestige of a dictum which has been cited in favour of it, is the passage from the judgment of Hall, V.C., in *Padwick v. Scott* (3), where, after stating that "the counter-claim was rested on Order XVII. rule 5, by which claims against persons as executors may be joined with claims against the same persons in their own rights," he says, "assuming the word 'claim' here could be taken to include counter-claim, it would not allow such a counter-claim as this." That was a mere assumption for the purpose of argument, and I do not think that the Vice-Chancellor meant to assume that in fact "claim" in that order meant anything of the kind, as has been here contended for, and therefore, in my opinion, Order XVII. rule 5 does not include a counter-claim, and a defendant is not at liberty to join a claim against a plaintiff as executor with one against a plaintiff personally, and, consequently, the counter-claim in this case cannot stand. But even if this be not so, and assuming that it is possible to join a counter-claim against a plaintiff in his personal character, with one against him in his representative character, still it ought to be a case of such a kind that the so joining such counter-claims will not embarrass the fair trial of the cause. Now, here it appears to me that to join them in this case would be very inconvenient and undesirable. Independently of the existence or not of assets, I think that the counter-claim is so drawn as to make it difficult to see the way in which it is intended at the trial to be relied on, namely, whether as a claim against the plaintiff personally, or as a claim against her in her representative character. My

brother Field at chambers refused to set aside the counter-claim on the ground, as I understand, that it consisted of a claim against the plaintiff personally, and I think, as far as I have been able to make out from the argument, the claim is substantially one of that nature. Then by Order XXII. rule 9, we have power to order a counter-claim to be excluded or to make such other order as shall be just. Now we do not think it necessary to make an order for striking the counter-claim out altogether, because it is easy to strike out so much of it as is embarrassing and to confine it to a claim against the plaintiff personally, and we therefore order that that shall be done. We also think that under the circumstances the costs of this rule should be costs in the cause, and abide the event of the action.

LINDLEY, J.—I am of the same opinion. I do not think it necessary to strike out the whole of the counter-claim, though it ought not to stand as it is without amendment. The claim which the plaintiff makes is not one which she states she is entitled to as representative in any way, but to which she is entitled in her own right on the covenant. Now the defendant sets up a case against the plaintiff of a threefold description; first, a claim against the plaintiff personally, inasmuch as the plaintiff's predecessor in title entered into a covenant which run with the land, and so bound the plaintiff, and for the breach of which by the plaintiff in her individual character, and not as executrix, damages are claimed; secondly, a claim against the plaintiff also in her individual character on the ground of certain expenses which were incurred with the knowledge of the plaintiff on the faith of the performance of the covenant giving an option to purchase. This claim, as well as the first one, being against the plaintiff individually, ought to be allowed. Then thirdly, there is a claim of damages against the plaintiff as representing the estate of the person who entered into the covenant for the option to purchase. That last is one which I think ought not to be mixed up with the others. The action by the plaintiff is on a covenant for the breach of which she sues in her individual

*Macdonald v. Carington, C.P.*

character, and the counter-claim is against her, both individually and as executrix. Now, ought all these to be allowed to stand? It is obvious that even assuming the last claim lies against the plaintiff, it is not an answer to this action, and if it stood alone, there would be judgment in her favour in respect of her action, and judgment against her in a totally different character. Now Order XIX. rule 3 says it is true that "a defendant in an action may set off or set up by way of counter-claim against the claims of the plaintiff any right or claim whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement or claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim." But I should understand that to mean that the defendant in any action may set up any claim against the claim of the plaintiff which he may have against the plaintiff in the same character as that in which the plaintiff himself sues. And I see nothing which brings the present case within that order and rule. Then Order XVII. rule 5 does not apply, for, as pointed out by Hall, V.C., in *Padwick v. Scott* (3), the reason of enacting it was the difficulty of deciding when an executor became personally interested in his testator's assets. The counter-claim as drawn, therefore, fails, and then comes the question, what is to be done? We think that so much of the counter-claim as relates to a claim against the plaintiff as executrix should be struck out, and that to that extent the counter-claim should be amended.

*Rule accordingly.*

Solicitors—J. Whitehouse, agent for Wynne & Son, for plaintiff; Freshfields & Williams, for defendant.

1878.  
Nov. 5, 30. }

RIGHTER v. LAXTON.

*Interpleader—Foreign Attachment in Lord Mayor's Court—Garnishee Order obtained during Existence of Attachment—Procedure.*

*The operation of a garnishee order made under the Common Law Procedure Act, 1854, is not suspended by the existence of an attachment in the Lord Mayor's Court, the former being a process of execution, the latter merely a process to compel an appearance.*

This was an action tried before Lush, J., at the Guildhall in February, 1878, and reserved for further consideration. The facts sufficiently appear in the judgment of the Court.

*Morgan Lloyd and Lyon*, for the plaintiff.

*Vaughan Williams*, for the defendant.

The following authorities were cited during the argument—

*Pillott v. Wilkinson* (1); *Oatterall v. Kenyon* (2); *Ex parte Williams*; *Re Davies* (3); *Watts v. Porter* (4); *Hirsch v. Coates* (5); *Magrath v. Hardy* (6); *Holmes v. Tutton* (7); *Webb v. Hull* (8); 17 & 18 Vict. c. 125. ss. 61, 62.

*Our. adv. vult.*

The following judgment was delivered (on November 30) by—

LUSH, J.—This was an interpleader issue directed to try the question whether a sum of 129*l.* 3*s.* 1*d.* paid into Court by an order of Master Dodgson, dated the

(1) 2 Hurl. & C. 72; s. c. 3 Hurl. & C. 345; s. c. 32 Law J. Rep. Exch. 201; s. c. 34 Law J. Rep. Exch. (Ex. Ch.) 22.

(2) 3 Q.B. Rep. 310; s. c. 11 Law J. Rep. Q.B. 260.

(3) 41 Law J. Rep. Bankr. 38; s. c. Law Rep. 7 Chanc. 314.

(4) 3 E. & B. 743; s. c. 23 Law J. Rep. Q.B. 345.

(5) 18 Com. B. Rep. 757; s. c. 25 Law J. Rep. C.P. 315.

(6) 4 Bing. N.C. 782; s. c. 7 Law J. Rep. C.P. 299.

(7) 5 E. & B. 65; s. c. 24 Law J. Rep. Q.B. 346.

(8) 4 Com. B. Rep. 287; s. c. 16 Law J. Rep. C.P. 187.

*Richter v. Laxton.*

26th of November, 1877, belongs to the plaintiff or to the defendant.

The defendant in April or May, 1877, recovered a judgment against one Plock, and obtained on the 7th of May a garnishee order attaching a debt growing due by instalments from one Stone to Plock, and ordering payment of the instalments to the defendant until his judgment should be satisfied.

On the 23rd of November, 1877, and while the garnishee order remained in force, the plaintiff brought an action in the Mayor's Court of London against Plock, and issued an attachment from that Court upon the same debt.

That action proceeded no further, and although an application was afterwards made by Stone in the Mayor's Court to dissolve the attachment, nothing was done beyond a verbal direction by the Judge that the attachment should stand over until the defendant's garnishee order should have been satisfied.

On the 30th of October, 1877, Laxton recovered another judgment against Plock, and obtained a second garnishee order, and by the order of the 26th of November, directing this issue, the Master ordered that when the garnishee has paid into Court so much of the instalments as is provided for by the order of the 7th of May, he should pay the residue, as the instalments fell due, into Court, till he had under that order paid in 129*l.* 8*s.* 1*d.*, the amount of Laxton's second judgment, to abide the event of the issue.

The question therefore argued was, whether the existence of the attachment in the Lord Mayor's Court prevented the operation of the second garnishee order.

When the nature of the two processes is considered, I think it cannot be doubted that the garnishee order prevails. A foreign attachment is merely a process to compel an appearance. As soon as the defendant in the action in the Mayor's Court appears the attachment is gone; if he does not appear, the plaintiff in the action in that Court may proceed to execution for the money attached in the hands of the garnishee, but before he can attain this process he must give bail to repay the amount to the defendant in

the action if judgment, therefore, should within a given time be given for defendant. Nothing short of payment by the garnishee under pressure of an execution out of the Mayor's Court will amount to a defence in any action brought against him by his creditor for the debt attached—*Magrath v. Hardy* (6). A garnishee order, on the other hand, is a process of execution. The debt from Stone, the garnishee, to Plock, the judgment debtor, not being disputed, the Judge might have ordered payment, and, in default of payment, execution against Stone. If Plock had brought an action against him for any instalment due before the issuing of the garnishee order, Stone would have had no defence. He cannot have a better defence as against a garnishee order issued by a judgment creditor of his creditor Plock, than he had against Plock himself. All the rights of Plock as against Stone were transferred by the garnishee order to Laxton, with the additional remedy of summary execution. I therefore give judgment for the defendant.

*Judgment for defendant.*

Solicitors—H. W. Christmas, for plaintiff; Harper, Broad & Battecock, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1878. { *In re* THE UNITED PATRIOTS'  
Dec. 9. { NATIONAL BENEFIT SOCIETY  
AND HOLT.

*Friendly Societies Act, 1875, 38 & 39 Vict. c. 60. s. 30—Disputes between Society and Members—Reference to Arbitration—Jurisdiction of Magistrate over Disputed Claim.*

[For the report of the above case, see 48 Law J. Rep. M.C. 55.]

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 Owens v. Unball. 2. 49. W. Bail. Coys. 4. 82. 3. 9. M. L. 69.  
 R. J. Salop. 7. 2. 2. Bovey. Bell. 4. 82. 3. 62. 1. 61. Myer. Defries. 4. 82. 3. 62. 1. 46.  
 M. L. 73. 49. 2. 3. 62. 2. 66.

Bradley v. King. Haydon v. 4. 82. 3. 62. 1. 85.  
 Clark v. Barton. 4. 92. 3. 62. 1. 57. 4.  
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 [IN THE HOUSE OF LORDS.]

1878. } GARNETT (appellant) v. BRADLEY  
 June 6. } (respondent).

Costs—Action for Slander where Damages less than 40s.—21 Jac. 1. c. 16. s. 6—Judicature Act, 1875, Order LV.

Where in an action for slander tried by a jury, the plaintiff obtained a verdict with nominal damages, the Judge at the trial refusing to certify for costs,—Held (reversing the decision of the Court of Appeal), that the plaintiff was entitled to his full costs. *Parsons v. Tining*, 46 Law J. Rep. C.P. 230; s. c. Law Rep. 2 C.P. D. 119, approved.

This was an appeal from a decision of the Court of Appeal reported 46 Law J. Rep. Exch. 545; s. c. Law Rep. 2 Ex. D. 349, reversing a decision of the Exchequer Division.

The action was for slander, and was brought by the appellant against the respondent for alleged slanderous words uttered by the respondent against the appellant in the way of his business. The cause was tried at the Derbyshire Spring Assizes, 1877, when a verdict was given for the appellant, damages one farthing. Lord Justice Amphlett, who tried the cause, refused to make any order as to costs. On taxation the Master allowed to the appellant his full costs, considering himself bound by the decision in *Parsons v. Tining* (1).

The respondent appealed to Field, J., in chambers, who referred the matter to the Court, when Pollock, B., and Huddleston, B., affirmed the Master's decision, but granted leave to appeal and reserved the costs of the litigation for the Court of Appeal. The respondent accordingly appealed, and Bramwell, L.J., and Brett, L.J. (Kelly, C.B., dissenting), reversed the decision of the Exchequer Division and gave judgment for the respondent.

This appeal was then brought.

Mr. Mellor and Mr. R. T. Reid, for the appellant, contended that the effect of

(1) 46 Law J. Rep. C.P. 230; s. c. Law Rep. 2 C.P. D. 119.

Order LV. was to repeal the provisions of the statute of James with regard to costs (2).—

The purpose of that order was to substitute a simple and uniform rule as to costs for the multifarious and contradictory procedure previously existing at common law. Numerous statutes, from the statute of Gloucester downwards, had introduced a variety of practice in particular cases based on no definite or consistent principle. In equity, on the contrary, the practice had always been that costs should be within the absolute discretion of the Judge. The introductory words of Order LV., "subject to the provision of this Act," and the special saving provisions with regard to actions in the County Courts contained in section 67 of the Judicature Act, 1873, indicate the intention of the Legislature to repeal generally the existing enactments with regard to costs, and to establish in their stead a uniform rule based upon the rule "hitherto acted upon in the Courts of Equity." To this rule, however, an exception is made, that in actions tried by a jury "costs shall follow the event." But even in cases coming within the exception, the discretionary power of the Judge is maintained, and he is empowered on good cause shewn to order otherwise.

It has been contended that the meaning of Order LV. is, that "the event" means "the legal event," that is, the event

(2) 21 Jac. 1. c. 16, s. 6 enacts "That in all actions upon the case for slanderous words . . . if the jury upon the trial of the issue in such action, or the jury that shall enquire of the damages, do find or assess the damages under forty shillings, then the plaintiff or plaintiffs in such action shall have and recover only so much costs as the damages so given or assessed amount unto without any further increase of the same, any law, statute, custom or usage to the contrary in any wise notwithstanding."

By Order LV. of the Judicature Act, 1875 (38 & 39 Vict. c. 87), it is enacted that: "Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court . . . provided that where the issue or action is tried by jury the costs shall follow the event, unless upon application made at the trial for good cause shewn, the Judge before whom such action or issue is tried, or the Court, shall otherwise order."

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as limited by the provisions of the various statutes. But this construction would re-introduce the chaos which it was the object of Order LV. to reduce to order. The provisions of this order being inconsistent with the statute of James, the latter must, according to the ordinary rule as to the construction of statutes, be regarded as repealed.

*Mr. Lawrence and Mr. Bigham*, for the respondent.—By construing the word “event” to mean the event as provided by the statute of James in cases of slander, all the alleged inconsistency between that statute and Order LV. is done away with. The costs will then follow the verdict, as provided by the order, the Judge not having ordered otherwise, but subject to the provisions of the previous statute by which the amount of such costs is limited, so as not to exceed the amount of damages awarded. Before the passing of the Judicature Acts even a Judge’s certificate could not give to a plaintiff in an action for slander more costs than damages—*Evans v. Rees* (3). See also *Marshall v. Martin* (4). If Order LV. is to have the effect of repealing the provisions of the statute of James, it must also repeal all previously existing rules with regard to costs. It has, however, been held by the Court of Appeal in the case of *The Daicos* (5) that the rule of the Court of Admiralty laid down in the case of *The Schwan* (6) still prevails, notwithstanding the passing of the Judicature Acts, whereby a defendant in a collision case who succeeds on a plea of compulsory pilotage is not entitled to his costs. It is submitted that the words of the Order LV. are general, and ought not to be held to repeal the special provisions of the statute of James. See *Baker v. Oakes* (7).

*Mr. Mellor* in reply.

(3) 9 Com. B. Rep. N.S. 391; s. c. 30 Law J. Rep. C.P. 16.

(4) 39 Law J. Rep. Q.B. 86; s. c. Law Rep. 5 Q.B. 239.

(5) 47 Law J. Rep. P., D. & A. 1.

(6) 43 Law J. Rep. Adm. 18; s. c. Law Rep. 4 A. & E. 187.

(7) 46 Law J. Rep. Q.B. 246; s. c. Law Rep. 2 Q.B. D. 171.

**LORD HATHERLEY.**—The appellant in this case was the defendant in an action for slander brought against him by the respondent, the plaintiff in the action, and the verdict was obtained by the plaintiff, with damages assessed by the jury at one farthing. The Act 21 Jac. 1. c. 16. s. 6 provides that when a plaintiff in an action of slander shall not recover more than 40s. damages, he shall not have more costs than damages; and the question upon this appeal is, whether or not Order LV., under the Judicature Act of 1875, coupled with the 33rd section of that Act, has had the effect of repealing, or at least modifying, the above enactment of the statute of James 1. This Order LV., made under the Judicature Act of 1875, is contained in the schedule of that Act, and is made a part of the Act, and must be so dealt with. It directs that “the costs of and incident to all proceedings in the High Court” of Judicature established by the Act “shall be in the discretion of the Court,” but “subject to the provisions of the Act.” The same Order excepts certain causes which have no relation to the matter now in hand, and also provides that, “where any action or issue is tried by a jury, the costs shall follow the event,” “unless the Judge who tries the action shall otherwise order.” In the case before us no order has been made by the Judge; and the majority of the learned Judges in the Court of Appeal have held that the Act of James 1, being an Act directed towards a special and limited object, is not repealed by the general affirmative enactment contained in this Order LV., notwithstanding the 33rd section of the Judicature Act of 1875, which repeals certain specified Acts, “and any other enactment inconsistent with this Act and the principal Act.”

Now I think that Order LV., when speaking of the costs following the event, must be taken in the first place to mean that he who has succeeded in his cause shall, without regard to the amount of damages which he shall recover, be entitled to his costs, unless the Judge shall otherwise order. I say I take that to be the meaning, if we are simply to consider

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the Order itself, and are not to consider its effect upon the statute of James.

An argument deserving of very great attention appears to have influenced the minds of the majority of the learned Judges in the Court below, an argument derived from a well-known class of authorities, which have determined that an Act directed towards a special object, or special class of objects, will not be repealed by a subsequent general Act embracing in its generality those particular objects, unless some reference be made directly or by necessary inference to the preceding special Act. The law upon this subject is stated in the observations of a text-writer cited by Lord Justice Bramwell. But I prefer taking the law as it is laid down by Lord Justice Turner in a well-known case, which gave rise to a considerable amount of discussion, that of *Hawkins v. Gathercole* (8).

The question there was whether or not the Act of Elizabeth, or that clause of it at least which prohibits the charging of benefices, had been repealed by a subsequent Act of a very late date, passed in the reign of the present Queen, with reference to rendering judgments more effectual on behalf of creditors, and which spoke of giving effect to those judgments against various classes of property, enumerating, amongst others, as a subject-matter of charge under the Act, any "interest in or out of any lands, tenements, rectories, advowsons, tithes, rents and hereditaments." An attempt was made to charge, under a judgment by virtue of that Act, certain tithes which were in the hands of a clergyman, on the ground that the statute of Elizabeth had been repealed by this statute, which gave effect to judgments over (amongst other things) "rectories, advowsons, tithes, rents and hereditaments;" but it was held that it had no such effect. What might have been held if there had been nothing whatever for the statute to operate upon in the shape of tithes, advowsons and rectories would have been a matter for consideration; but inasmuch as there are lay tithes, and as we know, of course, that advowsons as well as

tithes may be in the hands of laymen, it was held that there was enough to answer the purposes of the words used in the Act of Victoria relating to judgments; and it was held that the general intent and object of that Act was simply to give a facility of remedy to a judgment creditor, and that it was in no way directed to the particular class of persons and objects which are defined in the statute of Elizabeth. Indeed, in the course of the argument it was observed that the Statute of Frauds might have been open to the same observation, because there tithes are mentioned in relation to judgments; and it certainly never entered into anybody's mind that the Statute of Frauds would have any operation upon the statute of Elizabeth.

Lord Justice Turner reviews the whole subject in his judgment; and what he says is this:—"The principal question which we are called upon in this case to decide is, whether, under the provisions of the statute 1 & 2 Vict. c. 110. s. 13, a judgment entered up in any of Her Majesty's Superior Courts at Westminster operates upon an ecclesiastical benefice held by the person against whom the judgment is entered up." Then he shews that it may apply to lay tithes, and property of that description, in the hands of laymen; and then he says that, in construing Acts of Parliament, "regard must also be had to the intent and meaning of the Legislature. The rule upon this subject is well expressed in the case of *Stradling v. Morgan* (9), in which case it is said, 'That the Judges of the law in all times past have so far pursued the intent of the makers of statutes that they have expounded Acts which were general in words to be but particular where the intent was particular;' and after referring to several cases, the report contains the following remarkable passage:—"From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter they have expounded to extend but to some things, and those which

(8) 6 De Gex, M. & G. 1; s.c. 24 Law J. Rep. Chanc. 332.

(9) 1 Plowd. 204.

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generally prohibit all people from doing such an act they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only; which expositions have always been founded upon the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances; so that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion. "

The doctrine is laid down there as fully as in the learned text-writer cited by Lord Justice Bramwell (*Maxwell's Interpretation of Statutes*, p. 157), and the grounds and reasons of it are very well explained and satisfactorily established. This will be found, I think, on looking into and analysing the various cases on the subject (which I do not enter into because it is unnecessary so to do) to be the governing idea and conception, and the conclusion which has been founded upon it by the Courts of Judicature. When an Act of Parliament repeals a preceding Act which relates to a certain definite subject-matter, distinctly laid down for the guidance of those who are to be operated upon by the Act of Parliament in that special matter, or to a particular class of persons who are to be either protected, or it may be, affected adversely by a particular clause of the enactment, then the Legislature is presumed to have had that very special subject-matter and that very special class of persons in contemplation when the subsequent statute was passed; and if there was a general Act subsequently passed, the generality of which was large enough, as far as words go, to comprehend the particular matter dealt with in the previous enactment, it will be considered whether or not, as regards the persons who are to be affected or protected by the Act, persons who are not in any way mentioned or specified by the subsequent general Act are to be injuriously affected by an

adverse enactment, or deprived of a benefit they are entitled to under a previous enactment. And in that case the Court, in construing the subsequent general Act of Parliament, would expect to find something or other pointing out that the attention of the Legislature had been turned towards the former special enactment, &c., in passing the general Act, that it has made the new enactment with the view of embracing every case (including that special case) embraced within the provisions of the previous Act.

Now, considering the question in that point of view, let us see in the first place what the special Act of James I. did. That Act can hardly be said to have contemplated a special class of persons; and it only says that anybody bringing an action of slander who does not recover more damages than 40s., shall not recover more costs than damages. It can hardly be said that persons disposed to bring actions for damages for slander can be held to be a class of persons who are to be struck at on the one hand, or on the other hand to be regarded and who must be held as not to be within the generality of another Act, which would embrace all classes of persons whatsoever. It is simply a general Act striking generally at all persons who bring this class of action, but they do not form any particular class of the community who are entitled to any special observance, care or regard in the framing of a subsequent Act.

I think this will be apparent when you come to consider what the object of this Act of James I. was. It was this—In the matter of costs the Common Law Courts had no discretion such as the Courts of Chancery had at all times asserted. The Common Law Courts were obliged to go back to a legislative enactment in order to arrive at their power, or rather their duty, for power they had none, of dealing with costs. The statute of Gloucester which was passed in 6th Edw. 1, is the foundation of the Common Law jurisdiction as to costs, and that statute bound the Common Law Judges, so that they could not in any way depart from the rule that was laid down, that costs followed the event. Therefore it was necessary to except out of that strict and rigid

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rule any case which the Legislature might consider worthy of such exception. The Legislature, finding that there was one general sweeping enactment which deprived the Common Law Courts of their discretion, and compelled them to hold in all cases that the costs followed the event, thought that there was a particular case in which there might be an exception made from the hard and fast rule, that costs followed the event whatever the particular circumstances might be. Now, when the Judicature Act was passed, this difficulty was got rid of for ever, once for all, as regards the Common Law Courts. The two jurisdictions were mingled, and the same powers and authorities were given to what were formerly the Common Law Courts, that is to say, to those who had to try what previously were Common Law actions—the same authority was given to them as had always existed on the part of the Courts of Equity. The Legislature gave its sanction distinctly, as a part of the Judicature Act of 1875, to this Order LV. in the schedule. By the Judicature Act the Legislature gave a direct authority to all the Judges of the Courts constituted under the Judicature Act, and vested in them a discretion which was to guide and determine them, according to the circumstances of each case, in the disposition of costs.

In a general application of one rule as to costs, it will be considered (at all events Parliament so held) reasonable and proper that exceptions should be made, for the express purpose of preventing this otherwise general rule from governing all cases, whatever their circumstances might be. The argument with reference to the withdrawal of any object of a special Act, passed anterior to the general Act, from its operation, entirely fails, when you come to see that it was not a particular class of Her Majesty's subjects who were exempted from the operation of a particular rule, but that a mode was pointed out of administering justice in certain cases, which mode was rendered necessary by the previous course of legislation, which had laid down a distinct and rigid rule not otherwise capable of being disposed of. When

this Judicature Act of 1875 came to be passed, it was seen that it was no longer necessary that any such special exemption should be provided, because in every class of suit, whatever might be the character of the action or the position of the parties, there was a power left to the Judge in his absolute discretion (meaning of course his judicial discretion) to determine this question of costs. The case of a trial before a jury is no doubt, by Order LV., exempted in the first instance from the discretionary power of the Judge. The Judges who had the power to make the order and to give to it the authority and effect of an Act of Parliament, laid down as the primary rule to guide those who should have to act upon it hereafter, that, as a general rule, the costs should follow the event in jury trials, but even in that case they did not deprive the Judge of his discretion, for they added the words, "unless the Judge shall otherwise order."

Let us now see what would be the effect if we did not hold that this Order, together with the Judicature Act, superseded the special enactment of James on the subject of actions of slander. The effect would be this: you would have outstanding an absolute rule applying to a particular class of cases, actions of slander, as hard and fast that the Judges should not award the costs, as it had been before that they should award them, although you have a subsequent Act of Parliament intended, as it seems to me, to render the course of procedure in the Courts about to be established under the Act, analogous to that which had from all time been the practice of the Court of Chancery. Foreseeing that the Judges would have full power to make rules as to costs under the 17th section of the Act in future, which, indeed, they have made in the present case, and that full power as to costs, in reference to all subjects which were formerly subjects of Common Law jurisdiction, would be placed in the hands of the Judge, and that he might, at his discretion, entirely supersede the operation of that rule in the Common Law Courts, they seem to me, in reference to that object, and many other objects contained in the order, to have provided that



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this difficulty arising from clashing with other Acts of the Legislature, should be entirely overcome. They provide for that by the 33rd section of the Judicature Act of 1875, which expressly enacts that "From and after the commencement of this Act there shall be repealed the Acts specified in the second schedule of this Act;" and also "any other enactment inconsistent with this Act or the principal Act." Now, any order whatever as to costs made as the Judges have power to make an order under the 17th section, —made as is provided for in the Act of Parliament itself, would, if you were not to construe this Act as repealing previous Acts as to reference of costs, down to the last Act passed relating to special costs, bristle with inconsistencies. Any Act giving discretion to the Court must be inconsistent with any special Act not repealed by this 33rd section; and any regulation whatever that was made relating to costs would teem with insuperable difficulties if we were not to hold that all those previous Acts, which defeated this intention of the Legislature with regard to costs, were repealed by the 33rd section.

I do not rely much upon the 67th section of the Judicature Act of 1873, with reference to costs in proceedings in the County Courts. That was relied upon somewhat by some of the learned counsel as shewing that where there was an intention to except a certain class of costs that class of costs was specified. The rule was relied upon that the *expressio unius* implies the *exclusio alterius*. I do not rely upon that section; I do not think it is necessary to do so; but what I do rely upon in this case is, that this enactment of James I. was not made in regard to any definite portion of property, or any definite class of persons, but that it was made as a particular exception from a general rule laid down by a previous statute; that that previous statute must be altogether abrogated by the necessity of the case by the Act of 1875; and that in order to meet the power given to the Judges, that of having an absolute discretion with regard to costs, it is necessary that every portion of the Act of Parliament inconsistent with that general

discretion should be swept away, unless there be some local or special wrong which we have not yet heard of, in any part of the Act, in the case which has been argued before us. Except in that way it must be intended that the full discretion given to the Judges of allowing costs should be upheld notwithstanding any enactment inconsistent with it, and any enactment inconsistent with it must be taken to be abrogated.

I have not said a word, it will be observed, and I shall not do so, upon a point which was much dwelt upon by the learned Lord Justice Bramwell, to whose opinion I attach great weight, with reference to other Acts of Parliament relating to costs. There is a series of Acts referred to by the learned Lord Justice which in special cases give what are called double or treble costs. I can conceive many circumstances which might make a difference between those cases and this which is now before the House. What I see is that the Court of Chancery, always having had this jurisdiction with regard to costs, and the Courts of Common Law never having had it since the 6th of Edward 1, there being an intention on the part of the Legislature that in all cases before the High Court, whether Common Law or Equity, there should be one common course of procedure, the intention being that the Order and Rules made on that subject should be sanctioned by that Act, everything inconsistent with them must be considered as being done away with by the operation of the 33rd section. The Court of Chancery always had the power to regulate costs, and the Court of Chancery, in dealing with costs, might give costs as between party and party, which we know are far from indemnifying a successful suitor; or (as in many cases I have known it done) the Court of Chancery might reduce the costs. The Court might say that 50% should be paid for the costs, whatever they might be, or any other particular sum, always, of course, below the full costs as between solicitor and client; the Court had no power to increase the costs beyond that. Therefore, with respect to those enactments as to double costs and treble costs and the like, I think the

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argument need not be pursued, and I will not delay your Lordships by so doing; but it will easily be perceived that they relate to quite a different subject matter from that in which the discretion is to be absolute. Those costs are really penal; the costs to be paid by a party in a case of this kind are measured by the amount of damages. I say that there may be a different argument founded upon that, but I am not assenting to, or dissenting from that argument. It is enough for me to say—and I confine my observations entirely to that question—that this particular statute of James I. has been operated upon by the Judicature Act, so as to make it inapplicable to the present case.

Under these circumstances, I propose to your Lordships to reverse the decision of the Court below, and to direct that the appellant should have his costs in the proceedings in the Court below and his costs in this appeal.

LORD O'HAGAN.—I also am of opinion that the judgment of the Court of Appeal should be reversed.

Formerly, the rule as to costs was different in Courts of Common Law and Courts of Equity. In the latter they were in the discretion of the Judge; in the former, with some statutable exceptions, they followed the event, and the successful party took them as of course. The statutes making the exceptions were difficult of construction, and not always capable of satisfactory reconciliation with each other, and I well remember how often they embarrassed counsel and puzzled Judges, and how great was the conflict of decision upon them, whilst I practised at the bar, and sat upon the bench in a Court of Common Law.

The purpose of the Judicature Act was to establish one great tribunal, with consistent and homogeneous action in all its parts, and, as far as possible, an assimilation of practice and procedure. The matter of costs was one of the most important with which the Legislature had to deal in carrying out this purpose; and, in entire harmony with it, the order we are considering, which has the full force of law, declares that "the costs of and incident to all proceedings in the High

Court of Justice shall be in the discretion of the Court." The operation of that rule is as large as words can make it, and it was apparently designed to extend to all proceedings the discretionary power which had before governed only those in Equity. It is expressly qualified as to mortgagees and trustees, and by the proviso with which we have to deal, that on a trial by jury "the costs shall follow the event," unless the Judge shall determine otherwise.

Now, in the first place, assuming the law to be that mere general words do not repeal special provisions, unless there is a plain inconsistency between them, I am of opinion that there is here such an inconsistency. An enactment that, in a particular instance, a successful suitor shall have no more costs than damages, and an enactment that "in all proceedings" the Judge may give him such costs as in his discretion he may deem right, seem to me irreconcilable, and if they are, the latter enactment must prevail, substituting the wide discretion for the peremptory rule.

And why should we strain to discover another and a narrower construction when we consider that the general object of the statute was to work an assimilation, which such a construction would *pro tanto* forbid; and when we find the Legislature declaring that, in the event of a conflict between the rules of law and equity, the rules of equity shall have the preference? The continuing operation of the statute of James would confessedly limit the discretionary action of the Judge, which equity maintained; and why should we labour to find reasons for that limitation in opposition to the declared policy of the statute, and in spite of the substantial inconsistency between the old law and the new?

If this rule had terminated without the proviso, I do not think that the universal discretion of the Judge, save in the specially excepted cases, could reasonably have been denied; and I do not see in the subsequent words anything to abridge it, so as to work a revival of the Act of James I. The direction that "the costs shall follow the event" would, in ordinary understanding, point to the success or

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failure of the parties to the suit respectively as determining the right, or the liability, not to a portion but to the whole of the costs of the cause. And if I am right in holding that the inconsistency between the preceding clause of the rule and the statute is such as to overbear and nullify the latter, "the costs," after the passing of the Judicature Act, can mean nothing but the general costs unaffected by the special legislation which has, in that view, altogether ceased to have effect. I repeat that I do not understand why we should exert legal ingenuity to give to the words, "the costs shall follow the event," an interpretation not attached to them by ordinary usage, and also inconsistent with the principle and policy of the statute in which they are found. The statute aims at uniformity of practice "in all proceedings in the High Court." The suggested interpretation would continue the diversity between them. The statute contemplates a preference to the rules established in equity, the interpretation would involve the continuance of a law directly in antagonism with those rules. If we can fairly avoid these consequences and reconcile the plain objects of the Judicature Act with a reasonable construction of the rule we ought to do so. And I think we may accomplish this by adhering to the common meaning of the words, and holding that the costs to "follow the event" are the ordinary costs incidental to success in an action.

The Legislature has chosen, in the case of the verdict of a jury, not to take away the general discretion of the Judge, but to leave it to himself to say whether he thinks proper to exercise that discretion or allow the verdict to work its own result as to costs by giving them to the successful party. It presumes in favour of the verdict that the costs should follow, unless the Judge intervenes to regulate them, but I note in this, no indication of a design to re-establish the exceptional law which was, in my judgment, intended to be done away with by the antecedent words of the rule. I cannot entirely refuse to say, with the Lord Chief Baron, that in one view of the matter the proviso might not be held to bear the construc-

tion put upon it by the respondent as to the effect of the event of the trial; but at the most, in that regard, the matter is equivocal. There are two interpretations either of which might possibly be entertained; the one recognising the existence of the antecedent statutes, the other regarding them as repealed, and I prefer the latter, as, in my mind, manifestly accordant with the general intention of the Act, and calculated to attain the benefit at which it aimed, and to rectify the mischief it sought to remedy.

As to the argument derived from the repeal of a number of other statutes, as well as that immediately in question, which may be consequential on a decision in the appellant's favour, I think it scarcely legitimate, if there be any force in the considerations on which I have relied. If it was the purpose of Parliament to simplify our legal system and unify it as far as possible, and for this purpose, *inter alia*, to give to the Court universally, the discretion as to costs it had theretofore exercised in equitable proceedings, and if the phraseology of the statute is strong and clear to carry out that purpose, I do not think we are at liberty to balk the purpose, because the effect may be to work the repeal of statutes we may deem beneficial. We have no means of knowing how far such a result was accidental or designed—we cannot tell whether the view we may take as to those other statutes would or would not have been adopted, if the question of their abolition had been expressly raised; and whatever we may think about them, if the necessary consequence of the legislation of 1873 involves their repeal, we cannot help it.

I give no opinion as to its effect on other Acts which are not before us. Different considerations may apply to them with different results, and each must be dealt with accordingly as the occasion arises. But even if the view of the eminent Judges of Appeal should be correct as to the consequential repeal of the statutes to which they refer, I do not conceive that the respondent ought therefore to succeed. The Legislature may have unconsciously done a thing deemed injurious. It may have acted with im-

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providence or without sufficient forethought; but if so, it must be left to correct its own error, and we have no power to defeat its plain intention because of the results which it may or may not have contemplated.

I do not, therefore, feel the force of the argument which was so much relied on in the Court of Appeal; but whatever its force may be, I think it is counter-balanced and overborne by the special exclusion of the County Courts from the general operation of the Act as to costs. That exclusion shews that the attention of Parliament was called to the propriety of limiting the discretion of the Judge in particular circumstances, and the omission to limit it in those with which we have to deal persuasively suggests that the limitation was not designed to affect them. As was observed by Mr. Justice Grove, in *Parsons v. Tining* (1), a very few words would have secured the continuing action of the earlier statutes; but they were not inserted, and their non-insertion derives double significance from the careful reference to the County Courts.

For these reasons I am of opinion that the proposal of my noble and learned friend should be adopted by your Lordships. It seems to me to be warranted by the terms of the Order and the provisions of the statute, by carrying out the policy of the Judicature Act to remove the reproach which has been brought upon the law by so many astute arguments and so many conflicting decisions.

**LORD BLACKBURN.**—I also have come (although not without hesitation and doubt at first) to the conclusion that the decision of the Court of Appeal was wrong, and that it ought to be reversed.

I think that the ground upon which their Lordships went, which is in itself a good ground to apply to proper cases, has been misapplied in the present case, and I will give my reasons presently for entertaining that opinion.

First of all I will observe that before the Judicature Acts came into operation there was a rule as to costs in Courts of Common Law; costs in Equity we are

not concerned about. Costs in Courts of Common Law were not by Common Law at all, they were entirely and absolutely creatures of statutes. There had been statutes passed at different times giving costs, some in one case and some in another, the earliest being the *Statute of Gloucester*, passed many centuries ago, which gave costs, if I recollect rightly, to demandants who recovered damages in a real action, which they had not had before. Subsequent statutes were passed at different times giving a plaintiff a right to recover costs in any action, and there were other statutes passed at different times upon the subject of costs in the Common Law Courts. I think the first that gave costs to the defendant was as late as James I, and there were several other statutes giving costs, but all those statutes went upon one principle throughout. The result was that, as a general rule, in every case in Courts of Common Law, the party who succeeded got his costs, whether he was plaintiff or defendant, whether he succeeded by a verdict or upon demurrer. I say the general rule established by all those numerous statutes (for there was no one statute which laid it down) was that the successful party got his ordinary taxed costs; in other words that the costs followed the event; and that the party who was successful had them as a matter of right.

From that general rule, however, certain statutes made several exceptions in particular cases. Of the three statutes which come into question in the present case the first is the statute 21 Jac. 1. c. 16. s. 6. The effect of that statute was to make an exception from the general rule which I have stated, and to say that where a party had obtained a verdict and recovered damages less than 40s. in an action of slander, he should have no more costs than damages. There was no power to certify or to do anything of the kind. It was an inexorable rule that when he recovered less than 40s. in that particular action he was to have costs no doubt, but those costs were to be no more than the damages. That Act was obviously passed to discourage frivolous actions of slander. If that statute is

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still in force and has not been repealed, the plaintiff in the present case would be entitled as a matter of right to a farthing costs, and could not in any way have got more.

Besides that, two other statutes were passed for an object very little different, which it is necessary for me to notice. One of those is the 3 & 4 Vict. c. 24, what is commonly called Lord Denman's Act, which says that in actions of tort generally, when a party recovers less than 40s., he shall have no costs at all, unless there be a certificate or order of a particular sort. That statute would also be applicable to this action, if it has not been repealed; and as the plaintiff has obtained no certificate that would prevent his getting even a farthing costs.

There is another statute which I must mention, namely, the 30 & 31 Vict. c. 142, the County Courts Act. That is an Act passed for the purpose of discouraging persons suing in the Superior Courts instead of suing in the County Courts, and there is an enactment in general terms, that where a party recovers less than a specified sum in tort he shall have no costs at all, unless some particular certificates are given. Although that was a County Courts Act, and the general intention of the Legislature obviously was only to discourage the bringing of actions in a superior Court which might have been brought in an inferior Court, yet as the words were general, that enactment was originally construed to mean this: that when a plaintiff recovered in an action of slander less than a specific amount, although an action of slander could not be brought in a County Court, nevertheless he should not, if the damages were below 40s., get even his farthing, or if they were above 40s. (when the statute of James would not apply) he should not get his taxed costs unless he had a certificate. That also would have stood in the way of the present plaintiff, inasmuch as he has no certificate at all. If that statute stood, the plaintiff would not even get his farthing.

The question which arises in the present case is, are those three statutes got rid of under the Judicature Act?

Now, in order to ascertain that, we have to construe that Act and see what it means. There is first of all the Judicature Act of 1873—the principal Act—and in that Act there is a section, 67, which affects the provision in the last-mentioned County Courts Act—I shall have to make a remark upon that afterwards. The Act of 1875 provided, in the 16th section, that the orders contained in the schedule should be considered part of the Act, subject to all provisions to be made thereafter; and it did make them part of the Act, and the Orders contained in that schedule are as much part of the Act, and of the will of the Legislature in the passing of the Act, as any section in the Act itself. It is upon the construction of that Order LV., that this question will mainly depend.

The Order begins, "Subject to the provisions of the Act." The only provision in the Act which I think it is necessary to consider is that section 67 of the Act of 1873 which I have already mentioned, and which I shall refer to afterwards. Then the Order goes on to say, "the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court." Then follows a provision as to some costs in Equity which I need not care about. Then there is this proviso:—"Provided that, where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial, for good cause shewn, the Judge before whom such action or issue is tried, or the Court, shall otherwise order." With regard to the meaning of that proviso, I observe that, in the judgment of the Court below, the Judges say that they do not understand that proviso. Now, whether the proviso is wise or not wise, whether it was a judicious thing to put it in or not, was for the Legislature to consider; but it seems to me that its meaning is plain. The general enactment is that costs shall be in the discretion of the Court. That proviso says that, when an action is tried by a jury, it is to be a different thing. If the plaintiff recovers when the action is tried before a Judge alone, the costs are not to be recovered absolutely, but are to be

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at the discretion of the Judge. If he recovers when the action is tried before a jury there is to be a different rule—"the costs shall follow the event." That means that the successful party, whether plaintiff or defendant, shall have his costs (which would clearly, in my opinion, mean his ordinary taxed costs), unless "upon application made at the trial for good cause shewn," an order shall have been made otherwise. It is not at all necessary to enquire what would justify such an order, and what is meant by "good cause shewn," or the like, for in this case no order has been made, and it may be either one way or the other.

Therefore it remains entirely for us to say, upon the construction of that Order, whether or no this has the effect of getting rid of the three enactments which I have before mentioned, which would certainly have stood in the way of the plaintiff in the present case recovering any costs at all. Upon that the question arises, I think, upon the construction of the Act. I need mention only one other section in the Act upon which something has been said. The Act by the 33rd section provides that a number of Acts named in the schedule shall be repealed, and if it had stopped there and had done nothing more, there might have been an argument of this kind: Inasmuch as there are certain statutes enumerated which are repealed, *expressio unius est exclusio alterius*, and accordingly those statutes, and those alone, are repealed; and inasmuch as the statute of James I. is not one of the enumerated statutes, it would, under that argument, stand. But that is entirely obviated by what immediately follows. It says there shall be repealed also all statutes "inconsistent with this Act." That brings us to see, Is this statute of James I. inconsistent with the Act or not?

Now, an Act saying that all statutes inconsistent with itself shall be repealed really goes no farther than the general law, but it becomes a question, upon which there is a vast quantity of authority in different ways, as to what shall be the inconsistency which shall cause the repeal of an earlier statute or an existing

general rule. I do not know that it is better stated anywhere than in *Foster's Case* (10), where it is said—"This Act of 35 Elizabeth is all in the affirmative, and therefore shall not repeal or abrogate a precedent affirmative law before; and the said rule that *leges posteriores priores contrarias abrogant*, was well agreed; but as to this purpose, *contrarium est multiplex*." And then he proceeds to give five instances, I think, of different rules where he says that there may be a contrariety shewn in the statute, and he ends by saying what I have quoted. He, besides, refers to *Plowden's Commentaries* in *Amy Townsend's Case* (11), and I may refer also to *Plowden's Commentaries*, where, in two places, anybody who wishes to find an argument on either side about the repeal of a statute for inconsistency with a subsequent statute will find many good and ingenious arguments, and he can pick out the arguments which make for the side he particularly wants to support. Not content with that, Lord Coke goes on to say, "and many other contrarieties there are which are not necessary to be recited."

I shall not attempt to do what Lord Coke has not done. I shall not attempt to recite all the contrarieties which make one statute inconsistent with another; the *contraria* which make the second statute repeal the first. But there is one rule, a rule of common sense, which is found constantly laid down in these authorities to which I have referred, namely, that when the new enactment is couched in general affirmative language, and the previous law, whether a law of custom or not, can well stand with it, for the language used is all in the affirmative, there is nothing to say that the previous law shall be repealed, and therefore the old and the new laws may stand together. There the general affirmative words used in the new law would not of themselves repeal the old. But when the new affirmative words are, as was said in *Stradling v. Morgan* (9), such as by their necessity to import a contra-

(10) 11 Co. Rep. 62 b.

(11) Plowd. 112.

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diction, that is to say, where one can see that it must have been intended that the two should be in conflict, the two could not stand together; the second repeals the first.

Now, applying that to the present case, I think there could not be any reasonable doubt that a law which says that costs generally shall be in the discretion of the Court, and that costs, where a matter has been determined by a jury, shall follow the event, subject to being taken away if certain things happen, are absolutely inconsistent with statutes which say that the successful party shall, as a matter of right, have his costs. You cannot let the two laws stand together, and say that the costs shall be in the discretion of the Court, and at the same time say that one of the parties shall have them as a matter of right; it is impossible. Neither can you say that the costs shall follow the event, that is, belong to the party who succeeds, unless the Court takes them away, and at the same time let a law stand which says that a party shall not have the ordinary taxed costs, but shall only get a farthing. The two are absolutely inconsistent; the one repeals the other.

Nor should I entertain any doubt of that for a moment, but that there is another rule which has been laid down, which I think is a good rule if it is properly applied, namely, that where there has been a particular rule established, either by custom or by statute, where there is some particular law standing, and a subsequent enactment has general words which would repeal that particular law or particular custom, if they were taken in all their generality, yet nevertheless the first particular law is not to be repealed unless there is a sufficient indication of intention to repeal it. It is not to be repealed by mere general words; the two may stand together; the first, the particular law, standing as an exceptional proviso upon the general law. The contention here is, and the ground upon which the learned Judges below went was, that in this case this particular enactment of James I. was a particular law within the meaning of this rule, and that it will stand, together with the general

words in the Judicature Act, on the grounds, as Lord Justice Bramwell states, that the law laid down by the statute of James I. is a special exception, and that the object of the Order is not to repeal such special laws, but to provide a general law in lieu of the general law which existed before. It is upon that ground that the Judges in the Court of Appeal base their judgment, reversing that of the Exchequer Division, and during the argument I was rather impressed with the belief that that ground was sound, and that it was properly applied; but I think on consideration, and after looking into the cases which have been referred to, that, although that doctrine itself was sound, yet it was misapplied to this case, and I will proceed to state why.

That general rule which I have spoken of has been acted upon in numerous cases. I may refer to *Trudgin's Case* (12); what was held in that case was this—The statute *De Donis condition- alibus* said, that the tenants in fee-tail should forfeit their life interest and no more—the rights of the heirs were preserved. Then came a statute which said in general words where there was a *præmunire*, the owner in fee should always forfeit the fee simple; it was held that the particular in favour of tenants-in-tail was not intended to be repealed by those general words of the subsequent statute. In *The King v. Pugh* (13) there was a custom of the hundred of Battle that those who served as jurors in the hundred should not serve as jurors of the county. Then came an Act of Parliament, enacting that all persons should serve as jurors of the county. It was held by Lord Mansfield that the custom of the liberty stood upon the very ground that it was a special and particular law. Then again, in the case of *Hawkins v. Gathercole* (8), which has already been referred to by my noble and learned friend now on the woolsack, it was held in the same way that a general Act saying in general terms that the sheriff should seize tithes, did not repeal the Acts which had been passed for the protection of

(12) 11 Co. Rep. 63; s. c. Co. Lit. 130 a.

(13) Dougl. 188, 191.

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ecclesiastical bodies, saying that ecclesiastical tithes should not be seized, but should continue appropriated to the church. That again was an instance of the application of the rule, and *Fitzgerald v. Champneys* (14) was another case.

In all these cases, however, the particular statute relied on was a statute in favour of a particular class of persons or the property of a particular class of persons. I do not take upon myself to say that all cases in which that rule has been applied have been such, although I am not aware of any case in which it has been applied to which that remark would not be applicable. But where that is the case, where the particular enactment is particular in the sense that it protects the rights, the property, the privileges of particular persons or a class of persons, the reason for the rule which has been acted upon is exceedingly plain and strong. It would be very unjust, or I would rather say unfair (I do not go farther than that), to pass an enactment taking away from a particular person or class of persons, his or their rights without hearing what he or they have got to say about it; and if general words were to have the effect of taking away the rights of a particular person or class which had been given to them beforehand, it would be done without their having any knowledge or opportunity of resisting it, and it is not to be imputed to the Legislature or to be supposed that the Legislature would do what was unfair. Therefore, I think that where only general words are used there is a strong presumption that the Legislature did not intend to take away a particular privilege, right or property, of a particular class, unless they have done something to shew that intention. If they have done something in such a way as would shew their intention, if they have said in negative words that those rights or privileges shall all be taken away, any enactment to the contrary notwithstanding, that would prevent the presumption arising at all. But in the absence of that, I think it is an intelligible principle to say that the Legislature shall not be presumed to have

done anything unfair, and to have taken away any particular privilege, not having stated openly that they meant to take it away, or in such open or clear language that the persons affected might come and resist, and use arguments to shew why it should not be taken away, but having simply used general words quite consistent with their never having thought of this privilege at all. I think that that principle will reconcile almost all the cases; certainly it will reconcile all I have cited, and it is a good and intelligible principle.

But when you come to apply it to the present case, I do not think it applies at all. The statute of James I. and the other two statutes I have mentioned were not passed in favour of a particular class of persons at all. Every one of Her Majesty's subjects is just as much likely to be sued by a roguish attorney, and to be interested in the question of costs as another; and when the statute of James I. said, "We will discourage actions of slander by saying that a plaintiff who recovers less than forty shillings shall have no more costs than damages," the Legislature was not giving a privilege to a particular class, it was passing a general enactment for the benefit of all His Majesty's liege subjects. And to Lord Denman's Act, and the County Courts Act, which I mentioned before, exactly the same remark applies.

No particular classes of persons are more likely than others to be sued in superior Courts when they ought to be sued in inferior Courts. Those were general enactments for the benefit of all Her Majesty's subjects, and therefore they do not come within the principle, which seems to me to be a good principle. That it should be taken that the object of the Legislature is not, by mere general words, to repeal special laws, is a perfectly true, good and sound canon of construction, and if this was a case of special laws giving a privilege, or a property or a right, to a particular class, the canon would be applicable, but it is not applicable when that special law affected every one of Her Majesty's subjects, just in the same way as the general statute of Gloucester, giving costs to all persons who were plaintiffs who recovered damages

(14) 2 Jo. & H. 31; s. c. 31 Law J. Rep. Chanc. 777.



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in a real action, applied to all His Majesty's subjects, and not to any particular class. I think, therefore, that the reason of the rule does not apply in this case.

I only wish to add one word more. I wish to guard myself against being supposed to decide as to the effect of this rule upon other statutes which have been mentioned or its applicability to them. For instance, Jervis's Act contains certain provisions in favour of justices against whom actions might be brought maliciously, and gives them greater costs than there would be in other cases. Again, in the Dramatic Copyright Act, 3 & 4 Will. 4. c. 15, double and treble costs are given to the owners of dramatic copyright which is infringed. It may be said, I do not say whether it is true or not, that in these cases and in many others which might be mentioned there is a particular class, and the rule would apply to them. If that rule is a good rule, it must, like every other general rule of construction, yield where there is enough to shew that the intention was to overrule or repeal it. I see that in Maxwell's treatise *On the Interpretation of Statutes*, p. 157, it is said that it must be by express words. However, I wish to guard myself from being supposed to express an opinion one way or the other upon what would be the effect of Order LV. on such a class of enactments. I am confining what I am now saying to the three Acts I have mentioned, the statute of James and the two statutes of Victoria which I have particularly referred to.

Now as to section 67 of the Act of 1873. This General Order is made, "Subject to the provisions of the Act," and section 67 of the Judicature Act of 1873 is of course a provision of that Act. Now section 67 is curiously worded, it enacts that the provisions contained in the 5th, 7th, 8th, and 10th sections of the County Court Act, 1867, shall apply to "all actions commenced or pending in the said High Court of Justice, in which any relief is sought which can be given in a County Court." I have already said that the provisions of the 5th section of the County Court Act have been construed to extend only to cases in which relief

could not be given there, for instance, cases of slander. In this enactment of the Judicature Act when the Legislature was giving a greatly extended jurisdiction to County Courts, enabling them to deal with equitable suits, and a variety of other things which they had not previously dealt with, it was thought well to say, "These clauses shall extend not only to the 5th section," which we are now considering, "but also to the 7th, 8th, and 10th. They shall extend to all cases in which a County Court has jurisdiction." That is to say, in which relief could be given in a County Court; they shall extend both to an equity suit and a common law suit. That enactment, therefore, does not touch the cases in which a County Court cannot give relief, and still, notwithstanding all that has been done, a County Court cannot entertain an action of slander. Before this Order of 1875 was made, a party who brought an action of slander would have failed under the statute of James 1. to get more than his farthing, and would also have failed to get even a farthing, because the County Courts Act would have applied, and would have prevented his getting even that farthing, but he could not have failed on account of the 67th section of the Act of 1873, for it did not apply to an action of slander. For that reason it seems to me that inasmuch as an action for slander is not within the 67th section, it is not at all within the provisions to which the Order of 1875 was to be subject. It may seem a little subtle, but I believe that the reason will be found to be a correct exposition of why that Act does not apply.

I do not think it necessary to say more, but having felt inclined at first to entertain the opinion that the majority of the Court of Appeal was right, and only having changed my mind after looking into the cases, and for the reasons which I have stated, I need hardly say that I am very far indeed from expressing any opinion that the judgment of the majority of the Court of Appeal was clearly wrong; on the contrary, for some time I thought it was right, and I only, after some consideration, have come to the opinion that it is wrong, and ought to be reversed; but having come to that conclusion, I must

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agree in the motion which has been made by my noble and learned friend.

LORD GORDON concurred.

LORD HATHERLEY.—On the point of costs I ought to mention to your Lordships that I did not observe that the order of the 3rd of May, 1877, was upon an application with reference to the taxation of costs, and that that order reserves the costs of the litigation for the Court of Appeal. Therefore those costs ought to be dealt with in the same manner as the costs in the Court of Appeal, and consequently the Court of Appeal having ordered the appellant to pay to the present respondent the costs of that hearing, if he has had those costs paid to him he ought to repay them. Therefore, what I shall propose to your Lordships is to reverse the order of the 2nd of June, 1877, and to direct the respondent to pay to the appellant the following costs—the costs of the appeal in the Court below, including the costs (if any) paid by the appellant to the respondent under the order now reversed, and the costs of the appellant, reserved in the order of the 3rd of May, 1877, to be subject to the decision of the Court of Appeal.

*Order of the 2nd of June, 1877, reversed; respondent ordered to pay to the appellant the following costs:—*

1. *The costs of the appeal in the Court below, including the costs (if any) paid by the appellant to the respondent under the order now reversed.*
2. *The costs of the appellant reserved by the order of the 3rd of May, 1877, to be subject to the decision of the Court of Appeal.*
3. *The costs of the appeal to this House. The cause remitted to the Exchequer Division.*

Solicitors—Charles Butcher, for appellant; Stevens & Co., agents for Cutts, Jones & Middleton, Chesterfield, for respondent.

[IN THE QUEEN'S BENCH DIVISION.]

1877. }  
Nov. 2. } THE QUEEN v. WILSON.

*Extradition Act, 1870 (33 & 34 Vict. c. 52), ss. 2, 6—Limitation of Act by Treaty—Exemption of British Subject from Surrender—Writ of Habeas Corpus.*

[For the Report of the above case, see 48 Law J. Rep. M.C. 37.]

[IN THE QUEEN'S BENCH DIVISION.]

1878. {  
June 22. { THE SPON LANE COLLIERY COMPANY, LIMITED (appellants),  
v. BAKER (respondent).

*Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), ss. 46 and 51—Accumulation of Water in adjoining Colliery—Inability of Mine Owner to provide Remedy—Notice by Inspector—Jurisdiction.*

[For the Report of the above case, see 48 Law J. Rep. M.C. 25.]

[IN THE QUEEN'S BENCH DIVISION.]

1878. {  
March 5. { THE QUEEN on the prosecution  
Nov. 30. { of THE LICENSING JUSTICES OF  
THE COUNTY OF HEREFORD  
(respondents) v. SMITH (appellant).

*Licensing Acts—9 Geo. 4. c. 61. s. 1; 32 & 33 Vict. c. 27. ss. 8 and 19; 35 & 36 Vict. c. 94. s. 42—Renewal of Public-house License—General Discretion of Justices.*

[For the Report of the above case, see 48 Law J. Rep. M.C. 38.]

## [IN THE COURT OF APPEAL.]

1878. } GRIFFITHS & OTHERS v. BRAMLEY-  
Nov. 29. } MOORE & OTHERS.\*

*Marine Insurance—Insurance to cover Loss of Freight—Mode of calculating Underwriters' Liability.*

*The plaintiffs, shipowners, entered into a charter party by which they were to receive freight for their ship at a named rate. There was also a provision, that if any of the cargo was sea-damaged, the freight on such portion should be only two-thirds of the named rate. The plaintiffs insured with the defendants for a sum "to cover only one-third loss of freight in consequence of sea-damage as per charter party." Part of the cargo was sea-damaged, and the plaintiffs having only received two-thirds freight on that portion sued the defendants for the difference between the sum received and the full freight on that part of the cargo:—*

*Held, that the insurance was made to cover the difference between the full freight which might be earned, and the amount actually received; and therefore that the plaintiffs were entitled to recover the full amount claimed, and not merely such a portion of the loss as the sum for which the defendants subscribed the policy, bore to the whole value of the freight which might have been earned.*

Action on a policy of insurance.

The claim stated that the plaintiffs were ship owners, and let a ship to Bullock and Company by a charter party, which provided "that the charterer should pay freight on the true delivery of the cargo . . . at the rate of 3*l.* 7*s.* 6*d.* per ton." It also provided that "if any portion of the cargo be delivered sea-damaged, the freight on such sea-damaged portion to be two-thirds of the above rate, except only in case the vessel shall have been stranded."

On the 6th of March the plaintiffs insured the above freight with the defendants for 1,200*l.*

The material part of the policy was the following clause: "To cover only

one-third loss of freight in consequence of sea-damage as per charter party, unless the ship be stranded, sunk or burnt."

The cargo was loaded on board the ship, which duly arrived, and during the continuance of the risk a portion of the cargo was sea-damaged, so that the plaintiffs lost one-third of the freight on that portion. The ship was not stranded, sunk or burnt.

The total freight on the cargo was 3,871*l.* 16*s.* 3*d.*, and one third of that was 1,290*l.* 12*s.* 1*d.*, of which 1,200*l.* formed the subject of insurance under the policy. The one-third of the freight lost by the plaintiffs on the sea-damaged portion of the cargo amounted to 293*l.* 15*s.* 7*d.*, and the plaintiffs therefore claimed to recover from the defendants under the policy 273*l.* 13*s.* 8*d.* The statement of defence alleged, as far as is material, that assuming the total freight to have been 3,871*l.* 16*s.* 3*d.*, and the amount lost to have been 293*l.* 15*s.* 7*d.*, the plaintiffs were only entitled to recover that proportion of the loss which the amount insured bore to the whole freight, and no more, and they brought into Court the sum of 102*l.*, which sum they had tendered to the plaintiffs before action. Paragraph 5 of the defence also alleged in the alternative that it was represented to the defendants by the plaintiffs and agreed between the plaintiffs and defendants that the policy would and should cover the whole of the freight by the vessel against any loss of freight under the special clause in the charter party and that any claim in respect of such loss of freight would and should be calculated on such whole amount of freight and not on one-third of such whole amount. That the defendants had executed the policy in the belief that the subject matter of insurance was the whole amount of freight to be earned by the vessel, and that any loss covered by the policy would be made good in the proportion of 1,200*l.* to the whole freight; that the premium was agreed on on that understanding; that it was never intended that the policy should cover only that portion of the freight which might be lost on the sea-damaged portion of

\**Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

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the cargo, and that the plaintiffs were, contrary to their representation and to the real agreement between the parties, endeavouring to avail themselves of a mistake in the form of the policy. Issue.

At the trial before Denman, J., the jury found that no part of the above paragraph was proved, and the learned Judge thereupon directed judgment to be entered for the plaintiffs for the amount claimed.

The defendants appealed.

*Cohen and Mathew*, for the appellants. —Assuming the facts alleged in the statement of claim to be true, still the defendants are entitled to judgment. The policy shews that the subject matter of the insurance was the whole freight, and it is evident from the amount of the premium, one-half per cent., that the underwriters compared the amount of their subscription with the interest of the insured, and not with the amount of the possible loss—*Hendricks v. The Australian Insurance Company* (1). If the policy does not shew that the subject matter of insurance was the whole freight, then it is ambiguous and there is no contract unless reference be made to the correspondence between the parties in order to discover the real contract. There is either a latent or a patent ambiguity, if the former it can be cleared up by the correspondence, if the latter, there is no contract—*Raffles v. Wichelhaus* (2).

*Holl and Wilberforce*, for the plaintiffs, were not called on to argue.

BRAMWELL, L.J.—I think this is a very plain case. The plaintiffs had freight coming to them which might come to them at one or the other of two rates. If all the cargo arrived they would get a certain sum; if all was damaged there would be a deduction of one-third of the freight in respect of it, and if part only, they would suffer a deduction in respect of that part. They stood, therefore, to

lose one-third of the freight, more or less, or none. They desired to guard against that loss, and insured one-third of the freight, saying, as it were: "We assure 6s. 8d. out of every pound that comes to us as freight." The policy is "to cover only the one-third loss of freight as per charter party" and the charter party explains it. The argument for the appellants is that this is an insurance on the whole freight, and that although the utmost total loss can be only one-third of the freight, yet that a shipowner must insure the whole freight to get that one-third. So that he must insure the amount three times over, and, as a small premium only is required, he does not suffer. This seems to me to be a very round-about-way of doing business, and not a reasonable theory; it is surely better to insure one-third only, or 6s. 8d. out of every pound, as the plaintiffs did here. This appeal must fail.

BRETT, L.J.—The first point taken is that there is no description of the subject matter insured, because the description relied on is not in the usual place in the policy, and it is said that if it is not a description of the subject-matter insured, there is no description of any subject-matter insured and there is no policy. Is it a true proposition to say, that because such a sentence as this is not in the usual place in the policy it is not a description of the subject-matter? I cannot believe it. I did not obtain any answer to my question, whether if the clause were written lengthwise across the policy it would not be operative; but because it is written at the bottom, in a place which would hold it, it is urged that it is not. I am of opinion that it is a description, and the only description of the subject-matter of insurance. Then what is the subject-matter of insurance? It is not freight, other than charter party freight, because no other freight than charter party freight was at risk. It must be on charter party freight, or part of it. Moreover, it is shewn to be so by the very description of the subject-matter insured. Therefore the question is whether the subject-matter of the insurance is the whole charter party

(1) 43 Law J. Rep. C.P. 188; s. c. Law Rep. 9 C.P. 460.

(2) 2 Hurl. & C. 906; s. c. 33 Law J. Rep. Exch. 160.

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freight or only a part of it? It is said that the subject-matter of the insurance is not a loss; but the very words used are that the subject-matter of insurance is a loss; it is "to cover the one-third loss of freight in consequence of sea-damage as per charter party." That sends us to the charter party to see what was the subject-matter of insurance, and in the charter party we find that freight is to be payable on the true delivery of the cargo at so much per ton; but then there is a provision in the charter party that "If any portion of the cargo be delivered sea-damaged, the freight on such sea-damaged portion to be two-thirds of the above rate . . ." So that if any portion of the cargo is delivered sea-damaged, there is a loss under the charter party, and that loss is a loss of a portion of the freight on that portion of the cargo delivered sea-damaged, and that loss is one-third. Then turning from that clause in the charter party back to the policy to see what is the subject-matter of insurance, we find it is the loss, the one-third loss accrued on the charter party under and by virtue of the clause I have read. That is the subject-matter of insurance and there is no other. The subject-matter of the insurance is "the loss of freight in consequence of sea-damage mentioned in the charter party." Such being the subject-matter of the insurance, what is the true mode of construing the whole of the policy? Every part of the policy is to be applied which relates to the subject-matter of the insurance. It is said that some parts of the policy could not be applied to such a subject-matter of insurance, and this is used as an argument to shew that this is not the subject-matter of the insurance. The rule above enunciated answers the suggestion. Then it is asked what is the nature of the loss? This policy, and some others of a similar kind, are peculiar and exceptional, as it seems to me, in this, that although the subject-matter of insurance is accurately defined or described, it, or the quantity of it, is not ascertained until the loss has occurred. The subject-matter, though defined in the policy, is not completely ascertained

till the loss. The only peril is the peril by sea-damage; the only thing insured is one peculiar loss caused by such peril; it seems to me to follow that the only loss that could be recovered under this policy is a total loss. The subject-matter of insurance being a loss on the cargo which receives sea-damage there can be no loss in this case but a total loss, and if there is a total loss then the underwriter is liable to the full amount of his subscription. So he is liable for this loss as for a total loss, and the ordinary rule of calculating such a loss must be applied.

COTTON, L.J.—The question is whether there is a sufficient description of the subject-matter insured. I have no doubt as to the construction of the clause in the charter party; if the cargo arrives in good condition a certain sum, say 8,000*l.*, is payable as freight, but if any part arrives sea-damaged then there is to be a deduction, so as to make only two-thirds payable, so the difference of one-third in respect of sea-damaged cargo is the loss against which the insurance is effected. I find there is in this clause a reference to the subject-matter insured, that is to say, to the difference between the full freight and the freight payable if the cargo arrives sea-damaged. "To cover only the one-third loss of freight in consequence of sea-damage as per charter party." There can be no doubt what is the sea-damage as per charter party (1), and the difference is I think not inaptly described in the policy as "the one-third loss of freight in consequence of sea-damage."

*Judgment for the plaintiffs.*

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Solicitors—Fritchard & Sons, for plaintiffs;  
Waltons, Bubb & Walton, for defendants.

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(3) See *Joyce v. Kennard* (41 Law J. Rep. Q.B. 17; s. c. Law Rep. 7 Q.B. 78.)

[IN THE QUEEN'S BENCH DIVISION.]  
 1878. } SPENCER AND ANOTHER v.  
 Nov. 19. } SLATER AND OTHERS.

*Fraudulent Conveyance*—Stat. 13 Eliz.  
 c. 5—*Creditor and Debtor*—*Resulting Trust*.

*An insolvent trader executed a deed by which he conveyed all his property to trustees who were, inter alia, to carry on his business and realise his estate in such manner as they might deem expedient, and out of the proceeds thereof, after making certain payments, to apportion the residue equally among such of his creditors as executed or assented to the deed. It was further provided that if within a given time any creditor neglected or refused to assent to the deed, his dividends should be paid by the trustees to the debtor. It was admitted that the deed was executed for the purpose of defeating any execution that might prevent the equal distribution of the debtor's property among his creditors:—Held, that the deed was fraudulent and void under 13 Eliz. c. 5.*

This was an interpleader issue, directed to be tried in the form of a special case by order of a Judge.

#### CASE.

1. On the 23rd of July, 1877, a deed of arrangement was made between Thomas Keating, of the first part, the plaintiffs of the second part and the several creditors of the said Thomas Keating, who should execute the said deed, or otherwise signify their assent thereto, before the declaration of a dividend, of the third part.

2. The following is a copy of the said deed:—

"This deed, made the 23rd day of July, 1877, between Thomas Keating, of Oxford Road, in the city of Manchester, in the county of Lancaster, draper, hereinafter styled 'the said debtor,' of the first part, Reuben Spencer, a director of the firm of Rylands & Sons (Limited), Manchester, and William Nickson, of the firm of Samuel Fletcher, Son & Co., merchants, Manchester aforesaid, hereinafter styled the said trustees, of the second part, and the several creditors of

said debtor who may execute these presents or otherwise signify their assent hereto before the declaration of a dividend, of the third part, witnesseth that the said debtor hereby conveys and assigns all his real and personal estate and effects, debts due and owing, books, papers and writings, to the said trustees, their executors, administrators and assigns, upon the conditions and trusts, and for the purposes hereinafter declared:—

"1. To carry on the business of the said debtor, or to get in and realise his estate in such manner as the said trustees may deem expedient, and out of the proceeds of the estate to pay all fair and usual charges attending the liquidation thereof or incidental thereto, and all rents, taxes, salaries and preferable claims that would be payable in bankruptcy, and then to apportion the residue according to an equal pound-rate to all creditors, parties hereto, or of whose claims the said trustees shall have received notice, and have no sufficient grounds to dispute or shall dispute the same unsuccessfully.

"2. The execution of this deed or the assent hereto by any creditors shall operate as a full release to the said debtor in respect of the debt of such creditor so executing these presents or assenting hereto.

"3. The dividend so apportioned to every creditor as aforesaid shall be paid to him, her or them severally, provided he, she or they have executed these presents or assented hereto as aforesaid, and on the expiration of twelve calendar months from the date hereof, the said debtor may apply to the trustees to be paid the dividend or dividends of any creditor or creditors who have neglected or refused to assent hereto or execute this deed, and thereupon the said trustees shall give such creditor or creditors written notice by post of such application made by the said debtor, and if such creditor or creditors shall, for seven days thereafter, still neglect or refuse to execute these presents or assent hereto, such dividend or dividends shall be then forthwith paid to the said debtor by the said trustees.

"4. The said trustees may require full

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particulars relating to the debt of any creditor, and also that such debt be verified on oath or by statutory declaration before admitting such debt or paying dividend thereon.

"5. All matters not herein specially provided for shall be dealt with upon the principles applicable under the present English bankruptcy law.

"6. And the said debtor doth hereby appoint, make, ordain and constitute the said trustees, their executors and administrators, to be the true and lawful attorney or attorneys of him the said debtor to collect and get in, and by legal proceedings or otherwise, to recover and receive all and every the real and personal estate (and all book debts or other debts due to the said debtor) hereby assigned, and for such purposes, at his or their discretion to use the name of the said debtor or their own name as to the said trustees may appear most expedient.

"7. And lastly, the several parties hereto of the third part do hereby severally, in proportion to their respective claims, covenant, promise and agree with the said trustees to hold them harmless and indemnified from all personal risk, loss or damage they may sustain by reason of their proceedings under the trust hereof, excepting such loss or damage as may result from their own wilful negligence or default, and to hold them harmless and indemnified against any claim or claims by any person or persons, of which he may not have received notice before making a dividend, and from and against any claim by any future trustee or trustees of the estate and effects of said debtor, and from and against any order of any Court made in respect of the said debtor or his estate, or of this deed, and the trusts thereof or any of them, and from and against all costs, damages and expenses thereof, consequent thereon or incidental thereto."

3. On the 3rd day of August, 1877, the defendants obtained a judgment against the said Thomas Keating for 49l., and on the same 3rd day of August, 1877, a writ of *fiery facias* was delivered to the sheriff of Lancashire, indorsed to levy the amount of the said judgment without any costs.

4. On the 14th day of August, 1877, the sheriff of Lancashire seized the said goods, the subject of this action, under the said writ of *fiery facias*.

5. The said Thomas Keating was a trader within the meaning of the said Bankruptcy Act, 1869, when he executed the said deed, and was then indebted to several creditors respectively, whose debts respectively amounted to 50l. and upwards. The said Thomas Keating was in insolvent circumstances when he executed the said deed. He executed the said deed for the purpose of defeating any execution, including an execution at the suit of the defendants, which was then apprehended by the said Thomas Keating, and which execution might prevent the equal distribution of the debtor's property among all his creditors, and also for the purposes stated in the said deed.

The question for the opinion of the Court was whether the said goods seized by the sheriff, or any of them, were, at the time of the said seizure, the property of the plaintiffs as against the defendants.

If the Court shall be of the affirmative opinion judgment to be entered for the plaintiffs, with costs.

If the Court shall be of the negative opinion judgment to be entered for the defendants, with costs.

*Charles Orompton*, for the plaintiffs.—The object of the deed was to benefit the creditors, and there is nothing fraudulent about it so as to bring it within 13 Eliz. c. 5. [He was stopped by the Court.]

*B. T. Reid*, for the defendants.—The deed is void under the statute of Elizabeth if it interferes with the proper and fair distribution of the debtor's goods among his creditors—*Freeman v. Pope* (1). The intention of the debtor obviously was to evade the bankruptcy laws, and no creditor is allowed to come in without incurring the responsibility of indemnifying the trustees. The fact that the giving of the deed is an act of bankruptcy on the part of the debtor is immaterial, for those creditors whose debts

(1) 39 Law J. Rep. Chanc. 689; s. c. Law Rep. 5 Ch. App. 538.

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are under 50*l.* cannot take bankruptcy proceedings, and are therefore left altogether without remedy, unless they elect to come in under the deed, and undertake to incur any responsibility which may attach to them for so doing. There is, moreover, a resulting trust for the benefit of the debtor, in the case of creditors who refuse to come in, and this of itself is sufficient to render the deed invalid under the provisions of the statute. He referred to *Ex parte Saffery* (2) and *Ex parte Jones* (3).

*Crompton*, in reply.—No question arises here under the bankruptcy laws, and there is nothing at common law to prevent a debtor preferring one creditor to another. This deed is for the benefit of those creditors who are willing to come under it, and no unfair advantage is given to the debtor. Those creditors who refuse their assent are entitled to get a judgment against the debtor, and attach, by means of a garnishee order, any money in the hands of the trustees. He referred to *Siggers v. Evans* (4).

MELLOR, J.—The question here is whether these goods are the property of the defendants as against the plaintiffs. The defendants, it appears, had obtained judgment for a sum under 50*l.*, and on the 3rd of August, 1877, the sheriff issued an execution for that amount. *Prima facie*, therefore, the defendants were entitled to the possession of the goods under that execution, but when they try to enforce their claim they are met by the deed which is the subject of this case. The deed in question was, in my opinion, invalid by reason of the provisions of 13 Eliz. c. 5. Its object was to prevent the creditors from exercising their ordinary remedies in respect of the sums due to them, and to compel them to accept the terms chosen by the debtor. Accordingly, the debtor conveys all his property to trustees whom he chooses himself, his business is to be carried on by them, and

they are to distribute his assets in a prescribed mode, such as would not be allowed under any other circumstances. Moreover, the creditors are required to enter into conditions as regards the payment of their debts according to the provisions of the deed, and if they refuse to do so there is a resulting trust in favour of the debtor in respect of the dividends that would otherwise have been due to them. It seems to me clear that the effect of the deed is to defeat and delay all creditors whose debts are under 50*l.* Creditors for sums above that amount might treat this deed as an act of bankruptcy; but the class of creditors whose claims against the debtor are under 50*l.* are absolutely deprived of all remedy by the effect of the provisions of the deed. It was admitted that the deed was executed for the purpose of defeating any execution which might prevent the equal distribution of the debtor's property, and also to promote the purposes stated in the deed. Considering what these purposes are, and having regard to the provisions of the statute, I think this deed is invalid and cannot be sustained against the execution creditors.

MANISTY, J.—I am entirely of the same opinion. The question is whether or not these goods were, at the time of the seizure, the property of the plaintiffs as against the defendants. That depends on whether or not the deed was void under the provisions of 13 Eliz. c. 5. The defendants allege that these goods belonged to Keating, and that they were *prima facie* entitled to seize them; the plaintiffs, on the other hand, contend that the goods seized are protected by a deed given prior to the execution. In answer to that the defendants say that the deed so given was void under the statute of Elizabeth; so that the real question which we are now called upon to determine is whether the object of this deed was to defeat or delay Keating's creditors. When the deed was executed Keating was insolvent, and it is found in the Special Case that the deed was given for the purpose of defeating any execution, including that of the defendants, which might prevent the equal distribution of the debtor's property amongst

(2) 46 Law J. Rep. Bankr. 34, 89; s. c. Law Rep. 4 Ch. D. 455; 5 Ch. D. 365.

(3) 44 Law J. Rep. Bankr. 124; s. c. Law Rep. 10 Chanc. 663.

(4) 5 E. & B. 367; s. c. 24 Law J. Rep. Q.B. 306.



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all his creditors, and also for the purposes stated in the deed. Now what are the purposes stated in the deed? By one of its provisions authority is given to the trustees to carry on the business of the debtor, and that, too, under an indemnity from the creditors. It seems to me that this is a strong point in considering the object the debtor had in executing the deed. The debtor puts it in the power of the trustees to do as they like with regard to the business, and no creditor can obtain the benefit of the deed without assenting to that course. That appears to me to be not only delaying creditors, but putting them under responsibilities of a very grave kind. Again, the deed provides "that, if any creditor will not come in, the trustees may, at the expiration of a certain time, pay over any dividends which would have been paid to such creditor to the account of the debtor. This is clearly a resulting trust in favour of the debtor. Mr. Crompton contends that there is no substantial hardship in that, as a creditor might obtain a garnishee order, and attach the money in the hands of the trustees. That, however, is a very doubtful remedy, if not a wholly illusory one; for how could a creditor know when there was any money in the hands of the trustees to attach? I therefore come to the conclusion that the deed is void as containing a resulting trust in favour of the debtor and tending to delay creditors.

*Judgment for the defendants.*

Solicitors—Field, Roscoe & Co., agents for Atkinson, Saunders & Co., Manchester, for plaintiffs; Charles Butcher, for defendants.

[IN THE COURT OF APPEAL.]

1878. } HUNT v. THE WIMBLEDON LOCAL  
Nov. 1. } BOARD.\*

*Contract—Corporation by Statute for public Purposes—Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 85—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 174—Corporate Seal necessary.*

*By section 85 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), every contract by a local board of health whereof the value exceeds 10l., and by section 174 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), every contract by an urban sanitary authority, whereof the value exceeds 50l., shall be in writing, and sealed with the seal of such board, or authority, as the case may be.*

*The defendants, who were a local board within section 85 of the Act of 1848, and an urban sanitary authority within the meaning of section 174 of the Act of 1875 were found by a jury to have authorised their surveyor to employ the plaintiff, an architect, to prepare certain plans for offices they intended to erect, but which they did not erect, and to have ratified the act of their surveyor in procuring them; and such offices were found also by the jury to be necessary for the purposes of the defendants, and the plans necessary for the erection of the offices. The plans were ordered when the Public Health Act, 1848, was in force, but not finished till after the Act of 1875 had come into force. There was no contract under seal with the plaintiff, and no ratification of any contract under seal with him, and the value of the work done exceeded 50l. :—*

*Held, affirming the judgment of LINDLEY, J., that the enactments requiring a seal were mandatory and not merely directory, and that the defendants were not liable to pay for the plans.*

*Quære, whether they would have been so liable, upon an executed consideration, if they had made full use of the plans by having offices built in accordance with them.*

*This was an appeal from a judgment of Lindley, J., on further consideration, reported 47 Law J. Rep. C.P. 540.*

\* *Coram Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.*

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The action was brought by the plaintiff, an architect, to recover a sum exceeding 50*l.*, for work done and materials provided in making, by order of the defendant's surveyor, certain plans for offices contemplated by the defendants, but never erected.

The defence was that there was no contract under seal between the plaintiff and the defendants, and that, therefore, the plaintiff could not recover by reason of 11 & 12 Vict. c. 63. s. 85, and 38 & 39 Vict. c. 55. s. 174.

The facts of the case and the sections of the Acts relied on are fully stated and set out in the report of the case in the Court below.

Lindley J., after taking time to consider his judgment, gave judgment for the defendants.

On appeal,

*Patchett* and *Edward Clarke*, for the plaintiff.

*Marriott* and *Paterson*, for the defendants.

In addition to the authorities cited in the Court below, the counsel for the plaintiff referred to *Wilson v. The West Hartlepool Harbour and Railway Company* (1), and *Ungley v. Ungley* (2).

BRAMWELL, L.J.—I am of opinion that the judgment of Lindley, J., was right, and ought to be affirmed. First, I think that section 174 is applicable to cases other than those alluded to in it, and that it is not limited to them. The section is general, and refers to every class of contract, and there is no reason for limiting it. In the next place, I think the section is not merely directory but obligatory. It is not prohibitory so as to constitute the making of a contract, otherwise than in writing and under seal, an offence, but it is a mandatory direction that contracts shall be made in a particular way, that is to say, in writing and under seal. The enactment relates to a contract which is the act of both

parties, and is applicable not to one of them alone, but to both of them. I do not mean to say that the section makes anything in particular necessary on the part of the contractee, but it requires that the evidence of the obligation of the two parties must be in writing and sealed with their seals. In this particular case the section is of importance as drawing a line between cases where the contract shall or shall not be under seal. If it rested at the common law there might be a discretionary power as to what contracts should be entered into by parol and what contracts should be made under seal, such as contracts of small amount or acts of daily necessity, and some others which are said to be within the exception to the general rule that a corporation must contract under their corporate seal. If it were not for section 174 it might be contended that contracts to the amount of 5*l.* or 20*l.*, or even 100*l.*, came within the rule. The legislature, however, have drawn the line and said that all contracts over 50*l.* must be entered into under seal, and contracts for a less amount may be made by parol. That being my opinion as to the effect of the statute, I think it clear that this is a contract, which if after the order had been given it had been countermanded by the defendants, and the defendants had said to the plaintiff, "Do not go on with it, we shall not employ you," no action could have been maintained. Then it is said that this is not an executory contract, but it is an executed contract, of which the defendants have got the benefit, and for which they must pay. I will deal with that question presently. First, reliance is placed on the doctrine in equity as to contracts relating to land. It is said that a part performance by entering into possession of the land in a verbal contract for its purchase is sufficient to take it out of the Statute of Frauds. I think that that doctrine has no analogy to the present case, and the ground on which that law rests has been clearly stated by the Master of the Rolls in *Ungley v. Ungley* (2). He says: "The law is well established that if an intended purchaser is let into possession in pursuance of a parol contract, that is

(1) 2 De Gex, J. & S. 475; s. c. 34 Law J. Rep. Chanc. 241.

(2) 46 Law J. Rep. Chanc. 189, on appeal, 854; s. c. Law Rep. 5 Ch. D. 387.

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sufficient to prevent the Statute of Frauds being set up as a bar to the proof of the parol contract. The reason is that possession by a stranger is evidence that there was some contract, and is such cogent evidence as to compel the Court to admit evidence of the terms of the contract, in order that justice may be done between the parties." That reason is not applicable to a case like the present. But it is said the plaintiff is entitled to recover at common law, because the defendants have had what is called the benefit of the contract; the plaintiff has done the work and the defendants have had the enjoyment of what he has done. That rule, I believe, exists to some extent, though I am not sure that it would be found to exist where the price of the executed contract was of a large amount, if, for instance, a railway were built for a company at the cost of some hundred thousand pounds. I should not like to say it is decided by the authorities that in such a case the contractor, who had made the railway could recover the price, the incorporated company who employed him having given him only a verbal order. However, this doctrine exists to some extent or to some amount: that where a man has done work for a corporation under a contract not under seal, and the corporation have had the benefit of it, the person who has done the work may recover. But whether that is limited to contracts for small amounts or not, I repeat, I will not say. It is, however, certainly limited to cases where the benefit has been actually enjoyed, and, as far as I know, to cases in which it could be said that the work is such as was necessary; that it was work which if the corporation had not ordered, they would not have done their duty; or if they had not given the order for its execution, they would not have been able to carry out the purposes for which they were called into existence. That seems to have been the state of things in those cases which have decided that the plaintiff may recover when the work has been done. I think, however, that that rule of law does not apply to the present case for two reasons. The defendants have not had the benefit of the work in that sense,

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No doubt the order for the work was given. After the finding of the jury, it must be taken that the surveyor was authorized by the board to employ the plaintiff to prepare the plans, and that his act was ratified by the defendants, and that the work was done pursuant to an order (or something equivalent to an order) which was given, and as far as that work went it was accepted in that sense by the defendants, who acted upon it, and issued advertisements in respect of it, and received tenders in relation to it. But that is all. Any further benefit that the defendants would have derived from those plans, if the tenders had been accepted, would have been that their buildings should have been erected in accordance with those plans. What the defendants have done is this: they have to a certain extent taken to these plans and tried to use them—tried to apply them to the purpose for which they were wanted—but they found that the proposed plans were too expensive, and could not be used. I doubt, therefore, whether the defendants have had the benefit of the plans in the sense in which it is plain the defendants had the benefit of the coals in *Nicholson v. The Bradfield Union* (3), or of the water-closets in *Clarke v. The Cuckfield Union* (4). In both those cases it would have been contrary to the duty of the defendants if they had not given orders for the things supplied. In the present case the defendants might have continued transacting their business—possibly not so comfortably or so advantageously—without new offices; they might have waited for them.

I will now call attention to the cases. In *Nicholson v. The Bradfield Union* (3), Blackburn, J., entertained great doubt, but followed the decision in *Clarke v. The Cuckfield Union* (4). The amount, it must be recollected, which it was sought to recover against the defendants was small, only 26l. 10s. I doubt, therefore, whether that case would not come within the rule that orders for things of small amount may be given by corporations if they are used for matters of urgency or necessity

(3) 35 Law J. Rep. Q.B. 176; a. c. Law Rep. 1 Q.B. 620.

(4) 21 Law J. Rep. Q.B. 349.

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without the contract being under seal. The action was for coals sold and delivered, to which the defendants set up as their defence that the contract with the defendants, a corporation, was not under seal. Blackburn, J., in delivering judgment, speaks with hesitation, and says: "The case of *Olarks v. The Cuckfield Union* (4), is in its facts undistinguishable from the present case. We are aware that very high authorities have questioned the soundness of that decision, and, as pointed out in the judgment of that case, there are prior decisions in the Court of Exchequer which it is difficult to reconcile with it. We think, however, that as far as it extends to such a case as the present, at least, the case was rightly decided; there may be cases in which the circumstances may be different from those in *Olarks v. The Cuckfield Union* (4) and the present case, and which would still be governed by the principles laid down in the decisions in the Exchequer; those we leave to be decided when they arise; but so far as those prior decisions are inconsistent with the decision in *Olarks v. The Cuckfield Union* (4), we prefer to follow the authority of *Olarks v. The Cuckfield Union* (4), which we think is founded on justice and convenience." Again, in *Olarks v. The Cuckfield Union* (4), I may point out that the contract was executed and the amount sued for small—it was only 14*l.* 16*s.* I would make a remark on the case of *Haigh v. The North Brierley Union* (5). I think that Erle, J., does not rest his decision on the ground merely that the work has been done, but he considered that the retainer of the plaintiff to investigate the accounts of the union and to do the work would have been a binding engagement. In *Nicholson v. The Bradfield Union* (3), Blackburn, J., said, "that justice and convenience" require that where the contract was executed a defendant corporation should be held liable to pay for it. I am by no means clear that in such a case as this the defendants should be ordered to pay. I am by no means sure that persons who are exercising their authority daily should not exer-

cise that authority in a proper manner; and I think it desirable that persons who make contracts with those who have an authority delegated to them should not act in a slovenly manner; and if they do not care to enquire what authority such persons possess they must take the consequences. I cannot but think that in the present case if there had been a little more solemnity in making the contract—if the contract had been reduced to writing, for instance—it is not improbable that the plaintiff's attention might have been called more particularly to the plans required, and he might have been told that if he prepared plans for the erection of expensive offices, they would not be such plans as the defendants required, as they could only lay out a certain sum of money on the buildings. Sections 173 and 174 of the Public Health Act, 1875, were passed for the protection of ratepayers. I think they were good enactments, and we ought not to allow them to be frittered away.

BRETT, L.J.—I am of opinion that even if section 173 of this statute had not been enacted, the plaintiff could not recover, on the ground that the defendants were a corporation, and that this contract was not under seal.

The general rule is, that where the defendants are a corporation and the contract made with them is not under seal, the defendants are not liable. I think this case is within the general rule, and would not be within any of the recognised exceptions. It certainly is not within the exception which has been mentioned—if it can be called an exception—or within that doctrine of the Court of Chancery which is applicable to the Statute of Frauds. That doctrine of equity with regard to the Statute of Frauds is equally applicable whether the defendant be a corporation, or whether the defendant be only an individual, and is founded upon the view that the Statute of Frauds only deals with a matter of evidence upon a suit or trial. In the case of the Statute of Frauds the original contract is perfectly valid, and the only effect of the statute is that in a contested suit no evidence can be given of that contract unless certain formalities have been ob-

(5) E., B. & E. 873 s. c. 28 Law J. Rep. Q.B. 62.

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served. The Court of Chancery has held that in certain circumstances they will allow evidence to be given of the contract although the formalities of the statute have not been fulfilled. But that decision cannot have any reference or any application to a case where the contract originally, by a rule of law, is invalid. I think, also, that this case is not within any of the common law exceptions which have been suggested.

I think there is a common law exception, that although there be a corporation, with regard to which contracts in general must be under seal, yet if that corporation be of such a nature that daily, or periodically, or at frequent intervals, small transactions must take place, where it would be obviously of the highest inconvenience, or perhaps impossible, that each of such small contracts should be under seal, the common law Courts have declared that they need not be so.

Upon this contract the plaintiff never could have had any claim until his plans were complete, and the making of plans is not a frequent occurrence, nor a necessary part of the defendants' business. For the performance of a small contract, therefore, this case is in no respect within the recognised exception. Another exception is suggested. It is said that there is a rule that where orders are given by or on behalf of a corporation, and those orders result in an apparent contract, though not under seal, and the party with whom that apparent contract is made has fulfilled the whole of his part of the contract, and the corporation on whose behalf such apparent contract has been made accept and enjoy the whole benefit of the performance of the contract, that then the corporation is liable, although the contract is not under seal.

I doubt very much whether there is any such rule, either in law or equity. But it is unnecessary to consider this point, because here, assuming the order to have been given on behalf of certain persons, who may be called *cestuis que trust*, this is not a case within the rule. It is not like the case of a corporation where directors may give an order and make an apparent contract, and those on whose behalf they give the order may either

reject or accept it; as, for instance, if the directors of a railway company verbally order a railway to be constructed by a certain contractor, the whole corporation (namely, the shareholders, on whose behalf the directors had given the order) may, if they should please, reject the order, but if the railway is constructed, they may accept it by obtaining the benefit of what the contractor has done and receiving dividends in respect of the use of the railway. Where there is a body of shareholders capable of accepting the benefit of the contract, such a doctrine as is suggested may be applicable. But here the board is the corporation, who are acting for the inhabitants, who can neither accept nor reject what the board has done. The inhabitants cannot make use of what the board orders in the same way or in the same manner as the shareholders of a railway make use of a railway. Suppose the case of drains being made; no doubt the inhabitants use them, but they do so without the option of rejecting them. It seems to me, therefore, that in the case of such a corporation as this the doctrine suggested would not be applicable at all. But even if the local board were such a corporation that the parties on behalf of whom the order was given need not take the benefit of the work done, I think that in this case neither the board nor the inhabitants have derived any benefit. The work done by the plaintiff is drawing plans in order that certain buildings may be built. He drew the plans and fulfilled the whole of what he undertook. But then the only real benefit of such work as the drawing of plans is that buildings should be built according to them. Now, I think it is clear that the board accepted the plans, and they made some use of them—that is, they used them so far that they allowed them to be inspected, that tenders might be made upon them. But that is not a beneficial user. It is no benefit to a person to give out plans to be tendered for if no tenders are made upon them, or nothing is done upon such tenders as are made. Therefore I think that though the plans were accepted and partially used, no one obtained any real benefit from them. Therefore, even if the doctrine suggested had

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a real existence, and if the board, and the board alone, were the persons to be benefited, which I think is not the case, even then the board has not had such a benefit from this work as would bring this case within the suggested exception to the general rule. Therefore, even independently of the statute, I am of opinion that the plaintiff cannot recover. But I am further of opinion that the statute in this case is conclusive; and it seems to me that the statute is clearly more than directory. It is what has been called mandatory. It prevents certain contracts from being valid in any way, and the real meaning of the section seems to be this. The Legislature, knowing of the exception which existed at the time the statute was passed with regard to small contracts of frequent occurrence, which are necessary for the carrying on of the business of the corporation, intended to get rid of any discussion as to what were small matters, and to say that contracts which the board would not otherwise be authorised to make might be made for amounts less than 50*l.*—that is to say, that if they were necessary and under 50*l.*, they should be brought within the recognised exception as to small matters; and that if they were over 50*l.*, the mere fact of their being over 50*l.* would prevent their coming within the exception at all.

With regard to the cases that have been cited, I concur with Bramwell, L.J. The case of *Haigh v. The North Brierley Union* (5) appeared to be most like the present, but it is not necessary to say whether we should have thought that the facts of that case came within the exception. But I cannot help thinking on looking at the judgment of Crompton, J., that he acceded to the judgment in that case, whether rightly or wrongly, upon the assumption that the contract related to an act of frequent occurrence and for a small amount, and therefore within a recognised exception. It signifies not whether we should agree that the facts brought it within the exception; the judgment did not assume to state any new law, but only to bring the facts of the case within the recognised rule.

I am of opinion that the judgment of Lindley, J., should be affirmed.

COTTON, L.J.—I also am of opinion that the judgment of Lindley, J., was right. First, I shall deal with the question as if there had been nothing special in the Act of Parliament as to the contract entered into by the local board in this case. The common law being that a corporation cannot bind itself by contract except under seal, there are certain exceptions to that rule. There is one exception, that for the purpose of carrying out the ordinary business for which the corporation has been formed, it has power to bind itself without a contract under seal. But that is only in small matters necessary for the ordinary business of the corporation. There are, however, reasons why that cannot apply to this case, so as to bring the matter within such an exception. But it is urged that there is another exception, namely, that corporations are liable when goods have been supplied or work done in pursuance of a contract entered into not under seal, and the corporation have had the full benefit of such contract. I entertain very grave doubts whether such a corporation as this could be bound on any such ground, because the parties who have a beneficial enjoyment of anything supplied on the order of this body are not the corporation, but those for whom the corporation act as trustees. I cannot see that the principle can apply to a corporation constituted as this is, existing not for its own benefit, or for doing that from which it can derive any benefit, but as trustees for a certain portion of the public. But even if such a corporation can be so bound, in my opinion there has not been such a beneficial user of these plans as to bring the case under that exception. No doubt there has been a certain user, but a user which produces no benefit to the corporation, or to the inhabitants of the district, for in consequence of the plans not being suitable the matter went no further than the using of the plans for the purpose of obtaining tenders; and when the tenders came in, it was found that the plans could not be carried into execution, and therefore the plans were not used for what, in my opinion, is the most important part of the purpose for which they were made,

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namely, for the purpose of the erection of offices for the use of this corporation.

Then what is the effect of the statute? It was argued that such a contract as this did not come within section 174, because that section only applied to contracts necessary to carry this Act into execution, and that obtaining these plans and building new offices did not come within that description; but unless this is a work necessary for carrying the Act into execution, I do not see how it is possible that the corporation had power to enter into any contract with reference to the matter. Certainly, if they had offices, it must be for the purpose of carrying the Act into execution, and any contract relating to those offices is a contract for the purpose of carrying the Act into execution. Therefore section 174, in my opinion, applies to this contract, and whatever may be the case as regards sub-section 8 of that section, in my opinion, sub-section 1, which relates to the manner in which the contract between the two is to be made, is mandatory and prevents any contract for an amount exceeding 50*l.* from being entered into under the Act except under seal.

The Act gives power to the corporation to provide funds for the purpose of carrying into execution the provisions of the Act, that is to say, to levy rates. And in my opinion the meaning of the Act is, that as regards contracts where the amount exceeds 50*l.*, the board shall not charge the rates which they have power to levy except by a contract under seal. Therefore I am of opinion, subject, however, to what I am about to say, as regards the equitable doctrine, that there can be no judgment in this case for the plaintiff. But it was said that the case came within the equitable doctrine of part performance. For the purpose of considering this question, I will deal with the cases of *Ungley v. Ungley* (2) and *Wilson v. The West Hartlepool Railway Company* (1), which were principally relied on. We must bear in mind that this is a contract which in former days the Court of Chancery would not have enforced. *Ungley v. Ungley* (2) was an instance of part performance taking the case out of the Statute of Frauds. There had been

a contract entered into by a father at his daughter's marriage in relation to a house; and as there was no agreement in writing, the Statute of Frauds would have prevented any action being maintained to enforce the contract. But possession had been given to the parties who there sought to recover, and therefore the Court of Equity said there was such part performance as enabled it to act on parol evidence of the contract. Courts of Equity, in my opinion, acted on this principle:—The Statute of Frauds says that in certain cases no action shall be maintained unless there is evidence in writing to shew what the contract was. But if a Court of Equity finds an overt act, such as the possession of land, then the presumption of a contract is raised, and the Court will, in consequence of that overt Act, allow parol evidence to be given for the purpose of ascertaining what the actual contract was. These are the cases in which the Courts of Equity have given an effect to contracts valid at common law, which could be enforced but for the Statute of Frauds. That is the ground on which these cases rest, and that it is not on the ground of fraud is shewn by this, that the payment of the price to a vendor will not take the case out of the statute. But surely it is as great an injustice for the man to receive the price and then say, "You cannot enforce the contract," as to repudiate the contract where possession has been given. When there is an overt act, a Court of Equity will receive parol evidence of the contract; but that is in cases of specific performance of contracts relating to land which are valid at common law.

The other case which was referred to was the case of *Wilson v. The West Hartlepool Railway* (1). There Turner, L.J., gave judgment, and Knight Bruce, L.J., did not concur. I need scarcely say that the opinion of Turner, L.J., is one which I should hesitate to dissent from. But he to a great extent is in that case dealing with the difficulty of the Statute of Frauds. The powers of the defendants in that case were unlike those of the present defendants. They were a railway company governed by the provisions of the Companies Clauses Consolidation

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Act. That statute provides that contracts which if made by private individuals must be in writing will bind the company if signed by two directors; the statute says not that they must be so made, but that they may be, and Turner, L.J., is applying the principle of part performance of parol contracts relating to land made by individuals to the case where the defendant was a railway company capable of being bound by the written contract of its directors as an individual is capable of being bound by his own contract in writing.

There are other parts of the judgment of Turner, L.J., to which the explanation does not apply. He is there referring to an equity enforced by Courts of Equity independently of contract. It is this: if an individual who has to his knowledge title to land sees another (who is ignorant of such title and believes that he has a good title) expending money on the land, and yet gives no notice of his own title, a Court of Equity will not afterwards allow him to assert his title to the prejudice of the person whom he has allowed to act in ignorance of that title. This is an entirely different equity inapplicable to the present case.

*Judgment affirmed.*

Solicitors—W. J. Foster, for plaintiff; W. H. Whitfield, for defendants.

[IN THE EXCHEQUER DIVISION.]

1878. }  
Dec. 2, 3. } *In re TERRAZ.*

*Extradition—Warrant of Apprehension—Description of Offence—“Crimes against Bankruptcy Law”*—*Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 8, s. 26 and schedule 1—Extradition Act, 1873 (36 & 37 Vict. c. 60), s. 8, and Schedule—Habeas Corpus.*

*Upon a rule for a Habeas Corpus to discharge a prisoner arrested under the Extradition Acts, 1870 and 1873, on the ground that the warrant whereon he was arrested did not sufficiently describe the*

*offence, it appeared that the warrant (which was a warrant issued by a metropolitan police magistrate without the order of a Secretary of State) described the offence as “the commission of crimes against bankruptcy law”:*—Held, *that the warrant sufficiently described the offence.*

A rule had been obtained on behalf of Alexandre Terraz, who had been arrested upon a warrant under the Extradition Acts, 1870 and 1873, and was a prisoner in the Middlesex House of Detention, calling upon the Solicitor to the Treasury and the keeper of the prison to shew cause why a writ of habeas corpus should not issue to discharge the prisoner on the ground that the warrant did not sufficiently set forth the nature of the offence (1).

Cause was now shewn on behalf of the Solicitor to the Treasury and the keeper of the prison and also on behalf of the Swiss Government, upon whose application the arrest had been made, and who had been served with notice of the rule.

The material facts were the following:—The warrant upon which the prisoner was arrested was a warrant issued on the 12th of November, 1878, by a metropolitan police magistrate upon application made to him on behalf of the Swiss Government, without an order from a Secretary of State. Immaterial words omitted, the warrant was as follows:—“Whereas it has been shewn to the undersigned that Alexandre Terraz, late of Locle, is accused of the commission of crimes against bankruptcy law within the jurisdiction of the Swiss Confederation, this is to command you to apprehend the said Alexandre Terraz and to bring him before some magistrate sitting at this Court to be dealt with according to law” (2).

(1) The rule contained also the words, “and otherwise was not good;” but no other objection was argued.

(2) The material enactments and treaty-provisions appear to be in substance as follows; but the Acts are such that this summary is given somewhat doubtfully:—The Extradition Act, 1870 (33 & 34 Vict. c. 52) by ss. 2-5 and others, empowers the Crown where an arrangement has been made with any foreign state with respect to the surrender to such state of



*In re Terras, Exca.*

A second warrant was issued on the 29th of November, 1878, after the granting of the rule, describing more precisely

any fugitive criminals, to direct, by order in Council, that the Act shall, subject to the limitations (if any) contained in the order, apply in the case of such foreign state.

Section 8 enacts: "A warrant for the apprehension of a fugitive criminal, whether accused or convicted of crime, who is in or suspected of being in the United Kingdom, may be issued—1. by a police magistrate on the receipt of" an "order of a Secretary of State," under section 7, "and on such evidence as would in his opinion justify the issue of the warrant if the crime had been committed or the criminal convicted in England; and 2, by a police magistrate or any justice of the peace in any part of the United Kingdom on such information or complaint and such evidence or after such proceedings as would in the opinion of the person issuing the warrant justify the issue of a warrant if the crime had been committed or the criminal convicted in that part of the United Kingdom in which he exercises jurisdiction." The same section requires that a person issuing a warrant without an order from a Secretary of State shall forthwith send a report to a Secretary of State, who may cancel the warrant; and that a person apprehended on such a warrant shall be brought before a police magistrate.

Section 9 enacts: "When a fugitive criminal is brought before the police magistrate, the police magistrate shall hear the case in the same manner, and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England; the police magistrate shall receive any evidence which may be tendered to shew that the crime of which the prisoner is accused or alleged to have been convicted is an offence of a political character or is not an extradition crime."

Section 10 requires the police magistrate not to commit the fugitive criminal to prison to await his surrender unless "such evidence is produced as (subject to the provisions of the Act) would, according to the law of England, justify the commitment for trial of the prisoner if the crime of which he is accused had been committed in England" or in the case of a fugitive criminal alleged to have been convicted "would prove that the prisoner was convicted of such crime."

Section 11 requires the police magistrate, if he commits a fugitive criminal to prison, to inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of habeas corpus.

Section 26 enacts: "In this Act unless the context otherwise requires . . . the term 'fugitive criminal' means any person accused or convicted of an extradition crime committed within the jurisdiction of any foreign state . . ." and [by a previous part of the same section] "the term 'extradition crime' means a crime which if committed in England or within English juris-

the accusation against the prisoner—namely, reciting that he was "accused of the commission of crimes by a bankrupt against bankruptcy law, that is to say for that he having been adjudicated a bankrupt unlawfully did not deliver up to the trustee administering his estate for the benefit of his creditors or as he directed all such part of his real and personal property as was in his custody or under his control, and which he was required by law to deliver up, within the jurisdiction of the Swiss Confederation." But the decision of the case turned upon the first warrant; the Court being agreed that the first warrant was a good and sufficient warrant, and differing upon the question whether, at least in the circumstances of the case as they stood, the second warrant could properly be referred to; and it is unnecessary to make further mention of the second warrant.

*The Attorney-General (Sir John Holker) and O. S. O. Bowen, for the Treasury and the keeper of the prison; and H. D. Green, for the Swiss Government (on December 2).*—The warrant on which the prisoner

diction would be one of the crimes described in the first schedule to this Act."

The first schedule, after mentioning "murder and attempt and conspiracy to murder," "manslaughter," "counterfeiting and uttering money and uttering counterfeit or altered money," "forgery, counterfeiting and uttering, and uttering what is forged or counterfeited, or altered," "embezzlement and larceny," "obtaining money or goods by false pretences," mentions "crimes by bankrupts against bankruptcy law," afterwards mentioning various other offences.

The Extradition Act, 1873 (36 & 37 Vict. c. 60), s. 8, enacts: "The principal Act shall be construed as if there were included in the first schedule to that Act the list of crimes contained in the schedule to this Act." This list of crimes includes besides "any indictable offence under the Larceny Act, 1861" and the four other Criminal Law Consolidation Acts of that year, cc. 97, 98, 99, 100, "Any indictable offence under the laws for the time being in force in relation to bankruptcy which is not included in the first schedule to the principal Act."

An Extradition Treaty with the Swiss Confederation was made in 1874, to which effect was given by order in council of the 4th of February, 1875 (published in the *London Gazette* of the 19th of February, 1875), and which by article 2 mentioned amongst the extradition crimes to which the treaty was to apply, 7thly, "Crimes against bankruptcy law."

*In re Terras, Exch.*

was apprehended contains a sufficient description of the offence. Any objection which might have been open to the prisoner under the Extradition Act, 1870, on the ground that the warrant says merely "crimes against bankruptcy law" without saying (like the Act of 1870) crimes "by a bankrupt" against bankruptcy law, is answered by the Extradition Act, 1873, which, by section 8 and the schedule, adds to the list of extradition crimes contained in the schedule to the Act of 1870 "any indictable offence under the laws for the time being in force in relation to bankruptcy." The description of the offence in the warrant would be sufficiently precise in the case of an ordinary warrant of arrest for an indictable offence issued under Jervis's Act, 11 & 12 Vict. c. 42. s. 10; which, as to the description of the offence, requires merely that the warrant "shall state shortly the offence on which it is founded," and provides that "no objection shall be taken to any such warrant for any defect therein in substance or in form, or for any variance between it and the evidence adduced on the part of the prosecution, . . . but if any such variance shall appear to the justice to be such that the party charged has been thereby misled, it shall be lawful for the justice to adjourn the hearing, and in the meantime to remand the party or admit him to bail."

[KELLY, C.B.—What application has Jervis's Act, 11 & 12 Vict. c. 42, to a warrant issued under the Extradition Acts?]

The Extradition Act, 1870, section 8, sub-section 2, under which this warrant was issued, expressly empowers a magistrate to issue a warrant "on such information or complaint and such evidence or after such proceedings as would in his opinion justify the issue of a warrant if the crime had been committed . . . in that part of the United Kingdom in which he exercises jurisdiction" (3). Consequently Jervis's Act is directly applicable. Moreover the description of the offence would be sufficient independently of Jervis's Act and at common law. A

warrant of arrest upon a criminal charge does not require the same strictness as a warrant of commitment for trial or a warrant in execution—*The King v. Marks* (4); *Ex parte Krans* (5); *The King v. Gourlay* (6); *Ex parte Scott* (7); *In re Ternan* (8). A warrant with much less precision than this would be valid at common law—2 *Hale's Pleas of the Crown*, p. 111, where Hale says: "Regularly the warrant ought not to be general to answer such matters as shall be objected against the person arrested, and therefore it is in the pleasure of the Queen's Bench to discharge a person arrested on such a warrant," shewing that it was merely discretionary with the Court to discharge on such a warrant. A person arrested under the Extradition Acts is, by ss. 9 and 10 of the Act of 1870 (2), to be discharged by the police magistrate unless such evidence is produced as would justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England; and, by section 11 (2), if he is committed to prison to await his surrender, he is to be informed by the magistrate that he will not be surrendered until after fifteen days, and that in the meantime he has a right to apply for a habeas corpus.

They contended also that if there was any defect in the first warrant it was cured by the second warrant mentioned above, that the question was whether the prisoner was now properly in custody, not whether his original arrest was good; citing to this effect *The King v. Marks* (4), *Ex parte Krans* (5), *Ex parte Cross* (9), *In re Charles Smith* (10), *Ex parte Dauncey* (11), *In re Bull* (12), *In re Phipps* (13), *In re Tivnan* (5), per

(4) 3 East 157.

(5) 1 B. & C. 258.

(6) 7 B. & C. 669.

(7) 9 B. & C. 446.

(8) 5 B. & S. 645; s. c. 33 Law J. Rep. M.C. 201.

(9) 2 Hurl. & N. 354; s. c. 26 Law J. Rep. M.C. 201.

(10) 3 Hurl. & N. 227; s. c. 27 Law J. Rep. M.C. 186.

(11) 12 Mee. & W. 271; s. c. 13 Law J. Rep. Exch. 165.

(12) 15 Law J. Rep. Q.B. 235.

(13) 11 W. R. 730,

(3) See also section 9 set out in foot-note, *ante*.

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Blackburn, J. But the arguments on this part of the case need not be more particularly noticed, inasmuch as the decision turned upon the first warrant.

*Atherley-Jones*, for the prisoner.—The warrant upon which the prisoner was arrested is bad for want of a sufficient description of the offence. Even if Jervis's Act, 11 & 12 Vict. c. 42. s. 10, applies to warrants under the Extradition Acts, the description is insufficient, for that Act has not dispensed with the necessity of shewing some offence known to the law. No such offence is known to the law as "crimes against bankruptcy law." Jervis's Act directs that the warrant "shall state shortly the offence," and the warrant does not comply with that requirement. The description would have been insufficient in a warrant of arrest at common law. Greater strictness was required than the arguments against the prisoner have allowed—*Caudle v. Seymour* (14).

He contended also that the second warrant could not properly be referred to.

The following judgments were delivered on Dec. 3:—

KELLY, O.B.—I proceed to give judgment in this case which was argued before us yesterday. I shall express no opinion on the question whether the second warrant, to which reference was made in the argument, is a good and proper warrant. The case, in my opinion, turns entirely on the one warrant mentioned in the rule, that is to say, the warrant issued on the 12th of November, 1878. The warrant in question recites that Alexandre Terraz "is accused of the commission of crimes against bankruptcy law within the jurisdiction of the Swiss Confederation;" and the question is whether that description of the offence is sufficient or is too general. I am of opinion, looking to the terms of the statutes, that no reasonable doubt can be entertained that the description is sufficient, remembering that by the Act of 1870 the magistrate is required to take evidence

and to consider whether the case is within the Act. General principles require no doubt a due description of the offence. But when we look to the Acts, and particularly to the schedule of the Act of 1870, we find offences of two classes; first, offences which may be described in a single word or almost in a single word; secondly, offences which cannot be shortly described. To the first class belong "murder," "manslaughter," "arson" and other offences mentioned in the schedule; to the second class belongs the group of offences, "crimes by bankrupts against bankruptcy law," in which group has been included, by the Act of 1873, "any indictable offence under the laws for the time being in force in relation to bankruptcy which is not included in the first schedule to the principal Act." A short description would here not be possible, and, celerity and promptitude being requisite, the Legislature has accordingly allowed such a general description. No doubt the offence for which a person is arrested must not be merely an offence against the laws of the foreign state, it must be also either identical with or analogous to an offence against our law; but the description in the warrant must, I think, nevertheless be held in the present case to be sufficient. It is impossible, in my opinion, legally and constitutionally to refer at this stage of the case to the second warrant with a view to basing our decision upon it; but I may refer to it for illustration. Referring to that warrant for illustration, it is quite clear that a perfect description of the offence mentioned in it would require a long description somewhat as follows:—namely, that Alexandre Terraz, being a bankrupt, disobeyed an order duly made by competent authority, requiring him to surrender his property for the benefit of his creditors, and so forth. Instead of a long description such as that, the warrant has said shortly "crimes against bankruptcy law;" and in my opinion, having regard to the terms of the statutes, that description is sufficient. All that this warrant goes to is the need, as in *Ex parte Krams* (5), of further enquiry. For the reasons

(14) 1 Q.B. Rep. 889; s. c. 10 Law J. Rep. M.C. 130.

*In re Terraz, Exch.*

which I have given, I think that this rule must be discharged. I base my judgment entirely upon the first warrant.

HUDDLESTON, B.—I am of the same opinion as to the first warrant. The warrant is merely for apprehension and safe custody for the purpose of enquiry. Such a warrant does not require the same strictness as is needed—see *The King v. Gourlay* (6)—in a warrant in execution. In *The King v. Despard* (15), where during the subsistence of a temporary Act, 38 Geo. 3. c. 36, suspending the Habeas Corpus Act in cases of arrest for high treason, suspicion of treason or treasonable practices, the prisoner was arrested “for treasonable practices,” the Attorney-General did not rely, as to the form of the warrant, upon the temporary Act, but relied upon the common law as shewn by precedents of the reigns of William 3, Anne and George 1, 2, and 3; and the Court held the warrant good at common law. The warrant in the present case is under the Extradition Acts of 1870 and 1873, allowing arrest and extradition for certain offences which the Acts call “extradition crimes.” The definition of “extradition crimes” in the interpretation clause of the Act of 1870, section 26, is as follows:—“The term ‘extradition crime’ means a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the first schedule to this Act.” The first schedule to the Act mentions, among other offences, “crimes by bankrupts against bankruptcy law.” If the question had turned only upon the Act of 1870, the warrant would have been bad by reason of its not containing anything answering to the words “by bankruptcy;” but the Act of 1873 extends this group of offences, and includes in it “any indictable offence under the laws for the time being in force in relation to bankruptcy,” thus in effect striking out the words “by bankrupts.” There being these provisions in the Acts, what appears in the warrant? The warrant recites that Alexandre Terraz “is ac-

cused of the commission of crimes against bankruptcy law within the jurisdiction of the Swiss Confederation.” The description, therefore, of the offence, “crimes against bankruptcy law,” exactly follows the words of the Act; and that clearly is enough. It is necessary in extradition cases that action should be prompt; the treaty itself contains a provision, in Article 10, for the use of the post or telegraph. What the police magistrate or justice of the peace has to do, in respect of that which we are now considering, is, having received evidence, &c., to mention the charge in general terms, after which, when the alleged criminal has been arrested, comes a further investigation. *The King v. Marks* (4) and *Ex parte Krans* (5), shew that a warrant of commitment for further enquiry in such a general form as this is good. The Extradition Acts are careful to protect the alleged criminal by providing that he is not to be surrendered for a political offence (for enforcing which provision several means are pointed out in the Acts), and by providing in section 11 that when a police magistrate commits a fugitive criminal to prison to await his surrender, “he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of habeas corpus.” I am perfectly satisfied that this was a good warrant of apprehension. I am of opinion, also, that the second warrant might be referred to if necessary.

*Rule discharged.*

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Solicitors—A. P. Merriman, for prisoner; the Solicitor to the Treasury, for the Treasury; Freshfields & Williams, for the Swiss Government.

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1878. } THE HOUSEHOLD FIRE AND CAR-  
June 29. } RIAGE ACCIDENT INSURANCE  
Dec. 1. } COMPANY (LIMITED) v. GRANT.

*Company—Allotment of Shares—Contract when complete—Letter sent by Post but not received.*

*Where an application for shares in a company is sent in the usual form, with an express or implied statement that the letter of allotment may be sent to the applicant by post, then the moment the letter of allotment is posted, addressed to the applicant according to his address given in his letter of application, the contract to take the shares is complete, and it is immaterial whether such letter of allotment ever reaches the applicant or not.*

Action for 94*l.* 15*s.* claimed as due in respect of a call on 100 shares alleged to be held by the defendant in the plaintiffs' company. The defendant denied that he was a shareholder.

At the trial before Lopes, J., at the last Trinity sittings in Middlesex, it appeared that the defendant, who resided at Swansea, and who was afterwards appointed agent for the plaintiffs' company at Swansea, applied in September, 1874, for 100 shares in such company with a view of his being appointed such local agent. The application was sent through the manager of the company, and was in the usual form, of which the following is a copy:—

**" Application for Shares.**

" Liability limited to 2*l.* per share, interest at the rate of 5*l.* per cent. per annum from the date of allotment.

" The Household Fire Insurance Company (Limited).

Offices: 4, St. Paul's Churchyard, London, E.C., and 56, George Street, Edinburgh.

" To the Directors.

" Gentlemen,—Having paid to your bankers the sum of 5*l.*, being a deposit of 1*s.* per share on 100 shares in the above company, I hereby request that you will allot me that number, and I agree to accept such shares or any less number you

may allot me, and I agree to pay the further sum of 19*s.* per share within twelve months from the date of the allotment, and I authorise you to insert my name on the register of members for the number of shares allotted to me.

" I am your obedient servant,

" Name in full Alexander Grant.

" Address 16, Herbert Place,  
Swansea, Glamorgan.

" Occupation Commission and Insurance Agent,

" Date September 30, 1874.

" Usual Signature A. GRANT."

The shares so applied for were allotted to the defendant, and a letter of allotment in the usual form directed to the defendant, according to the address he had so given, was posted 20th of October, 1874. The following is a copy of such letter:—

**" Allotment Letter.**

" Household Fire Insurance Company, Limited.

" 4, St. Paul's Churchyard,  
London, E.C., 20th Oct., 1874.

" Sir,—In reply to your application for 100 shares in this company, the directors have allotted you 100 shares, the payments on which are as follows:—

Deposit of 1 <i>s.</i> per share on	
100 shares allotted	£5 0 0
Deposit received from you	
on application	
Balance due by you now (on	
allotment)	£

" A further sum of 19*s.* per share, namely, 95*l.*, will be due from you on the 23rd day of October, 1875.

" Certificates of shares, when ready (of which due notice will be given) will be delivered in exchange for the banker's receipt for the deposit money and the receipt for the further payment.

" I am, sir, your obedient servant,

" Henry Hare, Secretary.

" To Alexander Grant, Esq.,  
16, Herbert Place, Swansea."

The defendant swore that he had never received this letter, and that he had had

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no letter about the shares until March, 1877, when he received the following:—

“19th March, 1877.

“Sir,—The following amounts being due from you in respect of 100 shares held by you in this company—

5*l.* due 23rd of October, 1874.

95*l.* due 23rd of October, 1875—

I am instructed by the directors to require you to pay these amounts at this office on or before the 19th day of April next, and to inform you that in the event of your not doing so, the said shares will be forfeited.

“I am, sir, yours truly,

“(Signed) J. E. Redmond,

“Mr. A. Grant, Secretary.  
“7, Herbert Place, Swansea.”

Credit, however, was given in this action for 5*s.* 5*s.*, that sum being found entered in the books of the company as having been paid by the defendant on the 100 shares.

The jury found that the letter of the 20th of October, 1874, had been, in fact, posted, but that it had never been received by the defendant. On these findings the learned Judge reserved his judgment until the case had been argued on further consideration. The same was accordingly so argued in the Trinity sittings of 1878 by

*W. G. Harrison* and *Wilberforce*, for the plaintiffs; and by

*Finlay* and *Dillwyn*, for the defendant.

In addition to the authorities referred to in the judgment, the following were cited—*Taylor v. Jones* (1); *The Imperial Land Company of Marseilles, Wall's Case* (2); *Reidpath's Case* (3); *Finucane's Case* (4); *Duncan v. Topham* (5); *Adams v. Lindsell* (6); *Higgins v. Wilson & Co.*

(1) 45 Law J. Rep. C.P. 110; s. c. Law Rep. 1 C.P. D. 87.

(2) 42 Law J. Rep. Chanc. 372; s. c. Law Rep. 16 Eq. 18.

(3) 40 Law J. Rep. Chanc. 39; s. c. Law Rep. 11 Eq. 86.

(4) 17 W. R. 813.

(5) 8 Com. B. Rep. 225; s. c. 18 Law J. Rep. C.P. 310.

(6) 1 B. & Ald. 681.

(7); *Taylor v. The Merchants Fire Insurance Company* (8); and *Dunmore v. Alexander* (9).

*Cur. ado. vult.*

On the 1st of December, 1878, the following judgment was given by

LOPES, J.—This action is brought to recover 94*l.* 15*s.* for balance due on 100 shares in plaintiffs' company applied for by the defendant. The defendant denies his liability.

On the 30th of September, 1874, the defendant, who acted for the plaintiffs at Swansea, applied through the manager for 100 shares, and handed him a written application for shares in the following form.

[The learned Judge here read the letter of application.]

The manager laid the application before the plaintiffs, and an allotment letter was prepared in the following form.

[The learned Judge here read the letter of the 20th of October, 1874.]

The defendant swore he never received this letter or any notice of calls or dividends. His name was duly entered on the list of shareholders. Evidence was given on behalf of the plaintiffs to prove the postage of the allotment letter of the 20th of October. The defendant swore he had not received any letter about the shares until the 19th of March, 1877.

I asked the jury if they thought the letter of allotment of the 20th of October was, in fact, posted; they replied in the affirmative. I also asked them if they thought the letter of allotment was in fact received by the defendant. To this they replied in the negative.

It was urged by Mr. Finlay for the defendant that the letter of application was sent by hand, and there was no request to be answered by post. The letter of application it will be observed is in the usual form, and contains the usual particulars of name and address, and having regard to the position of the plaintiffs' office and the defendant's residence, the

(7) 9 Scotch Sess. Cas., 2nd Series, 1407.

(8) 9 How. Rep. (Supreme Court of United States of America) 390, cited in *Pollock on Contract*, p. 17.

(9) 9 Shaw & Dunlop, 190.

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ordinary and natural mode of transmission of the allotment letter would be through the post.

The question raised in this case is, whether the contract between the plaintiffs and the defendant was complete when the letter accepting the defendant's offer was put into the post by the plaintiffs, or not until it was actually received by the defendant.

The question is difficult, and the decisions are conflicting. It appears to me, however, that regard being had to the general inclination of the authorities and to mercantile convenience, the plaintiffs are entitled to succeed. I will refer only to a few of the leading cases.

In *Dunlop v. Higgins* (10) the proposal did not prescribe any time, but the nature of it implied the answer must be speedy. The acceptance was not posted by the earliest post. The Court decided that the contract was binding on the proposer. Lord Cottenham appears to have thought that the contract was absolutely concluded by the posting the acceptance (within the prescribed, namely, a reasonable time), and that it mattered not what became of the letter afterwards. In *Duncan v. Topham* (5) not long afterwards, Wilde, C.J., Maule, J., and Cresswell, J., seem to have so understood it; so that the contract would be binding, though the letter did not arrive at all.

In the case of *The British and American Telegraph Company v. Colson* (11) it was found as a fact that the letter of allotment was never received. The Court held the defendant was not bound, and endeavoured to restrict the effect of *Dunlop v. Higgins* (10). In *The Imperial Land Company of Marseilles, Harris's Case* (12) the letter of allotment was duly received, but in the meantime the applicant had written a letter withdrawing his application on the ground of the delay in answering. The Lords Justices held the applicant was bound on the authority of *Dunlop v. Higgins* (10) with which they thought it difficult to reconcile *The*

*British and American Telegraph Company v. Colson* (11). In the case of *Brogden v. The Metropolitan Railway Company* (13) Lord Blackburn says, "So again when, as in *Harris's Case* (12), a person writes a letter and says, 'I offer you an allotment of shares,' and he expressly or impliedly says, 'if you agree with me, send an answer by post,' then as soon as he has sent that answer by the post and put it out of his control, and done an extraneous act which clenches the matter, and shews beyond all doubt that each side is bound, I agree that the contract is perfectly plain and clear." And again, at page 692, "I take it that that which was said 300 years ago and more, is the law to this day, and is quite what Lord Justice Mellish in *Harris's Case* (12) accurately states, that when it is expressly or impliedly stated in the offer that you may accept the offer by posting a letter, the moment you post this letter the offer is accepted."

Acting upon these cases, I come to the conclusion that the contract here was complete on the posting of the allotment letter, and that it is immaterial whether the defendant actually received that acceptance of his offer. There is doubtless hardship caused to the proposer if the acceptance does not come to hand, but against this he may guard himself by making the proposal expressly conditioned on the arrival of the answer within a definite time. It would be difficult to exaggerate the extraordinary mischievous consequences to the commercial world which would follow if it were held that a contract was not complete until the letter accepting the offer had reached the proposer, and that it might be revoked at any time until the letter accepting it had been actually received.

#### *Judgment for plaintiffs.*

Solicitors—Evans & Cook, for plaintiffs; Tucker, New & Co., agents for R. T. Leyson, Swansea, for defendant.

(10) 1 H.L. Cas. 381.

(11) 40 Law J. Rep. Exch. 97; s. c. Law Rep. 6 Exch. 106.

(12) 41 Law J. Rep. Chanc. 621; s. c. Law Rep. 7 Chanc. App. 687.

(13) Law Rep. 2 App. Cas. (H.L.), 691.

[IN THE EXCHEQUER DIVISION.]

1878. }  
 Nov. 11, 14. } INSLEY v. JONES.

*County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 7—Sending Action of Contract to County Court where "the claim indorsed on the Writ does not exceed 50l."—Claim of 50l. and Interest from Date of Writ—Costs.*

*The defendant in an action in the High Court in which the writ was indorsed with a claim of 50l., "and interest from the date of the writ," applied under the County Courts Act, 1867, section 7, for an order that the action should be tried in a County Court as an action of contract where "the claim indorsed on the writ" did "not exceed 50l." :—*

*Held, that the claim indorsed on the writ exceeded 50l. within the meaning of the Act.*

The defendant applied, by summons at chambers, for an order under the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 7 (1), that this action should be tried in the County Court of Worcester-shire, holden at Dudley, as being an action of contract where "the claim indorsed on the writ" did "not exceed 50l." The indorsement of claim upon the writ claimed 50l., and interest thereon at 5l. per cent. per annum from the date of the writ till payment or judgment. A Master refused the order. Lindley, J., on appeal from the Master, made an order dismissing the appeal, but ordering that if only 50l. should be recovered the plaintiff should only be entitled to County Court costs unless the Judge at the trial should otherwise direct. The plaintiff appealed to the Court from this order as to costs.

(1) The County Courts Act, 1867, s. 7, enacts : "Where in any action of contract brought . . . in any of Her Majesty's superior Courts of Common Law the claim indorsed on the writ does not exceed fifty pounds . . . it shall be lawful for the defendant . . . to apply to a Judge at chambers for a summons to the plaintiff to shew cause why such action should not be tried in" a "County Court . . . and on the hearing of such summons the Judge shall, unless there be good cause to the contrary, order such action to be tried accordingly . . ."

*Bigham*, for the plaintiff.—The condition imposed upon the plaintiff in refusing the application of the defendant was *ultra vires*, as the application of the defendant could not be granted, the County Courts Act, 1867, s. 7 (1), applying only where "the claim indorsed on the writ does not exceed 50l." The claim here indorsed on the writ exceeds 50l. The claim of interest, whether it be a good claim or not, cannot be rejected as a mere nullity. If the defendant suffered judgment by default, the claim of interest would be sustainable without more evidence—*Rodway v. Lucas* (2). The indorsement on the writ is a demand in writing such as to empower the jury to give interest under 3 & 4 Will. 4. c. 42. s. 28.

*O. H. Anderson*, for the defendant.—The claim indorsed on the writ does not, within the meaning of the Act (1), exceed 50l., notwithstanding the claim of interest from the date of the writ.

*Bigham* in reply.

[KELLY, C.B.—Have you any authority to shew that the indorsement on the writ is such a demand of interest as to satisfy 3 & 4 Will. 4. c. 42. s. 28 ?]

No.

[CLEASBY, B.—*Pierce v. Fothergill* (3) is an authority that a writ is a sufficient demand to make interest payable on a promissory note not carrying interest till demand.]

*Bigham* was then stopped.

KELLY, C.B.—I should have been inclined in the absence of authority to think that where no demand has been made before the date of the writ and the only demand is by the writ, there is not a sufficient demand in writing on which to ground a claim to interest under 3 & 4 Will. 4. c. 42. s. 28. But my brother Cleasby has referred to *Pierce v. Fothergill* (3), in opposition to this view; and having regard to that authority I think the claim indorsed on the writ exceeds 50l. Consequently there was no power under the statute (1) to grant the application

(2) 10 Exch. Rep. 667; s. c. 24 Law J. Rep. Exch. 155.

(3) 2 Bing. N.C. 167.



*Insley v. Jones, Exch.*

of the defendant for an order to try in a County Court. That application should therefore have been refused unconditionally. The order appealed from must be varied as asked by the plaintiff.

CLASBY, B.—Whether the interest claimed is actually recoverable is not the question. It is claimed, and *Pierce v. Fothergill* (3) is an authority in support of the claim. Therefore I do not see how we can hold that the claim indorsed on the writ does not exceed 50%. As the claim indorsed on the writ exceeds 50% the action could not, as asked by the defendant, be sent for trial to a County Court under 30 & 31 Vict. c. 142. s. 7 (1); and the defendant's appeal from the Master should therefore have been dismissed unconditionally. The order of Lindley, J., must accordingly be varied by striking out the condition imposed upon the plaintiff.

*Appeal allowed.*

Solicitors—Goldring & Jukes, agents for E. & A. Caddick, West Bromwich, for plaintiff; G. S. Warmington, agent for Joseph Stokes, Dudley, for defendant.

*Jones v. Insley v. Gasby & Goldring & 62 J.*

[IN THE COURT OF APPEAL.]

(Appeal from the Exchequer Division.)

1878. } GARDNER AND ANOTHER v.  
Dec. 20. } IRWIN AND ANOTHER \*

*Practice—Discovery of Documents—Affidavit of Documents—Privilege—Sufficiency of Affidavit—Rules of Court, 1875, Order XXXI. rule 13, App. B. Form 9.*

*It is not sufficient that an affidavit of documents should state that certain documents are privileged, it must also state and, as far as possible, verify the facts on which the claim of privilege is founded.*

Appeal by the plaintiffs from a decision of the Exchequer Division, affirming an order of a Judge at chambers. The plaintiffs sued the defendants for damages for the conversion of certain timber,

which the plaintiffs alleged had been the subject of an action in the Russian Courts, between themselves and one Vonticiano, an agent of the defendants; and they also alleged that in that action, to which the defendants were, by means of their agent, parties, the Russian Courts had made a decree in favour of the plaintiffs, after which decree the defendants had converted the timber.

The plaintiffs had obtained an order directing the defendants to make an affidavit of documents, and the defendants had made one, of which the material portions were as follows:—

“We have in our possession or power the documents relating to the matters in question in this action, set forth in the first and second parts of the schedule hereto.

“We object to produce the said documents set forth in the second part of the said schedule hereto. That our reason for objecting to produce the said documents set forth in the second part of the said schedule hereto is, that the same are privileged.”

The second part of the schedule was as follows:—

“Correspondence between ourselves and our solicitors.

“Correspondence between our solicitors and their agents.

“Cash-books, ledgers and accounts.

“Writ of summons, statement of claim and other pleadings, counsel's opinion, statement of case in Russian Courts, prepared by attorney for Vonticiano, including copies of depositions and evidence given.”

The plaintiffs took out a summons to compel the defendants to make a further and better affidavit, and on this being dismissed by the Judge at chambers, they appealed to the Divisional Court, which affirmed the decision of the Judge. The plaintiffs appealed.

*Crompton*, for the appellants.—This affidavit is insufficient; it does not follow the form 9 in appendix B., made under rule 13 of Order XXXI. (1). The plain-

\* *Coram* Bramwell L.J.; Brett, L.J.; and Cotton, L.J.

(1) Rules of Court, 1875. Order XXXI. rule 13 provides that, “The affidavit . . . shall specify which, if any, of the documents . . . he

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tiffs have a right to have full particulars of the correspondence, so that they may see whether the claim of privilege is well founded. He cited *Minet v. Morgan* (2).

*FitzAdam*, for the defendants.—The affidavit is sufficient, for the plaintiffs can raise the question of privilege on a summons for inspection. The facts stated shew a *prima facie* ground for privilege, and that is sufficient; the form in the Rules of Court is only a skeleton guide, not a form of pleading to be followed literally or construed strictly.

BRAMWELL, L.J.—I think that this appeal must be allowed. It appears that the rule and the form were not brought under the notice of the Divisional Court, and therefore we are not differing from any opinion expressed by that Court. When once the rule and the form in the appendix have been read the case is really decided, for this affidavit does not satisfy the requirements contained in Order XXXI. rule 13, and form 9 in appendix B (1). I think, however, inasmuch as the appellants must be held responsible for not having directed the attention of the Divisional Court to the rule in question, the costs of this appeal should be costs in the cause.

BRETT, L.J.—The provisions of the rules and of the form have not been followed. It is said that the form in the appendix is a skeleton, and need not be followed strictly; but here the skeleton has not been filled up, and it still remains a skeleton. I think that it is necessary to state and verify the facts on which the claim of privilege is founded. That has not been done in the present case, so that there is in this affidavit a fatal omission. It is said that we ought

objects to produce, and it may be in the Form 9 in Appendix B. hereto, with such variations as circumstances may require."

Form 9, Appendix B. par. 2. "I object to produce the said documents set forth in the second part of the said first schedule hereto."

3. That [here state upon what grounds the objection is made, and verify the facts as far as may be].

(2) 42 Law J. Rep. Chanc. 627; a. c. Law Rep. 8 Chanc. App. 361.

not to construe affidavits with the same strictness as if they were pleadings. I am inclined to agree; but in this case the very fact which ought to be stated has been wholly omitted. This appeal must be allowed.

COTTON, L.J.—I think that the defendants must make a further and better affidavit. No doubt the question might be raised on an order for the production of documents, but still I think that, having regard to the Rules of Court and the form in the appendix, the appellants were entitled to apply for a better affidavit, so that they are entitled to succeed on this appeal. The affidavit of the defendants is insufficient because it merely asserts that the documents are privileged. Now the description of the documents in the schedule shews that some are privileged; but that cannot be said as to all, and the defendants ought clearly to state facts, which will enable us to see whether the privilege is rightly claimed.

In one sense, an affidavit as to documents must be construed strictly, because the other party cannot contradict it, nor can he cross-examine upon it, he is bound by it and cannot test it, nor can he enquire into the truth of it. Now this affidavit does not state enough to enable the plaintiffs to form an opinion as to the validity of the claim of privilege set up by the defendants, and the case of *Minet v. Morgan* (2) shews that where the affidavit merely contained a statement that documents were privileged, a second affidavit was required. With regard to the correspondence between the defendants and their solicitors, it is necessary to support the claim of privilege, that that correspondence should be strictly confidential, and that it should relate to the matters in dispute in this action. That this is sufficient was held recently by this Court in *Taylor v. Batten* (3), and I do not think that the plaintiffs will be entitled to have what it has been said they desire to ask for, that is, the dates and particulars of addresses of letters between the defendants and their solicitors, so as to enable them to discover by re-

(3) *Ante*, p. 72.

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ference the contents of the letters, and thus indirectly to cause the defendants to furnish from their confidential communications with their solicitors, evidence against themselves in this action. But this affidavit is technically insufficient, and the appeal must be allowed.

*Appeal allowed.*

Solicitors—Crowder, Anstie & Co., agents for Yates, Son & Co., Liverpool, for appellants; Gregory, Rowliffes & Co., agents for Charnley & Finch, Dudley, for respondents.

*tiguous to the land on which the adjoining house of the defendants stood, fell down in consequence of excavations made by the defendants on the site of their house which they had pulled down, and by reason of the pillar being deprived of the lateral support previously afforded by the soil under the surface of the adjoining land of the defendants. In an action by the plaintiffs to recover damages for the loss caused by the fall of their house, the Judge at the trial directed a verdict for the plaintiffs:—*

Held, by COTTON, L.J., and THESIGER, L.J., that the case must go down for a new trial to determine whether the burden which had been put upon the servient tenement was such as the owner could reasonably be expected to be aware of and provide for.

By BRETT, L.J., that judgment should be entered for the defendants.

Held also, by COTTON, L.J., and THESIGER, L.J. (affirming *Bower v. Peate*), that where a principal has employed a contractor to do work which is in its nature dangerous to adjoining property, the employer is bound to see that proper means are adopted to prevent injurious consequences, and cannot discharge himself of his liability by employing a competent contractor and directing him to use proper precautions.

This was an appeal from a decision of the Queen's Bench Division, reported 47 Law J. Rep. Q.B. 163.

It was an action brought by the plaintiffs, coachbuilders at Newcastle-on-Tyne, against the defendant Dalton, who was a builder and contractor, and the Commissioners of Works, who had employed Dalton to pull down a house adjoining to the plaintiffs' factory, for damages sustained by them by the destruction of their manufactory and warehouse, which fell down by reason of the excavations made on the adjoining land in carrying out the works of the defendants.

The facts of the case are fully stated in the judgments of the Court.

A verdict having been entered for the plaintiffs at the trial, the Divisional Court (COCKBURN, L.C.J., and MELLOR, J., dissentiente LUSH, J.), ordered judgment to be entered for the defendants on the

*Bryant v. Lister 48 L.J. 381.  
Duke of Devonshire v. B. 48 L.J. 783.  
Lemaitre v. Davis  
52 L.J. 175.*  
[IN THE COURT OF APPEAL.]  
(Appeal from the Queen's Bench Division.)

1878.  
May 20, 21, 22.  
Dec. 21.  
{ ANGUS AND COMPANY v.  
DALTON AND THE COM-  
MISSIONERS OF HER  
MAJESTY'S WORKS AND  
PUBLIC BUILDINGS.\*

*Easement — Prescription — Right to Lateral Support for Buildings from adjoining Land—Presumption of lost Grant, how rebutted—Principal and Contractor—Liability of Principal for Damage caused by Contractor's Negligence.*

*The right to the support for buildings from adjoining land is not a right of property. Such right cannot be claimed under the Prescription Acts, but may be acquired by prescription at common law, or by presumption of a lost grant arising from twenty years' open and uninterrupted enjoyment.*

*Per COTTON, L.J., and THESIGER, L.J. (dissentiente BRETT, L.J.), such presumption cannot be rebutted by proof that no such grant in fact was ever made.*

*Per BRETT, L.J., proof that such grant has never in fact been made, is an absolute rebuttal of the presumption.*

*One of two adjoining houses having been, twenty-seven years before the accident, altered internally by the plaintiffs (the owners) so as to rest chiefly on a pillar built on the edge of their land, and con-*

\* *Coram Brett, L.J.; Cotton, L.J.; and Thesiger, L.J.*

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ground that the facts proved shewed that no grant of the easement claimed had ever been made, or assent given by the defendants to its enjoyment, and that the circumstances were not such that any such grant or assent could be implied, Lush, J., holding that the twenty-seven years' uninterrupted enjoyment gave the plaintiffs an absolute right to the easement claimed.

The plaintiffs appealed from the above decision, and the case was argued on the 20th, 21st and 22nd of May, 1878.

*Littler, G. Bruce and Bidley*, for the plaintiffs.

*Herechell and Wheeler*, for the defendant Dalton.

*Sir James FitzJames Stephen* and *A. B. Hardy*, for the Commissioners of Works.

*Our. adv. vult.*

The following judgments were delivered on Dec. 21:—

**THESSIGER, L.J.**—The material facts of this case may be shortly stated. Down to the year 1849 two dwelling-houses of considerable age stood side by side, each having had in fact for a period long exceeding twenty years lateral support from the soil upon which the other has rested. In 1849 the plaintiffs' predecessor converted one of the dwelling-houses into a coach factory. In the course of the conversion the internal walls which had previously existed were removed, and girders supporting the upper floors of the factory were on one side let into a large chimney stack which extended along a portion of the dividing wall, and on the opposite side took their bearings from the plaintiffs' walls. The effect of this mode of construction was to throw a considerable part, estimated at one-fourth, of the whole weight of the factory upon the chimney stack, the foundations of which being in contact with the soil under the adjoining house, the lateral pressure upon that soil was materially increased. No express assent to the alteration was given by the owner of the adjoining house, but it must be taken that he was aware of the conversion of the dwelling-house into a factory,

although there is no evidence of his having been aware of the precise nature of the internal alterations made for that purpose, or of the exact effect which they would produce as regards lateral pressure. The adjoining house continued in its condition of a dwelling-house until shortly before the commencement of the present action, when the Commissioners of Her Majesty's Works and Public Buildings became possessed of it, and by a contract with the defendant Dalton, a builder, engaged him to pull it down, to excavate to such a depth as would enable cellarage which had not previously existed to be made, and to erect upon the site of the old house a building to be used as a probate office. Under the specification which was incorporated with the contract, Dalton was bound to shore up adjoining buildings, and to make good all damage caused thereto during the erection of the building, and to provide three rods of brickwork in Portland cement to be used if necessary in underpinning the adjoining property. Dalton employed Messrs. Newby and Thorpe as sub-contractors to do the whole of the excavators', drainers', bricklayers' and masons' work in the building under conditions which may be assumed to have included those to which I have referred. They, therefore, excavated to the depth of several feet below the level of the foundation of the plaintiffs' chimney stack, and notwithstanding that they left a thick pillar of the original clay around the stack for the purpose of supporting it during the erection of the new dividing wall, the clay gave away after exposure to the air, and the stack sank and fell, carrying with it a considerable portion of the factory, and causing damage to the plaintiffs in respect of which the present action was brought. The case came on for trial before Mr. Justice Lush and a special jury, when, in addition to proving the above-mentioned facts, the plaintiffs' witnesses gave detailed evidence as to the construction of the factory, and the weight thrown upon the chimney stack, the fair inferences from which evidence appear to me to be that the construction of the plaintiffs' factory, although somewhat unusual, was such as to make it reasonably stable, and

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that looking to the character of the building, and the purposes for which it was erected, the weight imposed upon the chimney stack, although greater than if there had been internal walls, was not unduly great. The cross-examination of the plaintiffs' witnesses was obviously directed to displacing the plaintiffs' case upon these points, and at the close of the plaintiffs' case it was submitted on the part of the defendants that no right to support for the chimney stack with the weight upon it had been obtained, or that at least it was a question for the jury whether the weight which was thereby put upon the adjoining soil was of such a character as the neighbouring owner could reasonably be expected to be aware of and to provide for. It was contended also on the part of the commissioners that Dalton, the builder, being a contractor and not a servant or agent to them, was alone liable, while Dalton took the same point as regards his sub-contractors. Upon this point the learned Judge held that he was bound by the authority of *Bower v. Peate* (1), to hold both the commissioners and Dalton responsible for the actions of the sub-contractors, and upon the main question he ruled, as I gather from the shorthand writer's notes of the trial, that where a building has stood for twenty years it has acquired an absolute right to the support of the adjacent land without any reference to the question whether the adjoining owner has had notice of the alterations of structure or of the additional weight thereby imposed, and that such right is not dependent upon the implication of a grant. In accordance with his ruling he directed a verdict for the plaintiffs, leaving them to move for judgment.

Upon motion for judgment the case was argued in the Divisional Court of Queen's Bench before the Lord Chief Justice and Justices Mellor and Lush, and while Mr. Justice Lush adhered in substance to the view of the case which he had taken at the trial, the other members of the Court held that the facts proved shewed no right of support, and

directed the judgment to be entered for the defendants. Against this judgment the present appeal is brought. The principal question raised by it is of an unusual difficulty, as well as of great importance, and looking to the difference of opinion which unfortunately exists upon it in this Court as well as in the Court below, I cannot but feel diffident as to the correctness of the conclusions at which I have arrived. If, indeed, that question had been wholly untouched by authority, I should have felt the greatest hesitation in forming an opinion upon it, for in every aspect in which it presents itself it discloses difficulties which render a satisfactory solution almost impossible. Although, however, the exact point for decision may not be covered by direct authority, the dicta of Judges upon it are to be found in a large number of cases in which analogous points have formed the subject of distinct decision, and it is, I think, possible to obtain from these dicta and decisions valuable assistance in determining what is the nature of a right of support, such as is claimed in the present case, and under what circumstances it may be acquired.

The right to lateral support to buildings from adjoining soil holds an intermediate place between the right to material support of soil from soil and the right of lateral support of buildings from buildings; and some light may be thrown upon this case by consideration of these kindred rights. The right to support of soil from soil is a right of property which requires neither prescription nor grant for its acquisition, and which naturally exists wherever the lands of adjoining owners are in contact—*Humphries v. Brogden* (2); *Bowbotham v. Wilson* (3). The right of support of buildings from buildings, on the other hand, is an easement of a highly artificial character, and one which must necessarily be of infrequent occurrence; properly constructed houses do not, as a rule, depend for their stability upon the existence

(2) 12 Q.B. Rep. 739; s. c. 20 Law J. Rep. Q.B. 10.

(3) 8 H.L. Cas. 348; s. c. 30 Law J. Rep. Q.B. 49.

(1) 45 Law J. Rep. Q.B. 446; s. c. Law Rep. 1 Q.B. D. 321.

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of adjoining houses; no man can, therefore, from the mere existence in fact of this dependence be presumed to have notice of it, and as a consequence to be presumed in the event of his not interrupting it to acquiesce in his neighbour's enjoyment of it. Such enjoyment offends against one of the cardinal rules governing the acquisition of an easement, namely, that the user must not be secret. But although the general rule be as I have stated, still, so far as there is authority upon this point at all, it would appear to have been the opinion of the Court that such an easement might under special circumstances be acquired. The decision of *Peyton v. The Mayor of London* (4), turned in great measure upon the form of the declaration, which, as Lord Tenterden said, neither alleged as a fact that the plaintiffs were entitled to have their house supported by the defendants' house, nor contained any allegation from which a title to such support could be inferred as a matter of law; but the concluding passage of the judgment in that case in which the Court adverted to the want of evidence from which a grant to the plaintiffs of a right to the support of the adjoining house might be inferred as well as to the form of the declaration, leads fairly to the conclusion that upon stronger evidence directed to a more properly drawn declaration a grant of the right of support claimed might have been presumed. In *Solomon v. The Vintners' Company* (5), which was a case in which the right of support for a house, from another house not immediately adjoining was claimed, Pollock, Chief Baron, in giving the judgment of himself and two other Judges, although apparently not favourably disposed towards such a right under any circumstances, yet admitted that if the house removed had been next adjoining the plaintiffs', he would have been much embarrassed by cases and dicta in arriving at a decision against the right claimed. Baron Bramwell was careful to rest his judgment against the particular claim made on the

ground that upon the facts proved the enjoyment was not open. *Richards v. Ross* (6) was the case of houses originally built together and belonging to the same owner, and there the Court presumed that upon the severance of the ownership there was a grant and reservation of the reciprocal right of support. These cases then at least indicate that even in the case of a claim to the purely artificial support of building by building the reason against presuming a right upon evidence of mere user is rather the particular one derived from the nature of the easement claimed, and the consequent improbability of knowledge and acquiescence on the part of the owner of the servient tenement, than a general one founded upon the impossibility of such an easement being acquired by user at all.

I come now to the consideration of the easement which is claimed in the present case, but it holds as I have said an intermediate place between the artificial right to which I have just referred and the natural right of property by which a man is entitled to have his soil supported laterally by his neighbour's soil. It has an affinity to this natural right if the means of support be looked at, it is more akin to the artificial right if the object of the support be considered.

I have applied the term "easement" to the right claimed in this action because it is clear that the support of a building cannot be claimed as a natural right of property. Natural rights of property must be rights which attach to property in its primitive state, and cannot without a contradiction in terms be applied to an artificial subject matter like a house; but I need not stop to reason this out, for the judgment of the Exchequer Chamber delivered by Mr. Justice Willes in *Bonomi v. Backhouse* (7), following what had previously been laid down in *Wyatt v. Harrison* (8), *Partridge v. Scott* (9),

(6) 9 Exch. Rep. 218; s. c. 23 Law J. Rep. Exch. 3.

(7) E. B. & E. 622; s. c. 28 Law J. Rep. Q.B. 378; in the House of Lords, 9 H.L. Cas. 503; s. c. 34 Law J. Rep. Q.B. 181.

(8) 3 B. & Ad. 871.

(9) 8 Mee. & W. 220; s. c. 7 Law J. Rep. Exch. 101.

(4) 9 B. & C. 725.

(5) 4 Hurl. & N. 585; s. c. 28 Law J. Rep. Exch. 370.

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and other cases, distinctly affirms the proposition that the right to support of buildings must be founded upon prescription or grant, express or implied. It is true that when *Bonomi v. Backhouse* (7) came upon appeal to the House of Lords, two members of that House, namely, Lords Cranworth and Wensleydale, used expressions to the effect that the right claimed in that case was not an easement but a right of the plaintiffs to the enjoyment of their own property, and the language of Mr. Justice Wightman in the Court of Queen's Bench was to the same effect. In no part, however, of the opinions and judgment referred to was it suggested that the decisions in previous cases upon this point were erroneous, and the language used may be reasonably attributed to the fact that while damage to the plaintiffs' buildings constituted the damage in respect of which the action was brought, it was caused by mining operations which had affected the soil upon which the plaintiffs' buildings stood, quite apart from the additional weight which they imposed upon it; in other words that the natural right of property had been invaded. The Lord Chancellor and Lord Brougham accepted the reasons as well as concurred with the judgment of the Exchequer Chamber. If then the right claimed be not a right of property, is it an easement which can be acquired, and if it can, how, and under what circumstances, may it be acquired? That it is a right or easement which may under some circumstances be acquired, is treated as clear law by a long series of authorities, and it is admitted by all the judgments in the Court below. That it is an easement not coming within the Prescription Act, appears also to be generally admitted and is assumed by me. That it is a right or easement which must be founded upon "prescription or grant, express or implied," is a proposition stated in terms already quoted, in the judgment of the Court of Exchequer Chamber in *Bonomi v. Backhouse* (7), at page 655, and is borne out by the general current of authority upon the subject of the acquisition of easements.

I cannot therefore accede to the view

suggested by Mr. Justice Lush in the Court below that an absolute right to an easement uninterruptedly enjoyed for twenty years may be obtained by analogy to the period of limitation fixed, as regards entry on lands, by the 21 James 1. c. 16. It may be that the commencement of the reign of Richard 1st was originally fixed as the period of prescription for incorporeal rights by analogy to the statute of 3 Edward 1. c. 29, which fixed the same period for alleging seisin in a real action, and there are dicta to be found in the books supporting the view that as a matter of theoretical law the same analogy carried with it an alteration as regards incorporeal rights, when the period of sixty years was fixed for a writ of right, and fifty years for a possessory action by 32 Hen. 8. But as a matter of practical law, this analogy does not appear to have been extended by the Courts to these last mentioned statutes. The reign of Richard 1. still remained the time to which legal memory in regard to easements was supposed to relate, and although the later statute of 21 James 1 did undoubtedly suggest to the minds of the Judges the propriety of giving to twenty years of uninterrupted enjoyment of incorporeal rights an effect to some extent at least commensurate with that produced by a similar enjoyment of land, they seem to have been unwilling, probably for good reasons, to go the whole length of applying the statute by analogy; notwithstanding that if they had done so they would have followed the example set them by their predecessors in respect of the statute of Edward 1. They effected the object which they had in view by the creation of the fiction of a grant made and lost in modern times. Such a fiction, like other fictions, may be open to the strictures passed upon it, but whatever may be the merits or demerits of the fiction, it is too much to question the validity of its introduction. The doctrine of a lost grant forms part of the law of the land, and is after all but an extension of the fiction which had previously formed the basis of prescriptive titles; for every prescription imports

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a grant which in most cases no one believes in; and any dislike which may be felt for this and like fictions cannot be allowed to interfere with the carrying out of the doctrines involved in them to the full extent which has been sanctioned by established authority. It becomes necessary therefore, in the first place to consider the character and extent of the presumption of a lost grant as applicable to easements generally, and then in the second place to see in what respects, if any, a difference exists in regard to the particular easement claimed in this action.

And first as regards easements generally, the authorities cited in the Court below establish that this presumption is not a *presumptio juris et de jure*, or, to use other language, is not an absolute and conclusive bar. On the other hand, those same authorities lay down that the uninterrupted enjoyment of an easement for twenty years raises, to use the words of Lord Maclefield in *Darwin v. Upton* (10), "such decisive presumption of a right by grant or otherwise that unless contradicted or explained the jury ought to believe it," and the corollary upon this proposition is stated by Mr. Justice Bayley in *Cross v. Lewis* (11), where he says, "I do not say that twenty years' possession confers a legal right, but uninterrupted possession for twenty years raises a presumption of right; and ever since the decision of *Darwin v. Upton* (10) it has been held that in the absence of any evidence to rebut the presumption a jury should be told to act upon it." What, then, is the nature of the evidence which could be held to contradict, explain or rebut this decisive presumption? Proof of the mere origin of the easement within the period of legal memory is not sufficient for this purpose. It was to meet the hardship which arose from such proof preventing the acquisition of a prescriptive title, that the legal fiction of a grant made and lost in modern times was invented. Neither is it sufficient to prove such circumstances as negative an actual assent on the part of the servient owner

to the enjoyment of the easement claimed, or even evidence of dissent short of actual interruption or obstruction to the enjoyment—see *Cross v. Lewis* (11), where Bayley, J., at page 689, speaking of the case of opening windows, says—"If his neighbour objects to them he may put up an obstruction, but that is his only remedy, and if he allows them to remain unobstructed for twenty years, that is a sufficient foundation for the presumption of an agreement not to obstruct them." Again, proof that the dominant and servient tenement were originally in one ownership, and were separated under such circumstances as to negative the presumption of any reservation or grant of the easement claimed having actually been made at the time of the separation, would not be sufficient to prevent the presumption arising in a case where the enjoyment has been uninterrupted for twenty years; see *Livett v. Wilson* (12), where, though it was proved that the two tenements were separated by a deed containing no grant or reservation of the easement claimed, the Court did not rely upon this fact as supporting the verdict of the jury negating the presumption of a lost deed, but took as their ground the contested character of the user. In harmony, as it appears to me, with the last proposition, is the further proposition that the presumption cannot be rebutted by mere proof by the owner of the servient tenement that no grant was in fact made, either at the commencement or during the continuance of the enjoyment. I am not aware that this proposition has been in terms directly decided, but it is almost impossible to suppose that among the numerous cases in which easements have been held by the Courts to have been acquired by uninterrupted user for twenty years only, there must not have been many in which the owner of the servient tenement, at the time when the period of user commenced was alive when the action was tried, to contradict, if such evidence had been admissible, the fact of a grant; and if such evidence were admissible, it is almost inconceivable that in the numerous cases in which questions of

(10) 2 Wms. Saund. 175, a.

(11) 2 B. & C. 686.

(12) 3 Bing. 115.



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easements have been discussed, no trace of an opinion to that effect should be found in the observations of the Judges. The correct view upon this point I take to be, that the presumption of acquiescence and the fiction of an agreement or grant deduced therefrom in a case where enjoyment of an easement has been for a sufficient period uninterrupted, is in the nature of an estoppel by conduct which, while it is not conclusive, so far as to prevent denial or explanation of the conduct, presents a bar to any simple denial of the fact which is merely the legal inference drawn from the conduct. If, instead of its being a mere legal inference, the Courts had considered that it was an inference of fact to be drawn by juries, like other inferences of facts and in respect of which the servient owner might be called as a witness to negative the fact by denial of a grant ever having been made, it is difficult to understand how Judges could have systematically, as the Lord Chief Justice admits they did, directed juries to find grants in cases in which no one had the faintest belief that any grant had ever existed, and where the presumption was known to be a mere fiction. The case of *Campbell v. Wilson* (13) lends support to my view upon this point, and illustrates to some extent my meaning when I speak of explanation of the conduct which is relied upon as leading to the presumption of a grant. There, under an award made twenty-seven years before action, all rights of way in a particular locality, except those set out in the award, of which the way in dispute in the action was not one, had been extinguished. The facts of the case pointed so strongly to the use of the way in question having originated in a mistaken acting under the award, that the Judge in his summing up almost assumed the fact; but having ruled also that notwithstanding it, the proof of subsequent user as of right was sufficient to raise the presumption of a grant, and the jury having found in favour of the defendant, who claimed the way, the Court supported both the ruling and the finding, and Justice Le Blanc said—"Unless the jury could

in the words of the report refer the enjoyment for so long a time to leave, favour, or otherwise than under a claim or assertion of right, and, indeed, unless it could be referred to something else than adverse possession, I think such length of enjoyment is so strong evidence of its right that the jury should not be directed to consider small circumstances as founding a presumption that it arose otherwise than by grant." The direction of the Lord Chief Justice himself to the jury in the case of *Rogers v. Taylor* (14), to which I shall have to refer again, still further supports my view. But while the cases which I have cited throw light upon the point as to what circumstances will not negative the presumption of a grant arising from an uninterrupted enjoyment for twenty years, still further light is thrown upon the subject by a consideration of cases cited in the Court below, in which the presumption was held to have been properly rebutted.

The case of *Barker v. Richardson* (15) was one in which the owner of the servient tenement, a rector, tenant for life, was incompetent to make a grant. And it was held, therefore, that a grant by him could not be presumed.

In *Webb v. Bird* (16), which was the case of a claim, as stated in the declaration, to the enjoyment as of right of the "benefit and advantage of those streams and currents of air and wind which had used to pass, run and flow from the west unto the windmill," and which enjoyment was alleged to have been interrupted by the building of a school-house twenty-five yards to the west of the windmill, Wightman, J., in delivering the judgment of the Court of Exchequer Chamber, said as follows:—"In the present case it would be practically so difficult, even if not absolutely impossible, to interfere with or prevent the exercise of the right claimed, subject as it must be to so much variation and uncertainty, as pointed out in the judgment

(14) 2 Hurl. & N. 828; s. c. 27 Law J. Rep. Exch. 208, 173.

(15) 4 B. & Ald. 679.

(16) 10 Com. B. Rep. N.S. 268; s. c. 30 Law J. Rep. C.P. 384; in Exch. Ch. 13 Com. B. Rep. N.S. 841; s. c. 31 Law J. Rep. C.P. 385.

(13) 3 Kant, 294.

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below, that we think it clear that no presumption of a grant or easement in the nature of a grant can be raised from the non-interruption of the exercise of what is called a right by the person against whom it is claimed, as a non-interruption by one who might prevent or interrupt it."

Again, in *Chasemore v. Richards* (17), a claim was made to underground water which merely percolated through the strata in no known channels, and it was held by the House of Lords that the claim could not be supported as a right of property, and that looking to the casual and uncertain, as well as secret character of the enjoyment of such water, no grant of an easement could be presumed.

These cases, therefore, as direct authorities, go no further than to shew that a legal incompetence as regards the owner of the servient tenement, to grant an easement or a physical incapacity of being obstructed as regards the easement itself, or an uncertainty and secrecy of enjoyment, putting it out of the category of all ordinary easements, will prevent the presumption of an easement by lost grant; and, on the other hand, indirectly they tend to support the view that as a general rule where no such legal incompetence, physical incapacity or peculiarity of enjoyment, as was shewn in those cases, exists, uninterrupted and unexplained user will raise the presumption of a grant upon the principle expressed by the maxim, *Qui non prohibet quod prohibere potest, assentire videtur*.

This maxim brings me, secondly, to the consideration whether the easement of lateral support for buildings from adjoining soil differs, and if so, in what respects, from easements generally; and whether different principles or presumptions of law are to be applied to it. It is said by the Lord Chief Justice that this particular easement is one, the enjoyment of which it is practically impossible to resist. If that be so, then the maxim I have just quoted does not apply, and the proper inference would be that an easement comes within the authority of the cases of *Webb v. Bird* (16)

and *Chasemore v. Richards* (17), and cannot by any period of user, however long, be acquired. But the Lord Chief Justice does not go so far as this. His language upon the point is as follows. At page 183 he says—"I am very far from saying that when houses or buildings have stood for many years, especially when they appear to be of equal age, the presumption of a reciprocal easement of lateral support ought not to be made. It may reasonably be inferred that they were built under circumstances from which, at the present time, a grant would properly be implied. Thus, they may have been built by one owner or under a common building lease, or if built by different owners, where some arrangement for mutual support was come to. Thus, had the plaintiffs' premises remained in their original condition, I should have been prepared to make the necessary presumption to uphold the right. Where land has been sold by the owner for the express purpose of being built upon, or where from other circumstances a grant can reasonably be implied, I agree that every presumption should be made and every inference should be drawn in favour of such an easement short of presuming a grant when it is undoubted that none has ever existed. But in the absence of any such circumstances there is no form of easement to which, as it seems to me, the doctrine of presumption should be more cautiously and sparingly applied than the easement of lateral support." The Lord Chief Justice appears, therefore, to place the easement of lateral support for buildings in some special class of its own, and while admitting that the doctrine of a lost grant may be under certain circumstances applicable to it, to make its application subject to conditions and limitations other than those which apply to easements generally. Is, then, the nature of the easement so anomalous as to justify this treatment of it, and even if in its nature it does present anomalous features, are they such as have at any time been considered by the Courts to warrant distinctive treatment?

Upon the first of these two questions it may not unreasonably be argued that the physical impossibility of resistance to

(17) 7 H.L. Cas. 349; s. c. 29 Law J. Rep. Exch. 81.

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the enjoyment of the easement, if it exists at all, exists only in cases where while the servient tenement has to bear the burthen of the easement, it at the same time as a dominant tenement enjoys a corresponding benefit; that the tenement from which support is claimed must at the commencement of the period of enjoyment be land either in its natural state or built upon; if the former, that there is little if any more difficulty in physically resisting the enjoyment of the easement than there would be in obstructing the access of light to windows. If, on the other hand, the servient tenement be land built upon, then that the easement which the dominant tenement will obtain will be no other in kind than that which the servient tenement must either have already acquired or be in course of acquiring. Notwithstanding this reasoning I am not inclined to dispute that the easement of support for buildings from adjoining soil does possess physical features which distinguish it materially from most other easements, except, perhaps, that of the access of light to ancient windows, to which it has a strong analogy; and if the principles of law relating to easements were now to be settled for the first time, I might be disposed to limit this particular easement of support, and I may add that of light also, by conditions other than those which are applicable to affirmative easements. But the principles of law relating to easements are in the main settled, and the easement most analogous to the one in question here, namely, that of light, is found to be at common law placed as high as, and by the Prescription Act placed even higher than, affirmative easements, although one the obstruction of which in many cases must be of the greatest practical difficulty. Can it properly be said then that the difficulty or practical impossibility of obstruction in the case of the easement of support for a building by soil is such as to place it at common law in an entirely different category from other easements, and to render it subject to any real legal distinctions? I think not.

This very ground of difficulty and practical impossibility of obstruction was present to the minds of the learned Judges

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who took part in the judgment in the Court of Exchequer Chamber in *Webb v. Bird* (16), and whilst they decided against the easement claimed in that case on that ground, Blackburn, J., was careful to guard against the supposition that the reasoning of the judgment extended to the easement of lateral support for buildings. His words were as follows:—"I perfectly concur in the judgment, but wish for myself to guard against its being supposed that anything in the judgment affects the common law right that may be acquired to the access of light and air through a window, or to the right to support by an ancient building from those adjacent. I agree with my brother Willes in the Court below, that the case of the right to light, before the statute, stood on a peculiar ground." But the question can only be fully answered by tracing down in a little more detail the authorities upon the subject.

In *Palmer v. Flashes* (18), which was a case of lights, the resolution of the Judges put the right of support for an ancient house upon the same footing as the right to ancient lights. The fact alleged by the Lord Chief Justice, at page 114, that the case does not say what length of time will constitute a house or lights "ancient," and does not touch the subject of presumption, does not affect the value of the case upon the point for which I cite it. Again, in *Stansell v. Jollard* (19), Lord Ellenborough in terms affirmed in respect of a building which had stood for twenty years the right to support, "or, as it were, of leaning to the adjacent soil, by analogy to the case of lights." It is true that this ruling of Lord Ellenborough was questioned by the Chief Baron Pollock in the case of *Solomon v. The Vintners' Company* (5). But the two cases were very dissimilar in their circumstances, and may well stand together.

In *Hide v. Thornborough* (20), Baron Parke, afterwards Lord Wensleydale, held at Nisi Prius that where the house of the plaintiff had been supported for twenty years to the knowledge of the

(18) 1 Sid. 167.

(19) 1 Selw. N. P. 435 (Ed. 10), 457 (Ed. 11).

(20) 2 Car. & K. 250.

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defendants, it had acquired a right to the support, and the observations of the same Judge in *Gayford v. Nicholls* (21) are to the same effect.

In *Brown v. Windsor* (22) there was evidence of express assent on the part of the owner of the servient tenement to the plaintiff's house being rested upon his wall, but at the same time the Judges who decided the case appear to have been clearly of opinion that, apart from the express assent, the acquiescence for twenty-seven years in the enjoyment of the support, afforded presumptive proof of the right to the easement claimed. This case, however, was so special in its circumstances as not to afford much assistance upon the point under consideration.

The case of *Partridge v. Scott* (9) is a more important authority. There a house built more than twenty years before action stood upon land which had been excavated, according to the assumption of the Court, within twenty years, and if it had not been for the excavation of the land, the mining operations of the defendant in the adjacent soil would not have affected the house. The Court, in a considered judgment delivered by Alderson, B., decided that the right to lateral support for the house standing as it did upon excavated soil, had not been acquired. But the judgment at the same time in substance affirmed these propositions, namely, first that the house as an ancient house would, but for the excavation of the soil upon which it stood, have acquired an easement of support by virtue of an implied grant. Secondly, that, apart from the Prescription Act, such a grant might have been inferred from an enjoyment of the house, although standing upon excavated soil, for twenty years after the defendants might have been or were fully aware of the facts. The judgment, therefore, seems to assume that, in the case of a house standing upon soil in its ordinary condition, the servient owner has sufficient notice of the fact of support being enjoyed to raise the presumption of acquiescence, and the consequent implication of a grant by

(21) 9 Exch. Rep. 702; s. c. 28 Law J. Rep. Exch. 205.

(22) 1 Cr. & J. 20.

him when the enjoyment has continued for twenty years.

*Rogers v. Taylor* (14) was a case of subjacent support, in which there had been twenty years' enjoyment of the support, which, however, on the trial was alleged, on the part of the defendants, to have been only a continuous enjoyment subject to any acts negating any right of support. The Lord Chief Justice himself, as I have already mentioned, tried the case, and told the jury that he thought at the end of twenty years after the house had been built the plaintiffs would have acquired a right to support, unless in the meantime something had been done to deprive them of it, that the jury must presume that the additional burden was put on the land by the assent of the owner of the minerals, and must presume a grant by such owner of a right to support. He thereupon left it to the jury to say whether the plaintiff had enjoyed the support for the foundations of his house for twenty years, and the verdict found for the plaintiff on this direction was upheld by the Court.

*Humphries v. Brogden* (2) was a case of subjacent support of soil by soil, but the considered judgment of the Court of Queen's Bench, delivered by Lord Campbell, C.J., while affirming the existence of the right as a natural right of property unaffected by a reservation of minerals, went at great length into the analogies to be derived upon the principles of law relating to rights of lateral support; and treated as unquestionable law, the proposition that a right to lateral support of a house by the adjacent soil, may be acquired like other easements, by twenty years' uninterrupted enjoyment of such support. The language of the judgment upon this point is as follows: "Where a house has been supported more than twenty years by land belonging to another proprietor, with his knowledge, and he digs near the foundation of the house, whereby it falls, he is liable to an action at the suit of the owner of the house—*Stansell v. Jollard* (19), *Hide v. Thornborough* (20). Although there may be some difficulty in discovering whence the grant of the easement in respect of the house is to be presumed, as the owner of

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the adjoining land cannot prevent its being built, and may not be able to disturb the enjoyment of it without the most serious loss or inconvenience to himself, the law favours the preservation of enjoyments acquired by the labour of one man and acquiesced in by another who has the power to interrupt them; and, on the supposition of a grant, the right to light may be gained from not erecting a wall to obstruct it, the right to support for a new building erected near the extremity of the owner's land may be explained on the same principle." The words "with his knowledge," used in the passage I have quoted as well as in the ruling of Baron Parke, in *Hide v. Thornborough* (20), must I think be referable to cases like *Partridge v. Scott* (9) which is cited in the judgment, and to any other cases in which the circumstances of a house are of such a special character as to throw without the knowledge of the servient owner a greater than ordinary burden upon his tenement, and cannot be construed to mean that any special knowledge is required in the case of an ordinary house, which must, as a matter of course, and to the knowledge of every person, increase by its downward pressure the lateral thrust of the soil upon which it stands. The question of knowledge, however, as affecting the present case, is a material one, and will be considered by me more particularly before the close of this judgment.

Lastly comes the case of *Bonomi v. Backhouse* (7), the judgments and opinion in which certainly assume the right of lateral support to a building from adjacent land, to stand as high as other easements; if indeed they do not treat it as one more nearly approaching a right of property, and as such, more easily to be acquired than an ordinary easement.

The result of these authorities which I have cited, is to shew that, in the opinion of Judges, ranging over a period of 100 years, from 1761 to 1861, the grant of a right of support for buildings by adjacent soil, is one subject to like conditions as, and which may be acquired in like manner with easements generally, by proof of uninterrupted enjoyment for twenty years. Against the consensus of

dicta in support of this view, no direct authority or even distinct dictum is produced, and under such circumstances I do not feel myself justified, even if I were so disposed, which I am not, in running counter to judicial view, so long and consistently entertained. But the question still remains, whether the right of support acquired by user is an absolute one, attaching itself to any house which has stood the requisite time, or whether any and what limitation is to be put upon the right in this respect. I have already incidentally touched upon this question; and its answer, as it appears to me, is to be found in a reference again to the rule that a user which is secret, raises no presumption of acquiescence on the part of the servient owner, and as a consequence, no presumption of right in the dominant. If, therefore, a particular house were by reason of some intrinsic or extrinsic weakness of a serious character, or owing to some unreasonable method of construction, to require a greater amount of support than houses of its kind usually require, I think the mere enjoyment in fact of that extra support would not raise the presumption of acquiescence on the part of the servient owner, or create after twenty years' user a right to that extra support. If, on the other hand, a house is of ordinary stability and of reasonable construction, I think it equally clear that the owner of the adjacent soil must be assumed to know the amount of lateral support which such a house must need, and is bound to afford it as a matter of right after the house has, in fact, enjoyed it for twenty years. This question was discussed, but not decided in *Dodd v. Holme* (23).

In *Partridge v. Scott* (9) the house was ancient, but the excavation which necessitated the additional support was assumed to be modern, and the judgment therefore in that case is not a direct authority upon the question, but the dictum contained in the judgment that a grant of additional support ought not to be inferred from any lapse of time short of twenty years after the defendants might have been or were fully aware of

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the facts, is a distinct intimation of the opinion of the Court upon the question. If, then, knowledge on the part of the servient owner is required to make effective the enjoyment of additional support for a house where it is rendered necessary by the soil under it having been excavated, it must equally be required where, by reason of some internal alteration of the house itself, some special support beyond what the general construction and character of the house would indicate becomes necessary. This, as I have already said, I infer to have been the meaning of Parke, B., in *Hide v. Thornborough* (20), and of the Court of Queen's Bench in *Humphries v. Brogden* (2), when they speak of knowledge as a necessary condition of the easement of support. It may be that in the case of the conveyance of one or both of two houses belonging to one owner, each of which is, in fact, enjoying by virtue of some peculiarity of construction a more than ordinary amount of support from the soil of the other, reciprocal grants of the right of support may be presumed without proof of notice or knowledge, but such a case involves different considerations to those which belong to ordinary cases of easements claimed by user, and it appears to me that to hold that a house, whatever be its construction, and whatever the amount of support it may need, acquires merely by twenty years' enjoyment of such support an absolute right to it, would be to run counter to well-established laws of easements, as well as to offend against the principles of reason and justice on which those laws are founded.

Applying, then, these observations to the present case, I cannot concur in the ruling of Mr. Justice Lush at the trial, that where a building of any kind has stood for twenty years, it has acquired an absolute right of support without reference to the question of notice to the adjacent owner; and inasmuch as the effect of that ruling was practically to preclude the counsel for the defendants both from addressing the jury, and, if they were so minded, from calling witnesses upon the question of notice, I feel a difficulty in seeing how, under such

circumstances, a new trial can be refused to the defendants. But apart from what I hold to be the erroneous ruling of the learned Judge, and assuming that his ruling had been founded upon the doctrine of an implied grant, I should still be forced to the conclusion that the defendants are entitled to a new trial. At the close of the plaintiffs' evidence the position of the case stood thus:—The plaintiffs' witnesses had proved that the factory was of a construction reasonably stable, but had admitted at the same time that its construction was somewhat unusual. It was clear also that the result of the insertion into the chimney stack of the girders supporting the upper floors was to concentrate a greater weight at one part of the building, than would have been the case if the girders had, on the side adjoining the defendants' soil, taken their bearings, as they did upon the opposite side, from a dividing wall; and the cross-examination upon this point had raised the issue of the reasonableness of such a method of construction; and, lastly, although it was alleged on the part of the plaintiffs that the stack of brickwork would have fallen in consequence of the excavation in the adjoining soil, without the extra weight of the upper floors of the factory upon it, the counsel for the commissioners distinctly intimated that they were prepared to negative, by witnesses, that allegation. This being the position in which the case stood, I cannot hold that the jury could be properly directed, as a matter of law, to presume a grant of the easement claimed, upon the footing of its having been enjoyed with the knowledge of the defendants, and, as a consequence, with their acquiescence; and I think that the defendants' counsel were warranted in asking that the jury should determine whether the weight which had been put upon the adjoining soil was such as the owner of that soil could, under the peculiar circumstances of that case, be reasonably expected to be aware of and to provide for.

One more point remains for consideration, namely, whether, assuming the plaintiffs to be entitled to recover for the damage caused by the acts of the sub-

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contractors, the defendants are responsible in law for those acts. Upon that question I entertain no doubt.

It is properly admitted by the defendants' counsel that the case of *Bower v. Peate* (1) is undistinguishable from the present, and I am of opinion that the law there laid down by the Lord Chief Justice in delivering the considered judgment of the Court is correctly stated, and placed upon proper principles; and that the defendants in the present case who have ordered work to be executed from which in the natural course of things injurious consequences to the plaintiffs' factory might be expected to arise unless means to prevent them were adopted, are, if the plaintiffs are entitled to recover at all, responsible for the damage which has in fact arisen owing to the means adopted having proved to be insufficient.

For the reasons given I am of opinion that the judgment of the Court below should be reversed, and if the defendants desire it, that the case should go down for a new trial, otherwise that the judgment should be entered for the plaintiffs.

COTTON, L.J.—The facts of this case have been sufficiently stated by Lord Justice Thesiger, and therefore I will not repeat them. The plaintiffs have no right to recover in this action unless they are entitled to have from the land which was excavated the lateral support required by their house. The majority of the Judges in the Queen's Bench Division were of opinion that the plaintiffs, under the circumstances, had no such right, and the first question is, were they so entitled?

The plaintiffs in the first place contend that every owner of property is entitled, independently of user or grant and as a natural right of property, to have from the soil belonging to adjoining owners such support as any buildings on his own land require. In my opinion this cannot be maintained. In all cases in which the right of lateral support for buildings has been considered, the Judges have, with one exception which I will presently mention, treated the right to

lateral support for buildings as one to be acquired by enjoyment or grant, that is, an easement. This is, I think, the correct view. Every owner of land must from the first have had as a necessary incident a right to the support from his neighbour which the land in its natural state requires. This is a right subject to which all property must be taken, but independently of grant or right acquired by enjoyment, no one can have a right to throw a greater burden on his neighbour by requiring him to support artificial erections. The one exception to which I have referred was *Bonomi v. Backhouse* (7), where Lord Cranworth in the House of Lords speaks of the right of the plaintiffs in that case as a right of property. But I think the correct explanation is that in that case the operations of the defendant would have let down the land of the plaintiffs even if there had not been any buildings thereon.

The right of the plaintiffs to support for their buildings must then be considered as an easement, and the question is whether they have under the circumstances acquired any such right. It is not an easement within the statute 4 & 5 Will. 4. In this I agree with the Judges of the Queen's Bench Division. The plaintiffs must therefore make out their right in such way as is available for that purpose, independently of the statute.

It was argued for the defendants that the easement was of such a nature that it could not be acquired except by express grant. Although there is not much decision as to the right of support for buildings, the view thus contended for by the defendants is opposed to the opinions expressed by many Judges of the highest authority, who all treat the right of lateral support for buildings as capable of being acquired by use or enjoyment. I may refer to the decision of Lord Ellenborough in *Stansell v. Jollard* (19), to what is said by Mr. Justice Willes in *Bonomi v. Backhouse* (7), by Baron Alderson in *Partridge v. Scott* (9), by Baron Parke in *Gayford v. Nicholls* (21), by Baron Bramwell in *Rowbotham v. Wilson* (3), and by Lord

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*Campbell in Humphries v. Brogden* (2). Though in none of those cases is there any express decision on the point, all the Judges to whom I have referred assume that a right to lateral support for buildings is an easement capable of being acquired by any means by which, independently of the Act of 4 & 5 Will. 4, an easement can be acquired. These means are either an enjoyment beyond living memory, from which, in the absence of evidence to the contrary, enjoyment before the time of legal memory would be presumed, or by enjoyment for such a time as would be sufficient in the absence of evidence to the contrary to justify a presumption of a modern grant which has been lost.

In the present case the building had been for twenty-seven years in the state in which it was when the act of the defendants, which is the foundation of the action, was done. The question of enjoyment beyond the time of living memory does not arise, but there had been upwards of twenty years' enjoyment, and this is sufficient to raise a presumption that the enjoyment has been under a modern lost grant. This is no doubt liable to be rebutted, and in my opinion the real question on this part of the case is what evidence is sufficient to rebut the presumption. On this point there is very little authority, but, as stated by Lord Chief Justice Cockburn in this case (24), it is not necessary that the jury should come to the conclusion that in fact there was such a grant. The easement is analogous to that of a right to light before the statute of 4 & 5 Will. 4. and in *Cross v. Lewis* (11), Mr. Justice Bayley lays it down, and in my opinion correctly, that in such a case mere dissent by the owner of the alleged servient tenement will not be sufficient to rebut the presumption. If, therefore, the parties at the trial, as stated by the Lord Chief Justice, admitted that there was not, in fact, any grant, this in my opinion was not sufficient to rebut the presumption arising from twenty years' enjoyment or to justify a judgment for the defendants. But it may be argued that

this is contrary to what is said in many cases, namely, that twenty years' enjoyment raises a presumption only, and that the opinion which I have expressed will make such enjoyment confer an absolute right; but this is not so. The presumption may be rebutted by shewing that the owner of the servient tenement was not capable of making a grant, as, for instance, that he was a tenant for life, or of unsound mind; and the principal case, except *Webb v. Bird* (16), and *Chase-more v. Richards* (17), referred to by Lord Chief Justice Cockburn, where the presumption arising from twenty years' enjoyment was rebutted, is *Barker v. Richardson* (15), where the owner of the alleged servient tenement was incapable of making a grant. The cases of *Chase-more v. Richards* (17), and *Webb v. Bird* (16), turned on the peculiar character of the right claimed, and in the latter case Lord Blackburn expressly distinguished the right there in question from that on which the plaintiffs rely in the present case. An admission, therefore, or evidence, that in fact there was no grant, would not in my opinion rebut the presumption, and notwithstanding such evidence or admission, unless there was any other evidence to rebut the presumption, as, for instance, evidence that the adjoining owner was incapable of making a grant, the jury ought to be directed to find that there had been a grant since lost. This, however, does not decide the case in favour of the plaintiffs. Enjoyment does not confer a right unless the enjoyment has been open. Twenty years' enjoyment of lateral support only gives a right to such support as the actual construction of the house, if known to the adjoining owner, requires, or to such support as reasonably is required by a house of the dimensions and construction known to the adjoining owner, or apparent. In my opinion, therefore, though on the evidence in this case the jury ought to have been directed to find that the plaintiffs by enjoyment had acquired a right to some support, the question of the degree of support to which they had acquired a right still remained. There was no evidence that the owner of the adjoining house knew



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of the particular construction of the plaintiffs' house, and in my opinion the question ought to have been left to the jury to find whether the support required for the plaintiffs' house was more than reasonably required by a house of the apparent dimensions and character of the house of the plaintiffs, if used for the purpose for which the house was used.

If this question had been answered in the affirmative the verdict would have been for the defendants, but if answered in the negative for the plaintiffs. Mr. Justice Lush entirely withdrew the case from the jury, and in my opinion there must be a new trial if the defendants claim it.

I think it unnecessary to enter at length into the question whether, assuming the contractor Dalton to be liable to the plaintiffs, the defendants, the commissioners, are answerable for the injury caused by the acts of their contractor. On this point I agree with the decision in *Bower v. Peate* (1), that where a defendant has employed a contractor to do work which in its nature is dangerous to the neighbouring property, and damage is the result of the work done, the employer is liable though he has employed a competent contractor, and given him directions to take precautions in executing the work.

BRETT, L.J.—In this case it seems to me very desirable, in order to express exactly my view of the law, to commence by stating what I understand and assume to have been those facts material to the decision which were in evidence at the trial. I collect them from the judgments. It was not in any way argued before us that they had been misunderstood by the Judges of the Queen's Bench Division. As collected from the judgments of Mr. Justice Lush and the Lord Chief Justice, they were, that there had been before 1849 two dwelling-houses adjoining each other, each built to the extremity of the soil belonging to its owner, but each independently built, so that they were without any party wall. In 1849 the plaintiffs altered the dwelling-house then belonging to them into a coach factory, and so

altered the structure as to make it, as a building, different from what it had been before, but the same as it was when it fell. It was, as I apprehend, at the trial and on the arguments in the Queen's Bench Division, taken as a fact, proved or admitted, that they made the alterations without any grant from the owner of the adjoining premises of any right of lateral support, unless his assent is necessarily to be inferred from his taking no steps to resist the acquisition and enjoyment of such support. This is what I gather from the express statement of the Lord Chief Justice. And Mr. Justice Lush says nothing is shewn except that the adjoining owner was not asked for and did not give his assent to the alteration of the house into a factory. The adjoining owner was never, in fact, asked for, and never, in fact, gave his assent to the alteration of the house into a factory.

The adjoining owner, however, must have known that the building was in and from 1849 used as a coach factory instead of as a house. But there was no evidence that he knew the nature or extent of the structural alterations made in the building. The work complained of was done by one Dalton, a builder, under contract with the defendants. It was done according to the plans he was instructed to carry out without negligence on his part. The plans did not disclose any danger to the plaintiffs' building. Work done according to them might have been reasonably deemed to be sufficient to prevent any damage to it. But by exposure to the air the thick pillar of clay left by Dalton, according to the plans, between his workings and the plaintiffs' buildings, cracked and gave way, and so the plaintiffs' factory was brought down. The pillar of clay left might have supported the plaintiffs' land in its natural state, but did not support the land with the factory on it. Upon this evidence Mr. Justice Lush directed the jury as a matter of law to find a verdict for the plaintiffs, leaving them to move for judgment. Upon a motion to that effect, Mr. Justice Lush gave judgment that the direction was right, and that the plaintiffs were entitled to judgment the Lord Chief Justice and Mr. Justice

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Mellor gave judgment that the verdict ought to have been directed to be entered for the defendants, and that they were entitled to judgment. It was contended before us on the appeal that the judgment ought to be for the plaintiffs, or that there ought to be a new trial.

The learned Judges of the Queen's Bench Division seem to have agreed on many propositions, as that the right to lateral support from the adjacent soil of an adjacent owner necessary for buildings in addition to the support necessary for the soil on which they stand, is not a right of property; that such a right may exist, but if it does, it is a right which exists as the result of an easement, that such an easement can, in consideration of law, only have its origin in grant; that such an easement is not within the Prescription Act (2 & 3 Will. 4. c. 71); that upon proof of twenty years' enjoyment after knowledge by the adjoining owner of the support given by his soil and the absence of any other evidence, a jury ought to be directed to find for the claimant a right as if there had been a grant in the nature of an easement. The points of difference were that Mr. Justice Lush held, that where there has been in fact an enjoyment of lateral support to a building for twenty years without physical obstruction, the jury are to be directed as matter at law to find for the right, and no evidence is admissible to shew that there never was a grant, or that the defendant had no knowledge of the nature or extent of the support given by his soil or premises, or that he objected otherwise than by physical obstruction. And he deduced this doctrine as a necessary consequence, not of the Prescription Act (2 & 3 Will. 4. c. 71), but of the Limitation Act (3 & 4 Will. 4. c. 27). The other learned Judges held that enjoyment for twenty years with other circumstances may be *prima facie* evidence of an original reservation or grant, but that such *prima facie* evidence may be met by evidence arising either in the plaintiffs' or defendants' case, shewing that no such reservation or grant was ever in fact made; that if the evidence on the latter points be questionable, the whole evidence must be left to the jury; but if such evidence be

not questioned or questionable, the jury should be directed to find that there never was any reservation or grant, and therefore that there never was any right. They further held that as, in this case, the fact of there never having been any real grant or reservation was not questioned or questionable, the jury ought to have been directed to find for the defendants.

As to the question raised by reason of the employment of Dalton as an independent contractor, all the Judges were agreed that the case of *Bower v. Peate* (1) was applicable and binding, so that if the plaintiffs were entitled to the support they claimed, they were entitled to judgment both as against the commissioners and Dalton, whether there was or was not negligence on the part of Dalton, or, if there was negligence by Dalton, whether they had or had not the right to support. On the argument before us it was contended on behalf of the plaintiffs that the right to lateral support from the adjacent soil of an adjacent owner necessary for buildings, in addition to the support necessary for the support of the soil on which they stand, is a right of property; that such a right if only an easement is within the Prescription Act, that if not, and though the right be only an easement, yet a user for twenty years without physical obstruction, gives a legal right on which a Judge is bound to direct in favour of the plaintiffs, and in derogation of which no evidence is admissible; that at all events a user for twenty years without any evidence to explain the origin of it, entitles the person in possession to a direction to the jury to find a right as if by grant, and that in this case there was no evidence to explain the origin, and that the plaintiffs were, therefore, entitled to the direction which was given at the trial, and that there was evidence which at least ought to have been left to the jury, for them to say whether they would find that there had been a grant; and that there was evidence of negligence which ought also to have been left to the jury.

The first question, then, to be determined is, whether the right claimed is a right of property, for if it is, it is un-

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necessary to enquire further in this case, the plaintiffs being clearly entitled to succeed. If such a right is admitted; it existed *ex necessitate* from the moment the factory was constructed. It must be, if it exists, a right wholly independent of the consent or knowledge of the defendants created solely by the will and acts of the plaintiffs. The questions of twenty years' user, of knowledge by the defendants, and of negligence are all immaterial.

It is contended that this right is a right of property, first as the result of reasoning from principle, and, secondly, as being settled by authority.

As to the first, it is said that the right claimed is in strict analogy with rights which have been admitted to be rights of property, as the right to support of land not built upon, the right to the use of the light and air where adjacent soils are both unencumbered. The validity of this argument depends on whether the alleged analogy exists. It exists if the reasons for which the right has been recognised in those cases are applicable to the claim now under discussion, but not otherwise, *cessante ratione, cessat lex*. The reason given in those cases has been, that such rights must be admitted if the owner of land is to enjoy it, if he so pleases, as it must have been always in nature from the beginning. They are attributes of nature given for the common benefit of mankind. "They are (says Parke, B., in *Embrey v. Owen* (25), bestowed by Providence for the common benefit of man." And he relies upon the elaborate judgment of Mr. Justice Storey in *Tyler v. Wilkinson* (26), in which the right is founded on this reason. The support to land in its natural state by adjacent land in its natural state must necessarily have existed from the beginning; so must the run of water, so must the passage of light and air over lands unincumbered by buildings. Unless each owner is entitled as of natural right to enjoy, unmolested, his land with all these attributes given to it by nature, he has not a free and absolute use of it. Such a right "stands on natural justice, and is essential to

(25) 6 Exch. Rep. 353; s. c. 20 Law J. Rep. Exch. 212.

(26) 4 Mas. U.S. Rep. 397.

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the protection and enjoyment of property"—*Humphreys v. Brogden* (2). The reason, then, why the right is admitted in all those cases is, that without such a right, the owner cannot enjoy his land if he so pleases in the condition in which it was given for the enjoyment of man by nature. It is obvious that the reason is not applicable to a claim of support necessary for such a building as anyone may, according to his fancy, erect, requiring more or less support according to the size or form which he has given to the particular structure, but requiring by the hypothesis more support than is necessary for the support of the soil on which it stands. Not only is the reason given for allowing the right to be a right of property in those cases inapplicable to the case now under discussion, but to allow the present claim would be inconsistent with that reason; because the exercise of the claim by the one owner would prevent the enjoyment by the other of his land as nature gave it. As the result of logical reasoning or deduction from admitted principles, therefore, the present claim cannot be maintained.

Then follows the question, whether the authorities by which we are bound have decided otherwise. The first on this subject is the passage in *Rolle's Abridgment*, citing a case of *Wilde v. Minsterley* (27). It is an authority which has been so frequently cited and acted upon that it is certainly binding. But it consists of two parts, and it seems difficult to say with propriety that it is to be treated as a binding authority as to one and as wrong as to the other, more especially as the part which has been distinctly adopted, namely, that with regard to land unbuilt upon, is that which is introduced by the term "*semble*," whilst that which it is now said should be rejected is the cited decision of the Court. That decision is clearly that the claim to support for a house is not a right of property. The distinction taken is between the right of support to land in its natural state, and the right to support of buildings upon the land, and the right of the latter, in the case of a new house, is distinctly denied.

(27) 2 Rol. Abr. "Trespass," i. pl. 1.

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But if the right be a right of property, it must exist in the case of a new house just as much as in the case of an old house, as the right of the land itself to support is just as absolute the day after the two ownerships are called into existence, as twenty years or any number of years afterwards. The judgment of Lord Tenterden in *Wyatt v. Harrison* (8) is distinct:—"Whatever the law might be, if the damage complained of were in respect of an ancient messuage possessed by the plaintiff at the extremity of his own land, which circumstance of antiquity might imply the consent of the adjoining proprietor at a former time to the erection of a building in that situation, it is enough to say in this case that the building is not alleged to be ancient, but may, as far as appears from the declaration, have been recently erected; and if so, then, according to the authorities, the plaintiff is not entitled to recover. It may be true that if my land adjoins that of another, and I have not by building increased the weight upon my soil, and my neighbour digs in his land so as to occasion mine to fall in, he may be liable to an action. But if I have laid an additional weight on my land, it does not follow that he is to be deprived of the right of digging his own ground, because mine will then become incapable of supporting the artificial weight which I have put upon it. And this is consistent with 2 *Rolle's Abridgment*." The whole of this passage is necessarily wrongly conceived, and the decision of the case is wrong, if the right now claimed is a right of property; because it must be always remembered that, if the right is a right of property, the length of time since the house, in respect of which the claim is made, was built, is immaterial. The judgment of Alderson, B., in *Partridge v. Scott* (9), is also against the claim as a right of property:—"Rights of this sort, if they can be established at all, must, we think, have their origin in grant. If a man builds his house at the extremity of his land he does not thereby acquire any right of easement for support or otherwise over the land of his neighbour. He has no right to load his own soil so as to make it require the sup-

port of that of his neighbour, unless he has some grant to that effect. *Wyatt v. Harrison* (8) is precisely in point as to this part of the case and we entirely agree with the opinion there pronounced." This discussion is without meaning if the claim could be supported as of a right of property.

The statement of the law as to lateral support in the judgment in *Humphreys v. Brogden* (2) is the same. The principle is deduced by Lord Campbell from the passage in *Rolle*, and stated to be settled by *Wyatt v. Harrison* (8). After stating that the right of land in its natural state to support from adjacent land is a right of property, he goes on to say, "This right to lateral support from adjoining soil is not, like the support of one building upon another, supposed to be gained by grant, but is a right of property passing with the soil." It must in fairness be observed that the contrast he draws is in terms between the support given to a building by a building; but the reasoning is surely equally applicable to the support given to a building by land. *Gayford v. Nicholls* (21) seems directly against the claim. There it was decided that the plaintiff had no right to support for his building from defendant's adjacent soil. "This is not a case," says Baron Parke, "in which the plaintiff has the right of support of the defendant's soil, either by virtue of a twenty years' occupation or by reason of a presumed grant, or by a presumed reservation where both houses were originally in the possession of the same owner; for unless a right of support by some such means can be established the owner of the soil has no right of action against his neighbour who causes the damage by the proper exercise of his own right." Here, again, in one branch of the sentence he no doubt speaks of a right by virtue of a twenty years' occupation; but if he had intended that such an occupation of itself gave an indefeasable right he would not have introduced the next phrase as to a right by a presumed grant, which would be wholly unnecessary. For in order to found that presumption, there must be a twenty years' occupation. By the former phrase, therefore, he must have alluded,

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although only in general terms, to the user for twenty years from which, unexplained, a prescriptive user may be inferred. He speaks also of two houses, but that is in the phrase relative to a right by reservation. It was suggested, however, that the case of *Bonomi v. Backhouse* (7) is to the contrary, and is binding. But the first observation to be made is, that there is no reference in the facts stated by the arbitrator to any distinction between the support necessary for the land if it had been unbuilt on, and that necessary for the buildings. It is consistent with the statements and findings, that the workings complained of would have let down the plaintiffs' land, if there had been no buildings on it. This is easily accounted for, if the workings would in fact have let down the land itself of the plaintiffs, because the arguments appear to have been confined to the question of what is the cause of action in such cases and what is the time at which a cause of action accrues. The want of reference, either in the statement of facts by the arbitrator or in the arguments, to the distinction between the support to buildings and that to mere land, is natural and right (if the workings would have let down the land), though there had been no buildings on it; but is inexplicable otherwise. The judgments there are to be applied to excavations which would let down the plaintiffs' land though not built upon. In that view it was right to say that "in such cases as the present the right claimed by the plaintiffs was not a right founded upon the presumption of a grant or easement, but the common right of the owner of the land not to be injured in his property," &c. If the excavations in that case would not have let down the land as mere land of the plaintiffs, the judgment of Willes, J., in the Exchequer Chamber, the reasoning of which is adopted as correct in the House of Lords, could not have been given without enquiry as to the origin of the admitted right, in that case, of the plaintiff to support. "The right to support of land and the right to support of buildings stand," he says, "upon different footings as to the mode of acquiring them, the

former being *prima facie* a right of property analogous to the flow of a natural river or of air, &c.; whilst the latter must be founded upon prescription or grant, express or implied." "But the character," he says, "of the right, when acquired is in each case the same. The question in this case depends upon what is the character of the right." The question, therefore, was not what is the origin of the right, that is to say, the mode of acquiring it, but what is the character of the right when acquired. There was no question as to how the right in that case had been acquired. It was admitted to exist. But the statement in the judgments of the law as to the origin of such a right is directly contrary to the argument urged on behalf of the plaintiffs in the present case.

The right to support of buildings must, it is said, be founded on prescription or grant, express or implied. If so, it cannot be, and it is stated not to be, a right of property.

I am, therefore, of opinion that both on reason and authority, the right to support from the adjacent soil of an adjacent owner, necessary for buildings, in addition to the support necessary for the soil on which they stand, is not a right of property.

The next question is, whether there can be such a right given by means of an express grant, and if yes, what is the character of such a grant? In order to answer this question, the character of the right, if it can exist, should be considered. It has been pointed out in the case of the right to the advent of light to windows or other openings in a building, that no grant is required of leave to a man to build a house with windows or other openings at the extremity of his own land. He has a right without a grant. Such a grant would be futile and inoperative. But the erection of the building gives its owner no right to prevent his neighbour from building on his land so as to obstruct the light which would otherwise come across his land to the windows or openings of the first builder. The owner of the adjacent land may, however, by grant covenant that no buildings on his land shall interrupt the free

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use of light from across his land to the building erected or to be erected by the grantee on his land. This is the judgment of Littledale, J., in *Moore v. Rawson* (28). And such a grant imposes a servitude on the adjacent land of the grantor. See *per* Cresswell, J., in *Smith v. Kenrick* (29), which service, as pointed out in Note k, page 320, of *Gale on Easements*, must be a servitude like that of the Roman "*Ne Facias*," affecting the grantor's land by burthening it with a negative easement "*Ne Facias*." So in the present case, that is to say, in the claim of right to support now under discussion, a grant to the claimant of permission to build his house at the extremity of his own land, and so as to require support from the defendant's soil, would be futile. The claimant of such a right, has an absolute inherent right to build any house requiring any support at the extremity of his own soil. But there seems to be no valid reason why the adjacent owner should not by grant impose upon his own adjacent soil the servitude that it shall not be so dealt with as to leave the grantee's building without support from it, or an equivalent support provided by the owners of such servient soil. The analogy is perfect between this grant and that admitted to be legal and binding in the case of light. Suppose such a grant made for a valuable consideration. There is no principle of law which can forbid its being binding any more than in the case of a similar grant with regard to light. Such an easement, therefore, can be created by express grant. If there could be an express grant, imposing by its legal effect such a servitude on the grantor's land, can such a servitude be prescribed for at common law? Subject to the well-recognised conditions of the evidence upon which such a prescription may be founded, there seems to be no legal reason why it should not. If evidence were given of the existence, as long as living memory could reach, of a building situated at the extremity of the owner's soil, of such a size or form of

construction that it requires support from the soil of the adjacent owner, and if no evidence could be or were given by reason of the style or materials of the building or otherwise that the building was or must have been erected within the time of legal memory, there seems to be, and in my opinion there is no legal reason why the owner should not, on controversy, be entitled to prescribe for a right to the necessary lateral support. But in point of fact there can hardly arise any such case; the origin of the building at a time later than the time of legal memory could by scientific or other evidence invariably be proved. The difficulty of maintaining the right as by prescription at common law, is a difficulty of fact and not of law. Is the case within the Prescription Act? I agree with the unanimous decision of the Judges of the Queen's Bench Division that it is not; one reason alone is decisive. Such a negative easement as this is clearly not within the statute.

The next question is, can such an easement be supported by the application of what has been called the doctrine of a lost grant? Such a right might be created by an express grant; it is a right of easement, it is an easement strictly analogous to those to which it is admitted that upon certain evidence a jury should be directed to find a right in the plaintiff as arising upon a lost grant, or in which upon other evidence it should be left to a jury to say whether they would infer such a lost grant. Unless, therefore, it is justifiable in the Courts of the present day to say that they will no longer apply this doctrine even to the cases to which before it has been applied, or that they will not apply this principle to a case strictly analogous to the cases to which it has hitherto been applied, it must be applied to such a case as this. But I am of opinion that no Court has the power legally to set aside a principle of law which has been established as law by the highest tribunal or tribunals to whose decision the Court must bow, or to refuse to apply it to any case brought within the proposition enunciated in and by the principle. Moreover it has been repeatedly recognised by many Judges that this principle is applicable to this

(28) 3 B. & C. at p. 340.

(29) 7 Com. B. Rep. 515; s. c. 18 Law J. Rep. C.P. 176.

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very right. The statement in Selwyn's N.P. of the direction of Lord Ellenborough in *Stansell v. Jollard* (19), although it may not go further, does at least go the length of affirming that upon proof of a twenty years' user and no evidence which proves the contrary, a grant may be inferred, and the right thereupon found and established by the jury. The ruling of Parke, B., in *Hide v. Thornborough* (20), also affirms this proposition, "If there were twenty years' enjoyment by the plaintiff of the support of the house from the defendant's land, and it was known that the defendant's land supported the plaintiff's house, that is sufficient to give him a right of support;" this is at least to say that upon such evidence a jury may find that he has such a right. But the origin of such a right must be a grant, express or implied. This is, therefore, an authority that the jury may upon such evidence infer a grant. The passage before quoted from the judgment of Parke, B., in *Gayford v. Nicholls* (21), does of necessity also import at least this same proposition. The phrase "either by virtue of a twenty years' possession," imports at least that evidence of twenty years' possession is material evidence. But if material, it must at least be evidence from which a grant may be inferred. And in the next phrase he says in plain terms, "or by reason of a presumed grant." So Bramwell, B., in *Rowbotham v. Wilson* (3), "but after a house has stood in such a position twenty years, it acquires a right to support from the adjoining land." This must at least mean that it is evidence from which, if uncontradicted or unexplained, a grant may be inferred. In the judgment of Lord Campbell in *Humphries v. Brogden* (2), he says, "Where a house has been supported more than twenty years by land belonging to another proprietor with his knowledge, and he digs near the foundation of the house whereby it falls, he is liable to an action at the suit of the owner of the house;" he cites as authority *Stansell v. Jollard* (19) and *Hide v. Thornborough* (20); and the judgment of Willes, J., in *Bonomi v. Backhouse* (7), where, speaking of the right of support to buildings as distinguished from the right

of support to land, he says it must be founded upon prescription or grant, express or implied. It is impossible that these passages could have been written unless those who wrote them were of opinion that a right to support of a building from the adjacent soil of an adjacent owner might be inferred from evidence of twenty years' user. I am thus brought to acquiesce in all the propositions in which the learned Judges of the Queen's Bench Division were agreed, and to have only further to give my opinion upon the proposition on which they differed. Unless we are controlled by authority, we ought not, as it seems to me, to take what I will respectfully venture to call, the bold step taken by Mr. Justice Lush. He deprecates that which he affirms was an assumption of legislative power by the Judge who introduces the fiction of a lost grant. But with deference I think he exercises the power of legislation and does not confine himself to the duty of declaration, when he holds that a twenty years' user without physical obstruction shall of itself, as a matter of law, confer a right, not because such facts bring the case within the prescription act or the limitation act, but by judicial authority, because the statute of limitations has fixed twenty years as the limit, after which, under certain conditions, an action cannot be maintained for the recovery of real property. I incline to agree that the Judges of former times did encroach upon the legislative function in what they held with regard to the doctrine of lost grant, and to the effect they gave in support of that doctrine, and of the doctrine of prescription, to a user of twenty years. Yet so far as their ruling has been affirmed by Courts, to whose decision we owe obedience, we are, in my opinion, bound to accept and apply their ruling, but I do not think that any Judges now should, in order to overcome a different hardship or difficulty, follow their example. This then being the doctrine which is to be applied, a question has been raised whether, in applying it, it is necessary to find formally that there has been a grant which is lost, or whether it is sufficient to find the fact of an uninterrupted user for twenty years (after

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knowledge of the burden imposed on the adjacent land) without going on to find the inference that there has been a grant, and that it has been lost. That must depend on whether the inference is to be treated as a necessary legal consequence or as an inference of fact. If it is an inference merely of law, I can see no distinction, not even the slightest, between the doctrine, or application of the doctrine, of a lost grant, and the doctrine of prescription under the Prescription Act. If we were to hold that it is a mere inference of law, it seems to me that we should be doing in an analogous form precisely what was done by the judgment of Mr. Justice Lush, which I think cannot be supported. Such a decision is legislation and not declaration.

The forms of expression used by Lord Ellenborough, by Parke, B., and Bramwell, B., in the passages I have cited, are relied upon as shewing, it is said, that in their opinion a twenty years' user, uninterrupted in fact, gives an absolute right, and therefore a right which cannot be contradicted, and therefore a right on the part of the plaintiff, who has proved such user, to a judgment thereupon that he has established his right. But those expressions are consistent with the view that those learned Judges were speaking of the effect of evidence of user for twenty years without any other evidence, and as laying down that in such a case, in a trial before a Judge and jury, the Judge would be bound to direct the jury to find the existence of a lost grant. They seem to me, when read with their context, to be only consistent with that interpretation of them. I do not believe that any one of those learned Judges meant to say that in the case of a trial by Judge and jury, the plaintiff could succeed without a finding by the jury, under direction or upon consideration, of the existence of a lost grant. None of them meant to say that a special verdict would have been good which did not in terms find the existence of a grant.

No case, I am sure, could be found in which, on trial with a jury, the Judge has not either directed the jury to find, or left them to find, the fact, as a fact, whether there has been a grant. No

Judge could have called this doctrine a "revolting doctrine" unless he had been of opinion that the jury must be asked to find the fact, as an existing fact. If it were only an inference of law, there is nothing which can be called revolting in it. In order, therefore, to support such a claim, the existence of a lost grant must be found as a fact. If the case is brought before a Judge without a jury, he must find such fact, though he may not do so in terms. If it is tried before a Judge and jury, inasmuch as the Judge cannot in such a case determine any fact, it is the jury which must find the fact. This raises another question, namely, whether the Judge may under certain circumstances direct the jury as matter of law to find the fact, and if he may, what are the circumstances under which he may or must do so? It is admitted by every one, I think, that he is bound to do so when there is evidence of twenty years' uninterrupted user after knowledge of the facts, and no other evidence. Now arises another question, which is, what other evidence is admissible or may be acted upon? Is it only evidence of acts of interruption, or although no act of interruption has been done, may evidence be given tending to shew that no grant was in fact ever made? If the parties are alive may they be called to prove conclusively that there never was a grant? If the question whether there ever was a grant is one of fact to be found by the jury, I know of no principle of law which can exclude evidence tending to shew that there never in fact was such a grant. The Legislature might forbid such evidence to be given, but then the Legislature would in reality enact with regard to a right to lateral support a Prescription Act similar to that which they have enacted with regard to lights and rights of way. To introduce into the common law proposition as to a lost grant the limitation of interruption only by acts is to introduce a limitation which it required an Act of Parliament to introduce in the case of lights and of ways. The limitation as to them has been held to be an inference from the statute. The legislature has not done so. The doctrine of inferring a lost grant was brought for-



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ward and applied because there is no prescription. The distinction between the two doctrines and the legal mode of applying the latter seems to me to be clearly laid down by Lord Mansfield in *The Mayor of Kingston-upon-Hull v. Horner* (30). In that case the question was left to the jury, whether they would not consider the usage from the year 1441 to the time of the action brought, namely, 1774, a sufficient ground to presume a grant of the duties between the 5th Richard 2, anno 1382, and the year 1441. There had therefore obviously been an uninterrupted user for more than three hundred years, and yet the question was left to the jury, and Lord Mansfield says, "Now with regard to admitting evidence to satisfy a jury that a charter did exist within time of memory which is not produced by record, my opinion is this, that all evidence is according to the subject-matter to which it is applied. There is a great difference between the length of time which operates as a bar to a claim and that which is only used by way of evidence. A jury is concluded by length of time that operates as a bar; as where the Statute of Limitations is pleaded in bar to debt, though the jury is satisfied that the debt is due and unpaid, it is still a bar. So in the case of prescription. If it be time out of mind, a jury is bound to conclude the right from that prescription, if there could be a legal commencement of the right. But any written evidence shewing that there was a time when the prescription did not exist, is an answer to a claim founded on prescription. But length of time used merely by way of evidence may be left to the consideration of the jury to be credited or not, and to draw their inference one way or other according to circumstances." And afterwards, "In questions of this kind possession goes a great way, but there is no positive rule of law which says that a hundred and fifty years' possession, or any length of time within memory, is sufficient ground to presume a charter." He must by the context mean to presume as a presumption of law. Again, "under circumstances it may be left to the consideration of a

jury or of a Court of Equity, if the case comes properly before them, whether there is not a sufficient ground to presume a charter." *Darwin v. Upton* (10) and *Cross v. Lewis* (11), and the case of *Campbell v. Wilson* (13) are, as I understand them, precisely to the same effect, namely, that although the user is for twenty years without interruption the inference must be left to the jury.

I am therefore of opinion, in conclusion, that the right to lateral support from the adjacent soil of an adjacent owner necessary for buildings, in addition to the support necessary for the soil on which they stand, is not a right of property, but that such a right may be established; that when it exists it consists of a negative easement by which the land of the adjacent owner is burdened with the servitude that it cannot be so used as to deprive the building of the adjacent owners of the support acquired by virtue of the easement unless an equivalent support is supplied; that such an easement might be given at once by express grant of the owner of the servient property, and the servitude so imposed would pass with the land; that such a servitude might as matter of law be proved as by prescription at common law, but could hardly be so proved as matter of fact, in accordance with the legal conditions of evidence as to such a prescription; that such an easement is not within the Prescription Act, 2 & 3 Will. 4. c. 71; that such an easement, if it exists in a particular case, must in contemplation of law have originated in a grant; that the claim to it may be supported by evidence complying with the legal doctrine of an alleged lost grant; that if in any particular case evidence be given of the existence for twenty years without interruption of a building which for that period has required and had support from the soil of an adjacent owner, and the building is of such a nature or in such a position that it must have been apparent to any observant person that it required such a support, or if the adjacent owner in fact had noticed that it required such a support, and if no evidence be given tending to shew that there could not have originally been or was not, and that there never has been a grant, the

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plaintiff would be entitled to a direction, as matter of law, to the jury to find for the plaintiff, a right to support as if he had had a grant which is lost. If the existence of the building for twenty years be proved, but there is contradictory or doubtful evidence as to the question whether it must have been apparent that it required support, or whether the adjacent owner had notice that it required support, or if circumstances tending to shew that there could not have been, or was not and never has been any grant, or the like, then the evidence must be left to the jury for them to say whether they will or will not find for the plaintiff a right to support in respect of a grant which is lost. If there be no evidence of the existence of the building for twenty years, or if there be undisputed or necessarily conclusive evidence, or if it be admitted that there was no grant, and never had been any grant, then the defendant is entitled to a direction, as matter of law, in his favour.

Upon the present occasion it seems to me that the case was at the trial treated by all the parties upon the footing that there was conclusive evidence, or an admission, that there never had been a grant. I am of opinion that there was no evidence of negligence in excavating. I am therefore of opinion that all the defendants were entitled to a direction in their favour, that the plaintiffs had no right to the support they claimed, and that they had given no evidence of negligence, and that, therefore, the plaintiffs had made no case against any of them.

The point raised with regard to *Bower v. Peate* (1) does not, therefore, become material. I therefore give no opinion upon it. The judgment should, in my opinion, be affirmed.

*Judgment reversed, and new trial granted, otherwise judgment for the plaintiffs.*

Solicitors—Shum & Crossman, agents for Stanton & Atkinson, Newcastle-on-Tyne, for the plaintiffs; Prior, Bigg, Church & Adams, agents for Thomas Dalton, Leeds, for the defendant Dalton; Hare & Fell, agents for the Solicitor to the Treasury, for the Commissioners of Works.

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1878. { BIDDLE AND OTHERS v. THE  
Nov. 26. { NORTH STAFFORDSHIRE RAILWAY COMPANY.\*

*Appeal—Special Case stated by Arbitrator under Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), s. 25—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 19.*

*Under section 19 of the Judicature Act, 1873, an appeal will lie to the Court of Appeal from a decision of a Divisional Court on a special case submitted by an arbitrator appointed under the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), s. 25.*

This was an appeal from a decision of the Queen's Bench Division on a special case stated by an arbitrator appointed to assess compensation under the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), s. 25.

In the Special Case the arbitrator proposed two questions for the opinion of the Court, and then proceeded to award to the claimants various sums in the alternative, according as the Court should answer either the first question in the affirmative and the second in the negative, or both questions in the affirmative, or both questions in the negative, or the first question in the negative and the second in the affirmative.

The Court having answered the first question in the affirmative and the second in the negative, the defendants appealed.

*Sutton*, for the plaintiffs, took the preliminary objection that no appeal would lie.—The arbitrator has stated a case for the opinion of the Court, and gives his own final decision according as the Court may find. This is not an arbitration under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 5, which refers to proceedings of a different kind—*Jones v. The Victoria Graving Dock Company* (1).

\* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

(1) 46 Law J. Rep. Q.B. 219; s. c. Law Rep. 2 Q.B. D. 314.

*Bidder v. North Staffordshire Rail. Co. (App.), Q.B.*

*J. Brown (W. Graham with him)*, for the defendants.—This is exactly the same as a reference under the Common Law Procedure Act, 1854—*Rhodes v. The Airedale Drainage Commissioners* (2); *In re the Dare Valley Railway Company* (3). The arbitrator had power to state a Special Case. The submission may be made a rule of Court, and comes under section 5 of the Common Law Procedure Act, 1854. The Court below therefore had jurisdiction, and an appeal will lie from their decision. See the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 19.

*Sutton*, in reply.—Under the Common Law Procedure Act, 1874, section 5, “judgment may be entered” according to the opinion of the Court where so ordered. But here there is no action and no judgment, and the decision of the Court below is merely an expression of opinion.

*BRAMWELL, L.J.*—I have considerable doubt whether a Court of error would have had jurisdiction to hear such an appeal as this before the passing of the Judicature Act, simply because of the technical objection that there is no judgment to appeal from. In a reference under the Lands Clauses Consolidation Act (in which there is a submission, which may be made a rule of Court), I doubt whether the arbitrator could order payment of the amount. I think he could only find the amount of compensation, and I doubt whether the Court could have ordered payment or given judgment upon a special case. But I think on the proper construction of the Judicature Act, 1873, the decision of the Divisional Court is an “order or judgment” within section 19.

*BRETT, L.J.*—A Court of error has decided that an arbitrator under the Lands Clauses Consolidation Act, is an arbitrator under the Common Law Procedure Act. He has, therefore, under section 5 of that Act, power to state a special case, which the Divisional Court has jurisdiction to hear. The decision on that special case is an order under section 19 of the Judicature Act, 1873.

(2) 45 Law J. Rep. C.P. 337, 361; s. c. Law Rep. 1 C.P.D. 402.

(3) Law Rep. 4 Chanc. 554.

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*COTTON, L.J.*—I am of the same opinion. It might have been otherwise if the arbitrator had no power to state a special case. Then it might have been said that the Court was merely assisting the arbitrator in coming to a conclusion which must be final.

*Appeal allowed.*

Solicitors—Lewis & Sons, agents for Sheratt & Son, Kidsgrove, for plaintiffs; Burchells, for defendants.

[IN THE COURT OF APPEAL.]

1878. } *JAMESON v. THE BRICK, STONE AND*  
Dec. 6. } *LMW COMPANY (LIMITED).*\* *McSmith*  
*5228 Ch*

*Bankruptcy—Cause of Action accruing after Bankruptcy—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), sections 15, 17, 25.* *412*

*The Bankruptcy Act, 1869, does not in any way affect the right of an uncertificated bankrupt to sue in respect of causes of action accruing after bankruptcy.*

*Herbert v. Sayer* (5 Q.B. Rep. 965; s. c. 12 Law J. Rep. Q.B. 286) followed.

This was an action for the price of certain plans, &c., prepared for the defendants by the plaintiff, a surveyor, between February and September, 1877. The plaintiff had been adjudicated a bankrupt on the 8th of May, 1873. The writ in this action was issued on the 16th of January, 1878, and the bankruptcy was closed on the 22nd of January. The trustee of the bankruptcy neither disclaimed the contract between the plaintiff and the defendants, nor interfered in any way in the matter. The defendants pleaded that at the time of the accruing of the causes of action, and at the time of action brought, the plaintiff was an uncertificated bankrupt, and therefore not entitled to bring the action. At the trial before Baggallay, L.J., at the Newcastle summer assizes, judgment was entered for

\* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton L.J.

2 K

*Jameson v. Brick, Stone and Lime Co., App.*

the plaintiff, subject to a reference as to the amount due.

The defendants now appealed.

*Digby Seymour and Gainsford Bruce*, for the defendants, argued that under sections 15, 17 and 25 of the Bankruptcy Act, 1869, the right of action in respect of after acquired property vested absolutely in the trustee, and that unless the trustee had disclaimed, he alone could bring the action. They cited—*Crofton v. Poole* (1), *Elliot v. Olayton* (2), *In re Dowling*; *ex parte Banks* (3), *Ex parte Vine*; *in re Wilson* (4), *Webb v. Fox* (5), *Motion v. Moojen* (6).

*Oave*, for the plaintiff, contended that the law with respect to the capacity of a bankrupt to sue was not affected by the Bankruptcy Act, 1869, and remained as decided in *Herbert v. Sayer* (7) and *Morgan v. Knight* (8) (see per *Erle, J.*, p. 169).

PER CURIAM.—This case is concluded by that of *Herbert v. Sayer* (7). The present Act has the same intention as 6 Geo. 4. c. 16. sects. 63 and 127, and 1 & 2 Will. 4. c. 56. sect. 25, and has made no alteration in the law on this point.

*Judgment affirmed.*

Solicitors—Williamson, Hill & Co., agents for J. Philipson, Newcastle-on-Tyne, for plaintiff; Cookson, Wainwright & Co., agents for Clayton & Gibson, Newcastle-on-Tyne, for defendants.

- (1) 1 B. & Ad. 568; s.c. 9 Law J. Rep. K.B. 59.
- (2) 16 Q.B. Rep. 581; s.c. 20 Law J. Rep. Q.B. 217.
- (3) 46 Law J. Rep. Bankr. 74; s.c. Law Rep. 4 Ch. D. 689.
- (4) 47 Law J. Rep. Bankr. 116; s.c. Law Rep. 8 Ch. D. 364.
- (5) 7 Term Rep. 391.
- (6) 41 Law J. Rep. Chanc. 596; s.c. Law Rep. 14 Eq. 202.
- (7) 5 Q.B. Rep. 965; s.c. 12 Law J. Rep. Q.B. 286.
- (8) 16 Com. B. Rep. N.S. 669; s.c. 33 Law J. Rep. C.P. 168.

[IN THE QUEEN'S BENCH DIVISION.]

1878.

May 27. } BUCK v. ROBSON AND ANOTHER.

July 2. }

33 + 34

Stamp—Stamp Act (32 & 33 Vict. c. 97), s. 48—Order for Payment of Money—Assignment of Debt—Assignment of Money to become payable under a continuing Contract.

A contract was entered into by which A. was to build a boat for B. for the sum of 80l., to be paid on completion and delivery of the boat to B. During the progress of the work B. advanced to A. 40l. on account; and subsequently A., being indebted to the defendants, agreed to make over to them the balance of 40l. to become due from B., and wrote to B. in these terms: "I hereby assign to Messrs. Robson the sum of 40l., or any other sum now due or that may hereafter become due, in respect of the steam launch I am building for you."

The plaintiff, as trustee for A.'s creditors, and the defendants having both claimed to be entitled to the 40l. now payable by B., the question arose whether the above letter was an order for the payment of money or the assignment of a debt:—

Held, that it was an assignment of a debt, and admissible in evidence at the trial for the defendants on payment of the stamp duty and penalty.

This was an interpleader issue tried before Hawkins, J., at Durham, at the March Assizes, 1878, when a verdict was given for the plaintiff.

The sum claimed was 40l., and it was in respect of a debt due by one Jopling to Tate, a shipbuilder, being the balance of the price of a steam launch built by the latter for the former under a contract.

The contract was to build the launch for 80l., payment to be made on completion and delivery to Jopling. During the building Jopling advanced Tate 40l. on account, and Tate, being indebted to the defendants, made over to them the balance of 40l. to become due from Jopling, and notified that he had done so by a letter to Jopling in these terms:—

"July 31, 1877.

"Dear Sir,—I hereby assign to Messrs. Robson & Son, boatbuilders, Sunderland,

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the sum of 40*l.*, or any other sum now due or that may hereafter become due, in respect of the steam launch which I am building for you: I will thank you to hold the same at their disposal, and their receipt for the amount due will be a full and sufficient discharge."

Before the boat was finished Tate went into liquidation, and the plaintiff was appointed trustee.

Jopling obtained possession of the boat; and as the trustee and Robson both claimed to be paid the 40*l.*, he interpleaded, and paid the 40*l.* into Court.

The claim of Robson being founded on the assignment of the debt by Tate, it was objected at the trial that the letter of the 31st of July was inadmissible for want of a stamp, and being an order for the payment of money, the duty and penalty could not be paid afterwards so as to make it admissible. The learned Judge so held, and a verdict was given for the plaintiff.

A rule was afterwards obtained to set aside the verdict and for a new trial, on the ground of misdirection, against which

*Lofthouse* now shewed cause.—The learned Judge was right in holding this to be within the Stamp Act. Section 48 of 33 & 34 Vict. c. 97, describes this document exactly. It is "an order for the payment by a person at a time after the date thereof of a sum of money sent by the person making the same to the person by whom the payment is to be made." *Ex parte Shellard; re Adams* (1) is a direct authority.

The Court then called on

*McOlymont*, in support of the rule.—There was here a continuing contract, and payment was to be made when the boat was finished. The letter was therefore an assignment of a debt, and is within subsection 6 of section 25 of the Judicature Act, 1873. *Brice v. Bannister* (2), just decided in the Court of Appeal, shews that this was a valid assignment of a debt to become due. In *Jones v. Simpson* (3) an order by a consignor to a consignee to

pay the proceeds of a shipment consigned to him to a third party was held not to be an order for the payment of money. So, too, *Diplock v. Hammond* (4), where the words were, "I authorise you to pay 365*l.*, being the amount of my contract." He cited also *Splidt v. Bowles* (5), *Douglas v. Russell* (6), *Heath v. Hall* (7).

*Lofthouse* in reply.

*Our. adv. vult.*

The judgment of the Court (8) was (on July 2) delivered by

COCKBURN, L.C.J.—This was an interpleader issue which came on for trial before Mr. Justice Hawkins, the subject-matter of the contest being a debt of 40*l.* due as part of the price of a steam launch from one Jopling to Tate, a shipbuilder, whose estate had gone into liquidation, and which was claimed on the one hand by the plaintiff Buck, as trustee of the estate, on behalf of the creditors, and on the other by the defendants, Robson & Son, under an assignment of this debt made to them by Tate prior to his going into liquidation, but the validity of which was disputed on the part of the creditors. Both parties having instituted proceedings against Jopling, the latter interpleaded, and brought the 40*l.*, the amount of the debt, into Court to abide the result.

The facts were as follows:—Tate, the insolvent, had entered into a contract with Jopling to build for him a steam launch for the sum of 80*l.*, the price to be paid when the boat should be completed and delivered. But though by the contract no part of the price was payable in advance, Jopling, during the progress of the work, advanced to Tate 40*l.* on account. In this state of things Tate, being indebted to Robson & Son, who are timber merchants, for timber supplied to him, agreed to make over to them the further 40*l.* which would become due to him from Jopling on the completion of the contract; in furtherance of which he addressed a

(4) 5 De Gex, M. & G. 320; s.c. 23 Law J. Rep. Chanc. 660.

(5) 10 East, 279.

(6) 4 Sim. 524.

(7) 4 Taunt. 326.

(8) Cockburn, L.C.J., and Mellor, J.

(1) 43 Law J. Rep. Bankr. 3; s.c. Law Rep. 17 Eq. 109.

(2) 47 Law J. Rep. Q.B. 722.

(3) 2 B. & C. 318.

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letter to Jopling of the 31st of July, 1877, in these terms: "Dear Sir,—I hereby assign to Messrs. Robson & Son, boat-builders, Sunderland, the sum of 40*l.*, or any other sum now due or that may hereafter become due, in respect of the steam launch which I am building for you. I will thank you to hold the same at their disposal, and their receipt for the amount will be a full and sufficient discharge." This letter having been forwarded by Robson to Jopling, the latter replied as follows:—"I am in receipt of your letter, and Mr. Tate's order to pay you the sum of 40*l.* on account of the boat he is building for me. This shall have my best attention when it is finished to my satisfaction." Before the boat was finished Tate, who had previously been in difficulties, went into liquidation, and the plaintiff Buck was appointed trustee on behalf of his creditors. Jopling, for whom the launch had been built, objected to the material with which a portion of the vessel had been constructed, but in order that it might not fall into the hands of the trustee, he, with the acquiescence of Tate, took possession of it, and in order to obtain possession paid a sum of 9*l.* 11*s.* to satisfy a distress for rent which had been put in by the landlord of Tate's premises, and under which the launch had been seized.

We are not in the present case embarrassed by having to consider how far these circumstances might have afforded to Jopling good ground for treating the assignment of the debt otherwise due from him to Tate on the completion of the launch as subject to any counter-claim on his part, in respect of these particulars. Jopling having interpleaded and paid the amount into Court, is not before us so as to be able to insist on the inefficacy, entire or partial, of the assignment of the debt, on the ground of any counter-claim which he might have against Tate. We have to deal with the question only as between the parties to the issue. On the trial the claim of the creditors' trustee being met by the claim of Messrs. Robson, founded on the assignment of the debt as made by the letter of the 31st of July, an objection was taken to the admissibility

of the document, on the ground that it was in effect an order for the payment of money, and as such inadmissible for want of a stamp, the defect being one which was not curable under the Stamp Act by the payment of the duty and the penalty. On the other hand, it was contended that the document in question was not an order to pay money, but an assignment of a debt to accrue due, which under the statute could be stamped *ex post facto* on payment of the duty and penalty.

The learned Judge ruled that the document was in effect an order for the payment of money, and therefore being unstamped, altogether inadmissible, and he would have given judgment for the plaintiff, but the counsel for the plaintiff admitting that if the document was an assignment of the 40*l.* accruing due from Jopling, it would, on payment of the stamp duty and penalty, entitle defendant to the verdict, and consenting, if such should be the view of the Court, to an order barring the plaintiff's claim rather than that the parties should be put to the expense of a new trial, the matter came before us in point of form on a motion for a new trial, but practically with a view to a binding decision between the parties.

We are of opinion that the contention of the defendants' counsel is right, and that the letter in question was in effect, not an order for the payment of money, but the assignment of the debt. At the time of the trial of this issue it had been held by Vice-Chancellor Bacon in a case of *Ex parte Shellard; re Adams* (1), that such a document was an order for the payment of money, and as such inadmissible, if wanting a stamp. In that case two contractors named Adams and Kerby, who were erecting some gasworks for the Bristol United Gaslight Company, addressed the company as follows:—"We shall be obliged by your paying Mr. Joseph Shellard the sum of 200*l.* out of money payable to us on the completion of our contract for buildings now being built by us for your company, and his receipt shall be a discharge of the same."

There being in substance no difference between this letter and the one in the

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case before us, we should have been bound equally with the learned Judge on the trial of this issue by the authority of this decision, as that of a Court of co-ordinate jurisdiction. But, concurrently with the present litigation, a case of *Brice v. Bannister* (2), which turned on the effect of a precisely similar document, was pending in the Court of Appeal; and judgment therein having been delivered just before the present case was argued before us, we were of course desirous of seeing a report of the judgment before we gave judgment in the case before us. The report of that case has not as yet been published, but by the courtesy of the learned reporters we have been furnished with a copy of the forthcoming report.

The decision of the Court of Appeal appears to us to warrant a different view from that taken by Bacon, V.C. In *Brice v. Bannister* (2), a contract had been entered into between the defendant Bannister and one Gough, a shipbuilder, under which the latter was to build a vessel for the defendant, the price to be paid by certain instalments corresponding with certain stages in the construction of the vessel, the last on its final completion. The last stage having been entered on, the builder being indebted to the plaintiff and pressed by him for payment, delivered to him a letter addressed to the defendant in these terms:—"I do hereby order, authorise and request you to pay to Mr. William Brice, solicitor, Bridgewater, the sum of 100*l.* out of money due or to become due from you to me, and his receipt for same shall be a good discharge. Dated 27th of October, 1876."

This letter was duly communicated to Bannister, but he declined to be bound by it; and the shipbuilder, being unable to complete the vessel for want of funds, the defendant advanced him sums of money for the purpose amounting to more than 100*l.*, the sum referred to in Gough's letter as to be paid to the plaintiff. An action having been brought by the plaintiff Brice against Bannister to recover the 100*l.*, the defendant, by way of counter-claim, sought to set off the amount of the advance made by him to

the builder to enable him to complete the vessel. But it was held by Cotton, L.J., and Bramwell, L.J., Brett, L.J., dissenting, that by the effect of the document of the 27th of October an absolute assignment of the accruing debt was made to the plaintiff, which could not be affected by any payments afterwards made to the assignee by the debtor. As we read this judgment it leaves the question open how far it may be competent to a debtor whose debt accruing due on the completion of a contract has been thus assigned to a third party to set off as against the assignee counter-claims arising out of the contract itself, as for bad materials, bad workmanship, and the like, as he might have done against the assignor himself, his proper creditor. It is one thing to say that where a creditor assigns to a third party a debt accruing due, the right of the assignee, if the debt actually becomes due, cannot be derogated from by any independent liabilities of the creditor to the debtor subsequently arising—a very different thing to say that liabilities of the creditor to the debtor arising out of the contract before the debt becomes due, may not be taken into account. But, as has already been pointed out, the debtor not being before us, no such question arises in the present case. The importance of the judgment arises from its appearing that an order from a creditor to his debtor to pay to a third party, was treated by the Court of Appeal as an assignment, and not as an order for the payment of money.

It is true that the question as to the distinction between these two classes of instruments, more especially with reference to the question of stamp duty, did not directly arise in *Brice v. Bannister* (2) as in the present case. But it appears to have been assumed on all hands that, subject to the disputed question as to how far the defendant was entitled to set off the advances subsequently made by him to the assignor, the effect of the instrument was, as between the builder and the defendant, to all intents and purposes an assignment of the debt. For had the direction to the defendant to pay to the plaintiff amounted to more than what is

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technically termed an order for the payment of money, the liability of the drawee would have been, not to the payer but to the drawer, and the claim of the latter would have been liable to be met by any diminution of the fund drawn upon through payments made to or on account of the drawer subsequently to the date of the order. In our acceptance of the term an order for the payment of money presupposes moneys of the drawer in the hands of the party to whom the order is addressed, held on the terms of applying such moneys as directed by order of the party entitled to them. No such obligation arises out of the ordinary contract of sale. If a purchaser buys goods of a manufacturer or a tradesman, he undertakes to pay the price to the seller, not to a third party who is a stranger to the contract, nor will the mere order or direction of the seller to pay to a third party impose any such obligation upon him; it is only when and because the right of the seller to the price has been transferred to the third party by an effectual assignment that the assignee becomes entitled as of right to the payment. The decision of the Court of Appeal in *Brice v. Bannister* (2) in favour of the plaintiff on an order similar in its terms to those of the document in the case before us, implies that the Court looked upon the document not as an order for the payment of money, but as an assignment *pro tanto* of the debt due from the defendant to the builder. Being ourselves decidedly of opinion that an order from a creditor to his debtor under an ordinary contract for the price of goods, or for work or labour, or the like, to pay to a third party can confer a right on the latter only so far as it operates as an assignment of the debt, we feel ourselves warranted, on the authority of *Brice v. Bannister* (2), in acting on that view, notwithstanding the decision in *Ex parte Shellard* (1), and in holding that the letter from Tate to Jopling was in effect an assignment, and not an order for payment of money, and consequently that it should have been allowed to be given in evidence on payment of the duty and penalty. In point of form we can only direct that the rule shall be made absolute for a new trial, but we presume that in

conformity with the arrangement come to at *Nisi Prius*, this will be equivalent to a judgment in favour of the defendants. Of course, the defendants can obtain this advantage only on the condition of payment of stamp duty and penalty, on the payment of which the document in question would have been admissible in evidence.

*Rule absolute.*

Solicitors—Bell, Brodick & Gray, agents for S. Alcock, Sunderland, for plaintiff; Belfrage and Middleton, agents for Skinner, Sunderland, for defendants.

1878. } WHITEHEAD v. HOLDSWORTH  
Nov. 18. } AND ANOTHER.

*Coal Mines*—35 & 36 Vict. c. 76. s. 18  
—“*Checkweigher*”—Discontinuance of his Office.

*Where the men employed in a mine appoint and pay a checkweigher under the Coal Mines Regulation Act, 1872, and are afterwards all discharged, his office ceases. If they are re-engaged with others, but nothing further is done with regard to the checkweigher, he is not “stationed by the persons employed in the mine” within the meaning of the Act, and cannot maintain an action against the mine owner for preventing him from acting after the re-engagement of the men.*

CASE stated on appeal from the Yorkshire County Court holden at Leeds, in an action for damages sustained through the defendants preventing the plaintiff from acting in the capacity of checkweigher of the miners of the Beckett Street Colliery belonging to the defendants.

On the 4th of March, 1875, the plaintiff, who was a miner employed in the colliery, was under section 18 of the Coal Mines Regulation Act, 1872, duly appointed by the miners employed in the



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colliery to act as checkweigher on their behalf.

From the 4th of March, 1875, down to the 17th of May, 1877, the plaintiff acted as such checkweigher, receiving a weekly wage of thirty-one shillings, paid to him by an association to which all the miners belonged, on behalf of the miners employed in the colliery.

On the 10th of May, 1877, the defendants gave notice to each of the miners in the colliery determining their service at the expiration of seven days from that date. After the expiration of the said notice, and after the miners had delivered up their tools to the defendants, namely, on the 18th and 19th of May, 1877, the defendants re-engaged all the old hands except six, and one or two hands in addition upon the same terms. Accordingly the miners so re-engaged and the fresh hands commenced to work for the defendants. No notice of any kind was given to the plaintiffs by the defendants or by or on behalf of the miners.

Upon the 19th of May, 1877, the defendants prevented the plaintiff from acting as checkweigher on behalf of the miners, and from having access to the colliery and the premises attached thereto, and from having any facility or opportunity for taking an account of the coal gotten by the miners employed at the colliery and thereby prevented the plaintiff from receiving his wages.

The Judge of the County Court ruled that on the facts above stated the plaintiff had by virtue of the notice of the 10th of May, 1877, ceased to be duly appointed checkweigher on behalf of the miners, and not being on the 19th of May, 1877, in the employ of the defendants, the plaintiff could not be re-appointed and was not such checkweigher, and had no right of access to the colliery, or the premises attached thereto. The Judge accordingly gave judgment for the defendants subject to this Case. The question for the opinion of the Court was, whether upon the facts above stated, the plaintiff was on the 19th of May, 1877, duly appointed checkweigher on behalf of the miners.

The 18th section of 35 & 36 Vict. c.

76 (the Coal Mines Regulation Act, 1872), provides as follows:—

“The persons who are employed in a mine to which this Act applies, and are paid according to the weight of the mineral gotten by them, may, at their own cost, station a person (in this Act referred to as ‘checkweigher’) at the place appointed for the weighing of such mineral in order to take an account of the weight thereof, on behalf of the persons by whom he is stationed. The checkweigher shall be one of the persons employed either in the mine at which he is so stationed, or in another mine belonging to the owner of that mine. He shall have every facility afforded to him to take a correct account of the weighing for the persons by whom he is so stationed; and if in any mine proper facilities are not afforded to the checkweigher as required by this section, the owner, agent and manager of such mine shall be guilty of an offence against this Act, unless he prove that he had taken all reasonable means by enforcing, to the best of his power, the provisions of this section to prevent such contravention or non-compliance.

“If the owner, agent or manager of the mine desires the removal of a checkweigher on the ground that such checkweigher has impeded or interrupted the working of the mine, or interfered with the weighing, or has otherwise misconducted himself, he may complain to any Court of summary jurisdiction, who, if of opinion that the owner, agent or manager shews sufficient *prima facie* ground for the removal of such checkweigher, shall call upon the checkweigher to shew cause against his removal. On the hearing of the case the Court shall hear the parties, and if they think that at the hearing sufficient ground is shewn by the owner, agent or manager, to justify the removal of the checkweigher, shall make a summary order for his removal, and the checkweigher shall thereupon be removed without prejudice to the stationing of another checkweigher in his place.”

*S. Tennant (G. H. Hardy with him),* for the appellant.—The plaintiff had

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been duly appointed checkweigher, and he cannot be removed except in the manner provided by section 18 of the Act. That Act intended the checkweigher to occupy a position independent of the mine owner, and allows him to be removed only, on proof of misconduct, by the magistrates. If the mine owner by dismissing his men and taking them on again can displace the checkweigher he can thus get rid of an obnoxious checkweigher, and evade the statute. The men cannot reappoint him, because he is required by the statute to be employed in the mine at the time of his appointment. The plaintiff not having been removed by order of the magistrates, is still checkweigher, and can recover damages against the mine owner for not allowing him to act.

*Lofthouse*, for the respondent, was not called upon to argue.

KELLY, C.B.—I come to the conclusion, with some regret, that this appeal cannot prevail, and that the plaintiff had ceased altogether to be checkweigher. As soon as the body of persons who had appointed him, who were the miners for the time being, ceased to be miners, whether for a short or a long time, the office of the plaintiff ceased. If a new body be employed, that body may appoint a new checkweigher, and if they do not employ him, he has no status. I quite agree, as argued by Mr. Tennant, that the result of our decision will be that if the mine owner has a prejudice against a checkweigher and wishes to get rid of him, he can do so, and that consideration might induce the checkweigher, if he were a worthless man, and the owner were a dishonest man, to favour the owner in the discharge of his duties as against the miners. But this is the consequence of the law. On the other hand, if the owner could not under any circumstances, by dismissing his men, displace the weigher, I think the evil would be much greater than that suggested by the learned counsel. If he had no such power, where in a case like this there has been an interval only of a day between dismissal and reappointment, he would have no power to do it if the

interval were six months or six years. The owner from want of capital, or any cause quite independent of the employment of the checkweigher, might shut up his mine. If all that time the person once appointed continued to be weigher, the mine might be opened again by a different person, under different circumstances, and with different workmen, who never heard the name of the checkweigher, and who, though they wanted to appoint one of their own body in whom they had confidence, could not do so. Although I agree there is an evil arising from our decision, yet a much greater evil might arise if the contrary were the law. We must therefore follow the words of the Act. He is to be appointed by a certain body. That body has been dismissed, and he has never been reappointed. His appointment has therefore ceased. Under these circumstances I think the decision of the learned County Court Judge was correct.

CLEASBY, B.—I am of the same opinion. The complaint is for disturbing the plaintiff in his office, and the question is whether at the time he was checkweigher within the necessities of the Act of Parliament. The Act says nothing about acting as checkweigher, or holding the appointment for a long or short time. It says that the persons employed in the mine may "station a person there." Was the plaintiff on the 18th of May stationed by the persons engaged in the mine at that time? It is plain that he was not. He had been stationed before by a certain number of those men, but as soon as the employment of those men was resumed with others, I, for my part, think it was competent for them to station this man there, or any other man. That is, in my opinion, the answer to the whole difficulty. All that was required was that the men employed on the 18th should sanction his going there. They did not sanction it, and not improbably because they did not want to pay a checkweigher. They were not bound by what they had done before to go on paying him, if they did not choose to have him employed and were satisfied with the weighing which

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place in the ordinary way. The plaintiff at the time in question was not stationed by the miners engaged at this mine, and he was therefore clearly not entitled to act.

*Appeal dismissed with costs.*

Solicitors—J. W. Hickin, agent for Olegg & Sons, Sheffield, for plaintiff; Paterson, Snow & Bloxam, agents for Dibb, Atkinson & Braithwaite, Leeds, for defendants.

1878.	} THE EMMA SILVER MINING COMPANY v. LEWIS AND SON.
Nov. 26, 27.	
Dec. 7, 20.	
1879.	
Jan. 11.	

*Company — Promoter — Liability for Money received in a Fiduciary Character — Payment out of Purchase-money for Services to Vendor.*

P. had a silver mine in America which he desired to sell for the best price. The defendants, who were metal-brokers receiving a commission on the sale of the ore from the mine, were aware of this, and that the mine could only be sold to a company to be formed for that purpose. By the establishment of such a company in England the defendants would sustain a loss on their commission, but P. promised the defendants that if they would assist him in getting the mine sold he would guarantee them against such loss by giving them 5,000*l.* in paid-up shares of whatever company was formed, it being intended that P. should include in his purchase-money a sum sufficient to cover such 5,000*l.* The defendants gave P. active assistance in selling the mine to some company, but it was not proved that they took any part in the formation of the company which was in fact established. Afterwards P., in fulfilment of his promise, gave the defendants 250 paid-up shares of such company, from which they realised on sale 5,968*l.* The arrangement between P. and the defendants for thus remunerating them for their services to him, out of money to be charged

to the company as part of the purchase-money, was unknown to the company :—

Held, in an action by the company against the defendants for profits received to the use of and as trustees for the company, that it was a question of fact for the jury whether the defendants were promoters, and that on the above facts there was evidence on which a jury might find that the defendants were promoters, and that they were liable to refund the profits they had received on the 250 shares of the company.

Order XL. rule 10, which gives power to the Court upon a motion for judgment to give judgment on any of the matters in dispute, is applicable to section 17 of the 39 & 40 Vict. c. 59, which provides for all proceedings down to final judgment being, so far as practicable, heard by the Judge before whom the trial took place, and such Judge may, therefore, in the exercise of his discretion, act under such power, by giving judgment on a finding by the jury on one of the questions in a cause, where the jury have been discharged from coming to any finding on the other questions.

This was an action tried before Denman, J., in June, 1878, and reserved for further consideration. The facts sufficiently appear in the judgment of the learned Judge.

The case was argued, upon further consideration, on the 26th and 27th of November, and the 7th and 20th of December, by

Gorst, Foulkes and O. Bowen (the Attorney General with them), for the plaintiffs.

Sir Henry James, Herschell and Henn Collins, for the defendants.

*Our. adv. vult.*

The following judgment was delivered (on Jan. 11) by

DENMAN, J.—This was an action brought by the plaintiffs, a limited company, against the defendants, James Lewis and Arthur Lewis his son, metal-brokers at Liverpool. The statement of claim was very long—much longer than was necessary—and contained several allegations which were mere statements of evidence. It cannot, however, be said

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that the defendants had not notice of the two causes of action upon which the plaintiffs relied, for the indorsement on the writ stated that "the plaintiffs' claim is for damages for conspiracy between the defendants and Trenor William Park and others in the sale of the Emma Mine, and profits received by the defendants to the use of and as trustees for the plaintiffs."

The action was tried before me on the 24th, 25th, 26th, and 27th of June last. It appeared from the evidence that the Emma Silver Mine in America, in the year 1871, had come into the hands of Trenor William Park and others, and that they wished to sell it. The defendants had, for some time previous to July, 1871, been selling about one half of the produce of the mine, as metal-brokers, for the usual commission on sales for American companies, namely,  $2\frac{1}{2}$  per cent. The other half of the produce was sold by other metal-brokers named Bath & Sons. A long correspondence was put in at the trial, between the two defendants, and between each of the defendants and Park and one Baxter who was jointly interested with Park in America, to which I shall have to refer presently. Many expressions in these letters were relied upon by the plaintiffs as proving the conspiracy alleged, and as shewing that the defendants were knowingly assisting Park in palming off a comparatively worthless mine upon the public as a mine of great value. The jury having declined to give any verdict upon the questions put by me bearing upon this part of the case, I cannot assume one way or the other, whether this was a correct contention on the part of the plaintiffs, or whether the explanations given by the defendants to shew that these letters were consistent with perfect *bona fides* were satisfactory.

In defining the meaning of the word "conspiracy," I told the jury that it would not be made out by a mere honest agreement, but that it involved an agreement to do something dishonest, as, for instance, the knowingly making of false representations. Notwithstanding the powerful arguments of the learned counsel, I am of opinion that there was evi-

dence which it was impossible to withdraw from the jury upon this part of the claim; but, inasmuch as the jury were discharged upon all questions relating to it which were submitted to them, I feel that it would be idle, and indeed unfair, to comment further upon that part of the case, or to refer to those letters now, except so far as they relate to the only part of the claim upon which the jury did give any finding. Coupling the letters and the oral testimony, and using both for this purpose, and for this purpose only, I think that it was established at the trial as follows, upon uncontroverted testimony:—That Arthur Lewis, as early as the 17th of July, 1871, being at that time in America, began a correspondence with his father in England, in which he informed his father, writing from Salt Lake City, that he contemplated giving assistance to mine-owners in selling their mines to companies for a consideration of some kind, whether in money payments, or by obtaining the sale of the ore, or allotments of shares, or otherwise. The first letter from Arthur to James Lewis read at the trial contains the following amongst other passages bearing upon this part of the case. On the 17th of July, 1871, he writes as follows:—"Mr. Park asked me if I would ask Captain N. (a mining captain) to accompany the party to the Emma Mine to-morrow, as I had told him that Captain N.'s opinion might be of some value if the mine were sold in London. I shall not give any written opinion without a definite arrangement of some sort being made by which advantage may accrue to me. Litigation is still going on about the mine, and until this is at an end they cannot hope to sell the mine in London. It is just possible the Court here might order that the proceeds of the ore should be paid into the hands of a receiver, to be afterwards handed over to the winning side. If this were the case, my being here might prove a great advantage, as they could arrange for it with me, and I could secure what we might otherwise have lost. I know the head of the opposition party. Walkers asked me if nothing could be done with us towards the sale in England of some of the mines in the neighbourhood. On

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thinking the matter over, I made the following proposition to Mr. Robert Walker:—I am willing to inspect, report upon and get reports from Nancarrow and Jarrim upon any mine that I was perfectly satisfied was *bona fide* and could honestly recommend. If they could bond it or purchase it themselves at the miners' price, I would endeavour to get it *taken up in England* at about the same price, no exorbitant commissions being paid to intermediate parties, taking my pay in a stipulation that we should be appointed the managers of *the company* (like Taylors). As a mine, to stand at par here, should certainly pay 25 or 30 per cent. interest, and as with us 10 per cent. dividends would place it at par, *the shares*, if Walkers would take or arrange for payment of the whole mine in paid-up shares, would soon become of twice or thrice the value they would be at if held here; and so it would prove a very good purchase for Walkers. If only a comparatively few shares were required to be taken up in England, sufficient for capital to work the mine, it would be easy to *float the company*; and the shares would soon reach a premium if the dividends were good. I would arrange that Walkers should pay us a per centage on the premium at which they ultimately sold their shares; thus paying us by results. I pointed out that, if they would commence with a really good mine in which they had thorough confidence themselves, and it should turn out well and the shares get up to a high premium, we should then have little difficulty in *placing this on the market* in the same manner. Thus a regular trade could be made of it, the exorbitant profits to intermediate parties would be saved to the *English company*, while Walkers could purchase mines at the low rate which the high value of money here justifies, and sell them at the greatly increased price which cheap money with us equally justifies. He told me to look round, and, if I saw any mine which took my fancy, he would then see what could be done."

After visiting the mine on the 19th of July, Arthur Lewis wrote again to his father on the 20th a letter in which he says—"Do not hand these mining men

who come over to Taylors, but make some arrangement with some one to accompany them to London and work it *with some good share-brokers* there." Taylors were a firm who were in the habit of acting as agents in the business of introducing owners of mines to intending purchasers.

On the 22nd of July, Arthur Lewis again wrote to his father in England—"With me out here, I do not see why we should not place some of the mines, like Taylors retain the management of them, with a commission on all the proceeds, and ultimately perhaps make a regular business of it; therefore do your best to help me. Mr. Park wants me to give him a report on the Emma Mine, and to come over to England in a few months' time to help him to *place it on the English market*. I doubt if I shall give it him at present. The mine is unsaleable at present, owing to the litigation." On the 24th of July, he writes to his father a letter which contains the following passage—"Should the mine improve sufficiently to justify making a report on it sufficiently good to effect a sale, S. and N. are each to make a report, Park is to take the mine over to England, and if a sale is made, S. and N. are each to receive 5,000*l.* in *paid-up shares*. This is pretty good for them, but not my way of doing business. Do not mention it on any account."

This seems to me to be ample evidence of knowledge on Arthur Lewis's part that Park contemplated a sale to a company to be got up for the purpose of purchasing the mine; but what follows is still stronger to the same effect: "I told Park it was disadvantageous to me for the mine to be sold to *an English company*; for at present we are receiving a New York commission, whereas, if a London company had it, we should only get a London commission; therefore, if he wished me to *assist him in the sale*, he must guarantee me from loss by the sale. *This he has agreed to do*, either by inserting a clause in the articles of sale that we are to receive the consignments of the ore on the present terms or an equivalent for it in *paid-up shares*. (This I conceive should not be less than 10,000*l.* or 15,000*l.*)

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He wanted me to go over to London with him to help him to *put it through*. I said I should be more useful to him here, by corroborating anything which the purchasers might wish to know with regard to the mine, while you will take him up to London and introduce him to the Taylors and other great people." From these and other passages in the same and other letters, I think it clear that Arthur Lewis contemplated that he and his father were to give active assistance to Park in selling the mine to an English company to be formed, and that they were to receive remuneration for their services, either by way of having secured to them the sale of the ore for the English company on advantageous terms, or by receiving some payment either in shares or money, or both.

On the 31st of August, Arthur Lewis writes to James as follows:—"Park writes me he leaves for Liverpool on the 2nd. Assist him all you can, and look after the loaves and fishes. He says he can afford to be liberal to us. You had better go up to London with all these people, to prevent them falling into the hands of Bath & Sons or others." To this letter there was a P.S. as follows: "Park says, 'I shall first call on your father in Liverpool and take his advice as to the course to be pursued, and shall ask his aid; and we also want your help in Salt Lake. I shall try to arrange so that your house shall have the ore shipped to Liverpool, and will be willing to compensate you and your house liberally, in case we make the sale. We go to London with a perfect title (U. S. patent), &c. I am willing to make a definite arrangement with you or your father, or leave it until we are through; and I have no doubt you will be satisfied. We can afford to be liberal.'" Park having in the meantime started for England, Arthur Lewis writes on the 5th of September to his father a letter containing the following:—"The Emma it would be better perhaps to hand over to Taylors, stipulating with Park before you introduce him to them what remuneration you are to have if they take it up. 5,000*l.* would not be too much to ask in this, as I can be very useful to them out here. Also stipulate for

the sale of the ore and the agency for us out here, if possible."

I now turn to the letters from James Lewis to Arthur Lewis, so far as they bear upon the question upon which the jury found. The first of these is dated Liverpool, September 12th, and alludes to Park as follows:—"Park arrives to-morrow, and I wanted to be here when he comes. I have prepared for him a statement of all the Emma ore since the commencement, in compliance with instructions from New York, and I will inclose you a copy of it. They asked particularly for all these details. Of course they have them all in the account-sales, but not tabulated." On the 14th again he writes from Liverpool:—"Mr. Park and Mr. Stewart" (who was acting with Park in endeavouring to sell the mine) "were with me all yesterday; and I go up to London on Monday about the Emma Mine. *I am to be remunerated handsomely for my services.*" On the 18th of September he writes from London:—"I am here for a few days trying to assist Mr. Park with the Emma. . . . I have had a long interview with John Taylor to-day, and don't think he will have anything to do with the Emma, as he has been told continually the last month by every Yankee who comes to his office—and they have been there by shoals—that it is a deposit, and that the mine has been overstrained. Mind you don't say anything about this in Salt Lake or to any one. Mr. Park wants me to stop all the week, but this I cannot do; besides, he has got letters to all the people here, and goes to them direct, and only wants me to certify, as it were, to the quantity of the ore; and I don't expect to get anything out of it all, though he talks cash liberally: but I have not got it in writing. He is going to see Albert Grant, who brought out the Mineral Hill, and his confederates got the chief pull out of it. The Taylors did not get more than a few thousands. However, Taylor told me that Grant would not take it up, as the Stock Exchange want him to clear up and have some return for the other mining adventures floated."

This letter seems to shew that James Lewis at that time had been assisting

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Park to induce persons likely to be instrumental in forming a company to take up the purchase of the mine; but that he was not at that time sanguine of obtaining such terms from Park as to make him care about giving himself any further assistance. But, on the 23rd, it appears that Park had made something more like a definite promise, and that the defendant James Lewis was under the impression that the mine was already sold. He then writes from Liverpool as follows:—"Emma Mine. All this keep to yourself, and do not repeat it. Mr. Park has sold the Emma Mine through Coates & Hankey, London, for 800,000*l.*, &c. He promised me 5,000*l.* in any case; and, if he got his own price, he said he would make the amount 10,000*l.*" It appeared that this sale through Coates & Hankey fell through; and, on the 7th of October, James Lewis again wrote to his son from Liverpool a letter in which he said—"Park remains (that is, in England) to close the Emma. He says all is going on well, and he will telegraph me when he wants me in London. I expect they can all get on without me."

Before Park's arrival in England, James Lewis had written to Taylors on the 6th of September a letter in which he said:—"I have had a letter this morning from New York mentioning that one of the owners of the Emma Mine is on his way here, and will arrive next Wednesday to place this mine also on the English market. It is a big affair, and an enormous amount will be required. I am well posted up, and know all about the Emma." The rest of this letter related to another mine called the Flagstaff, in relation to which James Lewis wrote that he had informed the owners of that mine that they must not expect the sum mentioned by them, namely, 250,000*l.*, but take less, and take *part-payment in shares*. He then proceeded as follows, referring to the Flagstaff mine:—"As regards your (Taylors') remuneration, I said that you could not look at it under 20,000*l.* to 25,000*l.*, or, if they wished to pay by commission, 10 to 12½ per cent. on the amount realized; and there is no doubt they (the vendors) will pay us liberally to get it taken up

by your firm: you must provide for me out of this amount, and liberally. Therefore, if I receive 3,000*l.* or 5,000*l.*, add it to your amount."

On the 8th of November, 1871, the plaintiff company was registered. The memorandum of association stated the first of the objects for which the company was established to be, "the carrying out of an agreement dated the 4th of November, 1871, between Trenor William Park of the one part, and George Henry Dean of the other part." The capital of the company was 1,000,000*l.*, in 50,000 shares of 20*l.* each. The agreement of the 4th of November was one whereby Dean, *as trustee for the intended company*, agreed on behalf of the company to purchase the mine, &c., for 1,000,000*l.*, of which 500,000*l.* were to be paid in cash and the residue in shares of the company. This agreement was mentioned in the articles of association of the company as being adopted by the company so far as its provisions were intended to be binding on the company thereby contemplated.

On the 9th of November, the prospectus of the company was issued. Both the defendants swore that they first saw it in the advertisement columns of a newspaper, and that they gave no express authority for the use of their names in it. The prospectus stated that Messrs. Lewis & Son (the defendants) had sold ore from the mine between October, 1870, and May, 1871, to the amount of 78,000*l.* odd, and averaging with ore sold by Bath & Sons about 38*l.* per ton in price; and that from the 1st of May, 1871, to the 1st of September, 1871, the amount sold by them had been 1,888 tons for 64,100*l.* odd. It also stated that Messrs. Lewis & Son and Messrs. Bath & Sons "would be ready to answer any inquiries relating to the ores, and the former firm also as regards the mine, one of their firm having been at the mine for some time." On the 11th of November, James Lewis wrote Arthur a letter containing the following passages alluding to the Flagstaff mine,—"Flagstaff. I have never been able to find out the names of the purchasers; but it appears from a letter received two days

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since that the mine is as good as sold; but he (the writer of the letter) wants me in London on Monday about it. He thinks he can *divide some plunder* with me, if there is any to be had; but he will not say who the parties are." The letter also contained the following passage:—"Emma. I send you a paper with the prospectus, and the shares are quoted to three premium. This of course is a Stock Exchange dodge, as the prospectus is not yet out except in the newspapers. I am writing to Mr. Park *to let me have half the amount he promised me in paid-up shares*; but he does not often take any notice of the letters I write to him."

Between the 11th and 23rd of November, several letters passed between James Lewis and persons who had received the prospectus, referring to the paragraph stating that one of the firm of Lewis & Son had been at the mine for some time, and that they would be ready to answer inquiries as to the mine, and inquiring whether Lewis & Son believed all that was stated in the prospectus. The answers to these letters varied in language to some extent, but they were all to the effect that the figures given in the prospectus as to the quality of the ore sold by the firm and the amount realised were perfectly correct, but that they could guarantee nothing further, and that the persons inquiring must act upon their own judgment as to whether they applied for shares. They also inclosed a copy of the prospectus and a copy of a report by Professor Silliman as to the mine, and stated that "the future of the mine entirely depended on the full realisation of this report." In several of these letters the defendant James Lewis advises his correspondents, being trustees or clergymen, not to invest in mining shares; and in one of them he says: "We can guarantee nothing, nor undertake any responsibility, as it is no interest to us whether you become a shareholder or not." In some of the previous letters he had informed the inquirers that they were too late to apply. The effect of the allusion to Professor Silliman's report appears clearly in a letter to one of these applicants, of the 2nd of

December, 1871, in which James Lewis, writing in the name of Lewis & Son, says: "But as to the future of the mine, it is impossible for us to give an opinion, as all entirely depends on the full realization of Professor Silliman's report as to whether it is 'a true fissure vein,' or simply 'a deposit.' He speaks very decidedly on this point; and he is considered a great authority in the States. All depends upon this one point, and no doubt from what you say you have heard to the contrary. Our Mr. Arthur Lewis has visited the mine, and resided at Salt Lake for some months past, and he is now on his way home. In a letter to hand this morning he mentions that there are 3,300 tons of ore at the railway depot to come here."

The principal use of these letters made at the trial was, to endeavour to shew that the defendant James Lewis was setting up Professor Silliman as a trustworthy witness as to the value of the mine; whereas it was contended that other letters to which I have only referred for other purposes, in passages not set out, proved that he and Arthur Lewis knew that Professor Silliman was a person of doubtful integrity. I do not refer to this letter here as bearing upon any such question, because the jury declined to express an opinion upon the question of suppression of material facts, fraudulently or otherwise, as bearing upon the claim for conspiracy; but it was also contended that they bore materially upon the question of promotership; and I think the passages above quoted were admissible also, and to some extent important, upon that issue.

On the 23rd of November, James Lewis wrote to Arthur a letter from which the following is an extract:—"Emma.—I have not heard the result of the application for shares, nor how many have been applied for. Before I went last to London, I wrote to ask Park *if he would arrange to let me have half the amount he promised me in shares*; and, when I saw him in London, he said he would arrange it all to my satisfaction; and I have heard nothing since. Park has made a great mistake in letting Grant have anything to do with it, as he is not



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thought anything of; and when it was known that he was connected with it, people drew back. You will receive from London a paper with an article about the Emma; and I also send you a *Times* with an article upon silver mines in general. The day is past for selling them at such fabulous prices. I have been inundated with applications from all quarters. I am not so very certain that I shall get the ore consignments from the new company. Look after it in New York all you can. Stewart I believe goes out on Saturday."

On the same day, the 23rd of November, a minute was entered in the company's books stating that it was arranged "that the present consignees, Bath & Sons and Lewis & Son, be continued for the present, reducing the commission to one per cent."

James Lewis in his oral testimony swore that, beyond introducing Park to Taylor and to a Mr. Blake, he did nothing which assisted him in any way in selling the mine, and that both of these introductions came to nothing; that he had nothing to do with drawing up the prospectus; that he first heard of the purchase of the mine in the newspaper; that the remuneration to be received by his firm for their assistance was in consideration of the loss they would be put to by only receiving a 1 per cent. commission instead of a  $2\frac{1}{2}$  per cent. commission on the sale of ore; that he never authorised the use of his firm's name in the prospectus, though he never repudiated it to the company or its promoters; and that they bought 150l. worth of shares in the company in May, 1872, at a premium, by which eventually they lost 700l. He said on cross-examination that he knew that, *if the concern was to be sold at all, it must be to a company to be formed*. He admitted that, in the case of the Flagstaff mine, by the passage referred to above in the letter of the 6th of September, 1871, he meant that his firm were to have 3,000l. or 5,000l. for assisting to get up a company to take that mine, and that the expression "to place the Emma," in that letter, meant to sell the Emma to a company to be formed. He said that Park and the

other owners of the mine were under no obligation to secure the commission to his firm; and on being asked "whether it was not because he promised Park to do his best in assisting him to get up a company to purchase the mine that he was to receive compensation," he said, "It was for that and the loss of the commission combined. *It was to introduce them to people to get up a company.*" Being cross-examined as to a letter written by his son (after consultation with him) to the *Hour* newspaper in February, 1876, in answer to a statement which had then recently appeared alleging that they had received 5,000l. in paid-up shares of the company from Park, in which letter was this passage:—"these shares were given to us by Mr. Park in lieu of *an account due to us* on the consignment of ore; and we had nothing whatever to do with the sale of the mine to the present English company," both the defendants admitted that this was an inaccurate statement, and said that it ought to have been "for loss of commission on sale of ore," and that nothing at the time was due to them for sale of ore.

Arthur Lewis in his evidence stated that, upon his first introduction to Park in America, he was informed by Park that he wished to sell the mine, and was told by him that many companies were being brought out in London for the purchase of mines in America. He said that Park as early as July had asked him whether he could assist him in the sale of the mine, and he stated that he could hardly expect him to assist him when it was directly opposed to his interests, because it would involve the loss of the New York commission; and that Park then said, "I don't want you to lose by it; and if you can render me assistance, I will undertake you shall not lose by it, either, when I come to sell it, by making a term that your firm shall continue to receive commission at the present rate, or an equivalent;" and that there was no arrangement made in America as to what the equivalent should be; that he got the *Times* with the prospectus in it just as he was leaving New York, and when he got to England the company

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had started, and he first discussed the terms of the commission at the meeting of the 12th of December, and gave such true information as he possessed to the directors on that occasion. Being asked on cross-examination what the real consideration was for Park's promise, he said: "The loss of commission: also I offered if I could be of any service in corroborating documents, or anything in my business, to assist him in that respect. I was never asked to render any such assistance. There was no binding agreement between us and Park. We had no legal rights whatever as against Park. We trusted to his word entirely. No sum was definitely arranged until the 6th of March, when we received the shares. I may have reminded him of the promise in December. I knew nothing of the agreement between Park and Grant until I received the shares: then Park gave me a *résumé* of the terms on which they were to be held; and I held then on the terms of the paper of March 9th, 1872."

The following letter (omitting an immaterial passage), which was not dated, but was agreed to have been written about the time at which the 250 shares were transferred by Park to the defendants, namely, about the 6th-9th of March, 1872, was put in:—"My dear Father,—I have just seen Park. He wants to know on what terms we will take the stock, namely, whether we will put it in with the 500,000*l.* (*i.e.* the half purchase money to be taken in paid-up shares) and let it be sold along with it *pro rata*, when Park and Albert Grant think best, or whether we will take it and control the sale ourselves, subject to the following conditions.—To be held for twelve months, unless previously sold under following agreement:—Grant has no right to sell below par, and no right to sell above par without Mr. Park's consent; but, if Mr. Park refuses to consent, he must take the stock at the price offered. Park has also a right to sell, placing Grant under similar conditions. When sold, Grant to receive 1*l.* per share, and half the amount of the premium realized. Of course, in the above arrangement, we would occupy Park's place. Whether we sell them

ourselves or not, we should still have to pay Grant, as above. I almost think we should do better to have the control of the sale ourselves, though Park will undoubtedly sell to great advantage, knowing exactly what is doing at the mine and the right time to sell. Grant is obliged to support the market at his own expense. We also can get informed by M'Intosh and Johnson what is doing. Telegraph me in the morning early your views on the subject both here and to Andrews' office. No amount was named. When I decide which way *we will take the shares*, Park will make them over to me. Let me know your views early by telegraph. If I get them here by 11 o'clock, I will call at his house, and try to get the stock to-morrow."

On the 9th of March the following agreement was entered into between Lewis & Son and Park:—"Whereas T. W. Park has transferred to James Lewis & Son 250 shares in the Emma Silver Mining Company, limited, which transfer of said shares is made under the agreement that the certificate of said shares should be held by Albert Grant for the space of one year from the 1st day of February, 1872, unless previously sold with the consent of said Grant; and when sold said Grant to receive 1*l.* on each share, and in addition, one half that may be received for said shares above par. Said Grant shall have the right to sell said shares in his discretion, first giving said James Lewis & Son the privilege of taking such shares at the price said Grant may propose for the same: Now, it is agreed between the said James Lewis & Son and said Albert Grant on the terms above stated."

In accordance with this agreement the shares were placed in Grant's hands and sold on the 16th of May, 1872, for 7,500*l.*, of which sum Grant received 1,531*l.* 5*s.*, and the defendants 5,968*l.* 15*s.*; for which sum and dividends upon the 250 shares and interest, the plaintiffs claimed to recover as money received by the defendants as trustees for the company, and under such circumstances as to be liable to refund.

In addition to the oral evidence and letters above referred to, the plaintiffs

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relied upon the following answer by the defendants on interrogatories, as shewing that they were promoters of the company, and that the shares which they were to receive were to be a portion of the purchase-money without any consideration as between the defendants and the company, or as between Park and the company. In answer to the 17th interrogatory,—“The said T. W. Park in or about September, 1871, promised us 5,000*l.*, and if he sold the mine at his own price, he said he would make it 10,000*l.* The said promise was made in fulfilment of a verbal promise made by the said T. W. Park to the defendant Arthur Lewis when in Salt Lake City, in July, 1871, that if we would assist him in the sale of the mine in England, he would guarantee us from loss by the sale, either by causing to be inserted in the agreement for sale a stipulation that we should continue to receive the consignment of the ore at the then rate of commission (2½ per cent.) or receive an equivalent in paid-up shares. The said T. W. Park, in September, 1871, informed the defendant James Lewis that he could not succeed in securing to us a continuance of the consignment of the ore on the old terms, and in lieu thereof promised to make us the above payment. Instead of taking it in money we took 250 paid-up shares in satisfaction of Mr. Park's promise. There never was any written agreement: it was verbally arranged (but when we cannot state) that the said T. W. Park should transfer to us the above number of shares. The said T. W. Park never paid us or either of us any sum whatever in cash, nor did he give us or either of us any consideration whatever in respect of the said sale.”

The secretary of the company, Mr. Tooke, was called for the plaintiffs, who said that he had called at the defendants' office at Liverpool to ask Mr. Arthur Lewis his opinion of the mine, and that he had informed him that he had seen it, and that the company had a very valuable property; whereupon he requested Arthur Lewis to call on the board, which he did, as before-mentioned, on the 12th of December. The purchase-money was paid,—400,000*l.* on the 4th of December,

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1871, 63,000*l.* on the 20th of December, 1871, 17,000*l.* on the 30th of January, 1872, 7,000*l.* in February, and 13,000*l.* in March; and 500,000*l.* value in shares was allotted to the vendors on the 5th of December, 1871, *including the shares afterwards sold by Grant for the defendants in May, 1872.* The 250 shares were transferred from Park to Arthur Lewis on the 14th of March, 1872.

After hearing the evidence on both sides, as well as at the end of the plaintiffs' case, Sir Henry James, for the defendants, claimed judgment on the ground that there was no evidence for the plaintiffs on either ground of claim. I thought there was evidence for the jury on both of the plaintiffs' contentions, and left several questions to the jury. I invited the counsel on both sides to suggest any further questions; but none were suggested; Sir Henry James declining to suggest any, on the ground that he did not feel justified in giving any colour to what he contended was a wholly unfounded action without any particle of justification either in law or fact.

The questions were mostly directed to the claim founded upon a conspiracy (which I defined to mean a conspiracy, by fraudulent misrepresentations or suppressions, to assist Park and others in the sale of the mine at a price beyond its value). But questions 5, 6, 7 and 8 were intended to bear upon the second branch of the claim. And I also told the jury that I should ask them the question generally whether they intended to find for the plaintiffs or for the defendants.

The questions handed to the jury in writing were as follows:—

1. Did the defendants conspire together with Park and others to assist or enable him or them to sell the mine at a price in excess of its real value?

2. Were the plaintiffs induced to enter into the contract for the purchase of the mine by reason of such a conspiracy as above?

3. Did the defendants, in pursuance of such conspiracy, state any facts false to their knowledge in order to induce the plaintiffs to purchase the mine?

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4. Did they fraudulently suppress any facts which would have been material to be disclosed, with the intention of inducing the plaintiffs to purchase the mine at a price in excess of its real value?

5. The same, omitting the word fraudulently.

6. Were they *promoters* of the company?

7. Do you find for the plaintiffs on the paragraph 8 in the statement of claim, or for the defendants as in paragraph 7 of the statement of defence?

8. The same as to paragraph 9 of the statement of claim and 8 of defence.

9. Assuming the plaintiffs to be entitled to recover as for a conspiracy,—what damages?

10. Assuming the defendants were promoters, and as such liable to refund,—what damages?

The jury, after a long absence, stated that they were hopelessly disagreed as to the first five questions, and as to the seventh and eighth (1). But, as to the sixth, they found that the defendants were promoters of the company; and, in answer to the question whether they were agreed to give a verdict for the plaintiffs or the defendants, at first they said they were not agreed, but afterwards added that, if the question was rightly put as a question for them whether the defendants were promoters or not, they intended to find for the plaintiffs for the amount of 8,188*l.*, namely, the 5,968*l.* 15*s.* for which the shares sold, 1,823*l.* 15*s.* 8*d.* interest, 303*l.* dividends, 92*l.* 14*s.* 8*d.* interest on dividends.

Both sides having requested me to adjourn the case for further consideration, I did so, and heard very learned elaborate arguments on the 26th and 27th of November, and on the 7th and 20th of December last. Both sides claimed judgment—the plaintiffs, upon the findings of the jury so far as related to the claim for a refunding of the proceeds of the shares; the defendants, on the whole claim, on the ground that there was no evidence which ought to

have been left to the jury in support of either portion of the claim.

I have already said that I am clearly of opinion that there was evidence which I could not properly have withdrawn from the jury applicable to the claim for conspiracy. It consisted partly of letters, partly of conversations upon which widely different interpretations were placed.

If the plaintiffs' view of the evidence as a whole and in its most debateable parts had been adopted by the jury, I should have thought there was ample ground upon which they might have found an agreement between the defendants and Park to aid one another in palming off a comparatively worthless mine by statements known to be false and to which all would be parties, for the purpose of making an illegitimate profit out of the persons who might be induced by such means to form a company for its purchase. Indeed, upon the plaintiffs' construction of the evidence, I think the defendants would be brought within the definition of conspiracy, laid down by the Lord Chief Justice as applicable even to criminal cases, in *The Queen v. Warburton* (2), cited by Mr. Bowen in his able argument.

On the other hand, if the defendants' explanations of this evidence were accepted, the defendants had done nothing fraudulent or wrong—at all events in such a manner as to be liable to the plaintiffs in an action for conspiracy. But, the jury having been discharged upon all questions put to them in relation to this part of the claim, I have abstained from recapitulating any of the evidence which was applicable to it only; and I shall say no more about it, because I think it fairer not to do so. The true construction of the letters referred to, and of the conduct of the parties, was entirely for the jury; and it would be impossible to discuss it in a judgment without running serious risk of prejudicing the fair trial of that part of the claim, should it again come before a jury.

When the case came before me first, upon further consideration, I stated that

(1) These 7th and 8th questions the learned Judge has since considered to be immaterial.—See *post*, page 269.

(2) 40 Law J. Rep. M.C. 22; s.c. Law Rep. 1 C.C.R. 274.

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I felt very great difficulty upon the point whether I ought to hear an argument at all, in a case where the jury have been discharged as to so important a question as that first raised in this case. I felt bound, however, at the urgent request of both parties to hear the views of both sides fully discussed, in order that I might, if possible, prevent a four days' enquiry from being wholly useless and abortive. And I have come to the conclusion that I ought to give judgment upon that part of the case to which the finding of the jury relates, although the plaintiffs declined to give any undertaking to abandon the other part of their claim, and although the defendants have still reserved to them all their rights of appeal, as well as that of moving the Divisional Court for a new trial on the ground of misdirection, or on the ground that the verdict was against evidence.

I am of opinion that I have power to do this by Order XL. rule 10, which gives power to the Court, upon a motion for judgment, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, to give judgment accordingly. This order (which was made in 1875) must, I think, be now read as applicable to section 17 of the Act of 1876 (39 & 40 Vict. c. 59), which provides that all proceedings in an action down to and including final judgment, shall, so far as practicable, be heard by the Judge before whom the trial took place.

It was admitted by the plaintiffs' counsel that I had a discretion whether to act upon this power or not. Upon the whole I think it may be better for the parties that I should do so; and I do so accordingly.

The question, then, which I have to decide is, whether the plaintiffs are entitled to judgment upon the finding of the jury that the defendants were promoters of the company, and upon the general finding for the plaintiffs, assuming that particular question to have been one for the jury.

The grounds upon which the defendants' counsel contended that I ought, notwithstanding this finding, to give

judgment for the defendants were several. First, it was said that the defendants came within no definition of promoters to be found in any of the cases decided on the subject; that there was no act done by them in any way conducive to the creation of the company, nor any duty existing on their part to inform the company of their arrangements with Park; and it was contended that I ought not to have left the question to the jury whether they were promoters or not, on two grounds—first, that the question is essentially a question of law, not of fact; secondly, that there was no evidence in support of the proposition that they were promoters, to be left to the jury in this case. It was also argued that they could not be promoters of *this* company, because there was no evidence that they had anything to do with its establishment, even though they might have contemplated throughout that their assistance of Park was to end in his selling the mine to *some* company to be promoted by him.

The plaintiffs, on the other hand, contended that the question whether the defendants were promoters or not, was properly a question for the jury; that there was ample evidence to be left to the jury on the question; and that, the jury having found that question in the affirmative, and also found a verdict for the plaintiffs, the plaintiffs are entitled to retain that verdict, and ought to have judgment for the sum assessed by the jury upon that part of the case, without being compelled to forego any other rights they may possess. They contended that there was ample evidence, not only of the fact of promotorship, but of such facts as to warrant the jury in finding the verdict generally for the plaintiffs, on the ground that defendants had agreed to share a portion of the purchase-money paid by the company, with a co-promoter, the vendor, either in money or in paid-up shares of the company, not in consideration of any services rendered to the company, but merely by way of reward to them for their assistance to him, the vendor, in getting rid of the property to the company.

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The question for me to decide now is, only whether there was any evidence for the jury upon which they could find for the plaintiffs; in other words, whether I ought, notwithstanding the findings, to have directed a verdict for the defendants. I am not at liberty now to consider whether the verdict was against the weight of the evidence, nor whether my direction to the jury in point of law was erroneous or insufficient. But I apprehend I can only now consider whether the evidence was so entirely in favour of the defendants that I ought not to have left the question to the jury at all, but at the end of the evidence to have given judgment for the defendants. This being the duty I have to discharge, the first question which has to be decided is, whether it is the duty of the Judge or the jury upon a complicated series of facts to decide whether certain persons are or are not promoters of a company. It appears to me that, though there may be cases in which the facts are so clear as to admit of no doubt, this must almost always raise a question for the jury, and that in this case (without at all wishing to prejudge the question whether I gave a sufficient direction to the jury in this respect), it was a proper question to leave to the jury.

I was referred to a case which was very recently before the Master of the Rolls, *The Emma Mining Company v. Grant* (not yet reported), in which this very question was directed to be tried in an issue as a question of fact. In *Twy-cross v. Grant* (3), Cockburn, L.C.J., and Bramwell, L.J., both treat the question as one of fact. And in a case tried before Lush, J., at Guildhall, the same opinion was expressed. In the present case I am clearly of opinion that it was a question for the jury, if it was a necessary question at all, and that I have no power to disregard their finding on the ground that I ought to have withdrawn it from them. I do not think it necessary, having very fully set out the evidence bearing upon the point, to examine

it in detail for the purpose of pointing out all the facts upon which I think a jury might be asked whether the defendants were promoters of the company or not; but I think, to put it as shortly as possible, that there was evidence of the following facts sufficient to go to a jury, and that, if the jury were satisfied of all these facts, they might find that the defendants were promoters:—First, that the defendants knew that the whole object of Park and the other owners was to sell the mine for the best price they could obtain; secondly, that it could only be sold to a company to be formed; thirdly, that there was an agreement beforehand that whatever company should be formed, Park was to include in his purchase-money a sum sufficient to cover a sum of money to be handed to Lewis & Son for their assistance to him in getting the property sold; fourthly, that Lewis & Son did give Park active assistance, and looked to the formation of the company by Park for their remuneration in shares out of the purchase-money.

But it was argued forcibly for the defendants, that, even if the defendants were promoters, it does not at all follow that they were liable; for that many cases may be put in which a man might properly be found to be a promoter of a company, and yet not be in such a position as to make him liable to refund moneys which he might have received from the vendors of the property which the company was formed to acquire. On the other hand, the plaintiffs' counsel admitted that the mere finding that the defendants were or were not promoters, would not be conclusive as to their being in such a position as to be liable to refund the amount of the shares received by them. On the contrary, they contended that, independently of their being promoters, the defendants might be liable as trustees to the company for their shares received by them under the circumstances of this case, and therefore that I ought to give judgment upon the finding of the jury for the plaintiffs independently of the particular finding as to promotorship.

Subject to the question of whether the

(3) 46 Law J. Rep. C.P. 636; s. c. Law Rep. 2 C.P. D. 469.

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verdict ought to be set aside and a new trial had on the ground of misdirection—which I apprehend is not a matter now to be considered—and subject to the difficulty arising from the fact that other questions left to the jury were not disposed of, I am of opinion that there was evidence upon which the jury might find for the plaintiffs upon the second head of claim, as stated in the indorsement on the writ, as a claim for “profits received by the defendants to the use of, and as trustees for the plaintiffs.” With regard to the two questions put to the jury upon paragraphs 8 and 9 of the claim and 7 and 8 of the defence, it appears to me, on full consideration, that they are immaterial; for, assuming the version of the defendants to be correct, they do not touch the question now under consideration, which arises under paragraph 17 of the statement of claim and paragraph 13 of the defence.

Paragraph 17 of the claim is as follows:—“The defendants became and were proprietors of the plaintiff company, but did not communicate to the plaintiff company, and such company did not know, that they had obtained from the said T. W. Park the said promise of 250 fully paid-up shares, nor that the agreements mentioned in paragraphs 7, 8, 9, 10 and 12 had been entered into, nor the facts mentioned in paragraphs 5, 6, 10, 11, 13, 15 and 16, as known to the defendants. Such agreements and facts were material to the plaintiffs to know, and as such promoters the defendants were bound to disclose them fully, yet they did not disclose them, but concealed and misrepresented them as aforesaid. If such agreements and facts had been disclosed, the plaintiffs would not have entered into the agreement to purchase hereinafter mentioned.”

Paragraph 13 of the defence is as follows:—“As to paragraph 17 of the claim, the defendants deny that they were promoters of the plaintiff company. They had nothing whatever to do with the promotion thereof, and first knew of the said company’s existence from seeing a copy of the said prospectus in a newspaper. They deny that they had obtained a promise

from the said T. W. Park of 250 or any shares, and they deny that they were under any obligation or owed any duty whatever to the said company, and they deny that they concealed or misrepresented any facts within their knowledge. They do not admit that the said alleged agreements or facts were material to the plaintiffs to know, nor that had they been disclosed the plaintiffs would not have entered into the agreement of purchase.”

The reason why I am of opinion that the findings referred to are immaterial is, that the issues raised by paragraphs 7 and 8 of the defence appear to me to be the only issues as to the exact amount of agreement at which Park and the defendants had arrived at a given time, and not to amount to a denial of the material allegations of paragraph 17, namely, that the defendants had obtained a promise (though it might not have been definite as to amount) that they should be remunerated for their assistance in paid-up shares of the company, or in moneys to be included in and to come out of the purchase-money to be charged by him, in consideration of assisting him. I think that it does not lie in the mouth of the defendants to say that there was no promise, merely because down to a certain period there was an uncertainty as to its performance, or as to the amount of the shares or money to which Park would recognise his liability. The evidence shewed that, immediately upon the formation of the company, one of the defendants wrote to the other, “I am writing to Mr. Park to let me have half the amount he promised me in paid-up shares;” and they both in their evidence admitted, and the correspondence shewed, that it was contemplated that this was a probable mode of payment. I think that upon the whole of the evidence there was enough to warrant the jury in finding, and that they must be taken to have found, that there was an agreement that the defendants should have payment or part payment of the sum they were to receive out of the purchase-money in paid-up shares, which Park was to receive from the company in part payment of the

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purchase-money; and that they did receive the 250 shares in accordance with that agreement. This being so, I think it matters not that, as between them and Park, the consideration may have been in part their loss of the  $2\frac{1}{2}$  per cent. as compared with the 1 per cent. commission. That was merely one of their motives for assisting Park to sell, and to get up a company, by helping him in disposing of the property. It was not a matter for which the company intended to create shares or to pay in the shape of purchase-money or otherwise. It was a mere mode of obtaining money of the company for services rendered to Park for his own benefit and that of the defendants, without any consideration as far as the company was concerned. It cannot be suggested that the latter part of paragraph 17 of the claim, which alleges that if such agreement had been disclosed the plaintiffs would not have entered into the agreement to purchase, would be proved or not proved, according as the promise of Park was or was not reduced to a certainty as regards the exact number of shares to be taken by the defendants, or the exact amount of the money to be paid. The substance of the question was, whether there had been a promise by Park to remunerate the defendants for services to him, the vendor, out of moneys to be charged by him to the company in the purchase-money for the mine, which arrangement was unknown to the company, but throughout known to be intended by the defendants, and which ended in their obtaining from Park, by virtue of his promise, the 250 shares in question. I think there was evidence to go to the jury that this was the real state of the case, and that the jury intended to give their verdict upon that ground.

This being so, it only remains to consider whether the facts proved, supposing them to amount to what I have above suggested, do constitute a good cause of action. I am of opinion that they do.

A great many cases were referred to on the argument; but it is unnecessary to refer particularly to more than one. It appears to me that the case of *Bagnall v. Carlton*

(4)—which ought to be called *Bagnall & Co. v. Carlton*—deals with a state of facts identical in all essentials with those in the present case, and lays down principles entirely applicable to and sufficient to decide that part of this claim upon which I feel called upon to give judgment. It is there distinctly laid down that it is not necessary that the particular company should have been constituted or contemplated at the time when the arrangement for remuneration complained of is made. This point was expressly argued by the counsel for one of the persons held liable in that case, and Cotton, L.J., who was the only one of the Lords Justices who gave reasons for his judgment—the others treating the matter as too clear for argument—gives reasons entirely applicable to this case for thinking that this made no difference.

The case of *Bagnall v. Carlton* (4) also clearly establishes that persons who know that the sum they are to receive is to come out of the secret profit which persons standing in the position of trustees for the company are going to put into their own pockets, are themselves in a fiduciary relation to the company, and answerable as trustees to refund any profits so made by themselves at the expense of the company. The case of the *Richardsons* dealt with by Cotton, L.J., in his judgment, seems to me to be on all fours with that of the defendants in the present case; there being evidence in this case, as in that, from which the jury might reasonably think that the defendants knew that Park was to pay them out of moneys of the company ostensibly but not really purchase-money, or out of shares to be created for the mere purpose of covering a reward to them for their secret services to Park.

If the question were to turn upon whether the defendants were promoters of the company or not, as distinct from the question whether they occupied such a position as to be liable to the company as trustees in respect to the shares, I think there is evidence that they were promoters

(4) 47 Law J. Rep. Chanc. 30; s. c. Law Rep. 6 Ch. D. 371.



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in quite as high a degree as were the Messrs. Duigenan in the case of *Bagnall v. Carlton* (4), who were held to be promoters by Bacon, V.C., in his powerful judgment in that case, and by the Court of Appeal, though in both Courts it was held that they were not liable to refund the 1,500*l.* received by them, on the ground that the money did not come out of the funds of the company, but was a debt personally due from the vendor, and payable out of his own moneys.

In the present case I think there was ample evidence upon which the jury might find that it was throughout intended and understood (though in what particular proportions and in what exact manner was not at the time of the formation of the company defined) that the payment to the defendants by the vendor for their assistance to him in promoting a company and furthering the sale of his mine, should come from the funds of the company by being included in the purchase-money of the chief promoter Park, and paid to Lewis & Son out of that purchase-money, whether in cash or shares, or partly in each.

On the whole, therefore, I am of opinion that there was evidence upon which the jury might reasonably find, if necessary, that the defendants were promoters, and, at all events, that they were liable to refund the profits received by them, in the shape of shares of the company for which the company had received no consideration.

No question was raised before me as to the amount of the verdict. It was not urged, as in *Bagnall v. Carlton* (4), that the defendants ought to be allowed to retain any sum because of the value of their services; nor was any evidence given to warrant me in telling the jury that they were bound to take any such question into consideration. The defendants simply stood upon the points of law raised. So far as this part of the case was concerned, the facts sufficient to warrant the finding of the jury were really not in dispute.

I therefore give judgment for the plaintiffs for the sum awarded by the jury in respect of that part of the claim which consists of a claim "for profits received

by the defendants for the use of, and as trustees for the plaintiffs"—leaving either party to take such further steps as they may be advised.

*Judgment accordingly* (5).

Solicitors—F. W. Snell, for plaintiffs; Burton, Yeates & Hart, agents for Tyrer, Kenion & Tyrer, Liverpool, for defendants.

*Carroll v. Burdett* 50 *L. J. Ch.* 189.  
*Mandamus* 50 *L. J. Ch.* 557.

[IN THE DIVISIONAL COURT FOR THE Q.B., C.P. AND EXCH. DIVISIONS.]

1879.

Feb. 18.

WOODGATE v. GODFREY.

*Bill of Sale—Registration—Receipt for Purchase-Money—Sale by the Sheriff—Bills of Sale Act, 1854* (17 & 18 Vict. c. 36).

*The sheriff's officer, under an execution which had been levied on the goods of A. in an action by B. against the said A., sold such goods to C., the father-in-law of the said A., and the sheriff's officer gave a receipt for the purchase-money, in which it was expressed that the money had been received for the goods which had been seized in the said action and sold to the said C. A list of such goods was given at the foot of the receipt. The goods were not removed, but were at once let to the said A., in whose possession they were allowed to continue until seized in execution by a subsequent creditor:—*

*Held, that the receipt was not a bill of sale, and was not as such required to be registered under the Bills of Sale Act, 1854.*

Interpleader issue tried at the Hilary Sittings, 1879, in Middlesex, before Pollock, B., to ascertain whether certain goods and chattels which had been taken in execution by the defendant were, as against him, the property of the plaintiff.

The goods were in a house occupied by

(5) The defendants have since obtained from the Divisional Court a rule nisi to set aside the verdict and judgment, and for a new trial on the ground of misdirection and of the verdict being against the evidence.

*Woodgate v. Godfrey, Q.B.*

the execution debtor, a Mr. Charles Dillon Watson, and it appeared at the trial that on the 30th of May, 1875, these goods were sold to the plaintiff (who was the father-in-law of the said Charles Dillon Watson) for the sum of 589*l.* 17*s.* by the Sheriff of Surrey, under an execution levied in an action by one Robert Wood against the said Charles Dillon Watson. On that occasion the sheriff's officers, Herrick & Son, gave the plaintiff a receipt for the purchase-money in the following form:—

"51 Stamford Street, Blackfriars Road,  
"31st May, 1875.

"In the Common Pleas.

"Robert Wood, plaintiff, and Charles Dillon Watson, defendant.

"Received of Mr. Thomas William Woodgate, of the Boundaries, Balham, Surrey, the sum of 589*l.* 17*s.*, being the value of the undermentioned goods, chattels and effects seized by the Sheriff of Surrey in the above action at 15, Altenburg Gardens, Lavender Hill, Balham, in the county of Surrey, and sold to the said Thomas William Woodgate.

(Signed) "H. Herrick & Son.

"589*l.* 17*s.*

(Signed) "Chas. Dillon Watson."

There then followed a list of the goods referred to in the above receipt.

The goods were not removed, but as soon as bought they were let by the plaintiff to his son-in-law, the said Charles Dillon Watson, in whose occupation they remained until seized in execution by the present defendant.

On behalf of the defendant it was contended at the trial that this receipt was a bill of sale within the meaning of the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), and that, not being registered as required by that Act, the plaintiff was not entitled to the goods as against the defendant. The learned Judge held the contrary, and under his direction a verdict was entered for the plaintiff.

*R. V. Williams*, for the defendant, now moved for a rule to shew cause why there should not be a new trial, on the ground of misdirection.—The learned Judge was wrong in holding that this receipt was not

a bill of sale within the Bills of Sale Act, 1854. The intention of that Act was to apply the doctrine of reputed ownership in bankruptcy to cases where there was not bankruptcy. The execution debtor was still allowed to remain the apparent owner of the property, and the case was clearly within the mischief which the Act was intended to prevent.

[COCKBURN, L.C.J.—The substance of the transaction was a sale by the Sheriff, and the receipt was immaterial. The Sheriff had nothing to do with the goods after he had sold them, and he was no party to what was afterwards done about them.]

The Bills of Sale Act, 1854, applies to a bill of sale given by the sheriff's officer. The 1st section states that a bill of sale which is not registered as required by that section shall "be null and void to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale which at or after the time," *inter alia*, "of executing such process (as the case may be), and after the expiration of the said period of twenty-one days, shall be in the possession or apparent possession of the person making such bill of sale, or of any person against whom the process shall have issued under or in the execution of which such bill of sale shall have been made or given, as the case may be." Therefore, where the bill of sale is given by the sheriff's officer, the Act substitutes the execution debtor for the grantor; and if, after the bill of sale has been given by the sheriff's officer, the goods remain in the possession of such execution debtor, the bill of sale is liable to the consequences of the statute. Then the only question is whether the document given by the sheriff's officer in the present case was a bill of sale or not. The interpretation clause, section 7, states that the expression, "bill of sale," shall include "bills of sale, assignments, transfers, declarations of trust without transfer, and other assurances of personal chattels." This was a transfer, and so within the meaning given to "bill of sale" by the Act. It is true that in *Allsop v. Day* (1) it was held

(1) 7 Hurl. & N. 457; s. c. 31 Law J. Rep. Exch. 105.

*Woodgate v. Godfrey.*

that a receipt for the purchase-money of furniture was not a bill of sale within the Act; but that case is now no longer law, since the cases of *Ex parte Odell*; *re Walden* (2), and *Ex parte Cooper*; *re Baum* (3). In that last case, Baum sold the furniture in his residence to one Alexander Isaacs, and signed a receipt for the purchase-money at the foot of an inventory of the furniture, in these words:—"Received this 29th of May, 1876, of and from Mr. Alexander Isaacs, the sum of 600*l.*, being the amount of purchase-money in respect of the goods, chattels, plate, linen and effects mentioned in the foregoing inventory." It was there held, on appeal, by the Lords Justices, that this receipt was a bill of sale within the meaning of the Bills of Sale Act, 1854, and was void for want of registration. The Legislature has adopted this construction, and in the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), it expressly includes in the meaning of "bill of sale" "inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods."

COCKBURN, L.C.J.—I am of opinion that in this case there should be no rule. The argument on behalf of the defendant would come to this, that in every case in which there is a sale of goods and chattels out and out, and a receipt is given for the purchase-money, specifying the goods which have been sold, such document is a bill of sale, which requires to be registered as such under the Bills of Sale Act, 1854. Now, what says the Act? The 1st section says that every bill of sale of personal chattels, "whereby the grantee or holder shall have power, either with or without notice, and either immediately after the making of such bill of sale or at any future time, to seize or take possession of any property and effects comprised in or made subject to such bill of sale." That was because the mischief intended to be prevented by the Act was where the property in the goods passed to the grantee without his having the possession, so that the person who gave the

grantee the right to take his goods was able in fact to retain the possession of them; but that Act was never intended to apply to an out and out sale, where it was never contemplated that the possession should remain in the grantor. I think that the 1st section does not apply to the case of a sale out and out. Then what was the transaction here? It was a sale by the sheriff, who simply sold in the execution of his duty, and who had nothing to do with the goods afterwards. He gave a receipt for the purchase-money. Is that receipt any title to the goods? No, the title was valid without it. The receipt does not state that he thereby sells, but that he has received the money for, goods that he had sold. It is not, in my opinion, a bill of sale within the Act, and therefore there will be no rule.

POLLOCK, B.—I also think that there should be no rule. This case arises under the Bills of Sale Act, 1854. What is the proper construction of the expression "bill of sale" under the Act of 1878, it will be sufficient to determine when the occasion arises. I own that the argument of Mr. Williams has failed to convince me that this receipt is a bill of sale within the Bills of Sale Act, 1854. The sale was a sale out and out so far as the Sheriff was concerned, and the receipt was only a receipt for the money, and it did not become a bill of sale merely because it shewed what were the goods sold for which the money was received. But for two cases which have been cited there would not, in my opinion, be any doubt about the matter. Those cases are, however, very distinguishable from the present; and in deciding this case as we do it is not necessary to dispute the law as laid down in those cases. There the receipt was part of a transaction which, taken as a whole, was in effect a mortgage; it was something more than a mere sale.

*Rule refused.*

Solicitors—Walker & Mewburn-Walker, for plaintiff; J. W. Heritage, for defendant.

(2) 48 Law J. Rep. Bankr. 1; s. c. Law Rep. 10 Ch. D. 76.

(3) 48 Law J. Rep. Bankr. 40.

*Stooke & Taylor 492 362 858.*  
*Heale & Clarke 411 2 54 38.*

[IN THE DIVISIONAL COURT FOR THE  
Q.B., C.P. AND EXCH. DIVISIONS.]

1879. }  
Jan. 14. } POTTER v. CHAMBERS.

*Costs—Amount recovered reduced by successful Counter-claim below 20l.—County Courts Act, 1867, s. 5—Judicature Act, 1873, s. 67.*

*Where plaintiff's claim exceeds 50l. and he recovers a sum exceeding 20l., he will not be deprived of his costs under section 5 of the County Courts Act, 1867, on the ground that defendant has succeeded on a set-off and counter-claim so as to reduce the amount actually recovered as the balance to less than 20l.*

*Section 67 of the Judicature Act of 1873 has no application to such a case.*

This was an action for goods sold and delivered, tried before Thesiger, L.J., at Chelmsford in July, 1878. The plaintiff claimed a sum of 114l. 8s., and the defendant pleaded a set-off and counter-claim to the amount of 109l. 16s. Both parties succeeded in establishing their respective claims to the full amount, and the verdict was entered and judgment given for the plaintiff for the balance of 4l. 12s. An application was made to the learned Judge immediately after the trial to deprive the plaintiff of his costs, but after taking a day to consider he refused to do so. Subsequently, the Divisional Court was moved on behalf of the defendant to enter the judgment distributively for each party, but the motion was refused. On plaintiff taking in his costs for taxation, the Master taxed them.

*Peile, for the defendant, now moved for a rule calling upon the Master to review his taxation.—The plaintiff has "recovered a sum not exceeding 20l." within the meaning of section 5 of the County Courts Act, 1867, and that section is incorporated by section 67 of the Judicature Act, 1873. For the purpose of calculating the actual sum recovered, the amount recovered on the counter-claim must be deducted from the amount recovered on the claim; and if the balance is thus reduced to below 20l.*

*the plaintiff is not entitled to his costs of suit—Staples v. Young (1).*

*Shaw, for the plaintiff, was not called upon.*

COCKBURN, L.C.J.—I am of opinion that the Master was right in his taxation of the plaintiff's costs. *Staples v. Young* (1) is to be distinguished on the ground that the original claim in that action was below 50l. Section 67 of the Judicature Act, 1873, has no application to the present case, for the relief sought was not such as could be afforded in a County Court. It was never intended by the legislature to give jurisdiction to an inferior Court where the sums in dispute on each side are large, and the difference only is small. The plaintiff was compelled to come to the superior Court in order to establish his original claim. He could not know for certain that the defendant would raise the defence of set-off and counter-claim. Why should he be placed in a worse position because that defence has been pleaded? It was not an admitted set-off. As a matter of fact he has established his claim to the full amount, though it was afterwards cut down by the amount of the counter-claim. The intention of the legislature was to give jurisdiction to the County Court only in cases where small sums are due, i.e. where the claim is for a sum originally small.

POLLOCK, B.—I am of the same opinion. This case is within neither the terms nor the spirit of section 67 of the Judicature Act. The language there is "actions in which any relief is sought which can be given in a County Court." The relief here sought could not have been afforded by a County Court.

*Motion dismissed with costs.*

Solicitors—Digby & Jones, agents for Digby & Evans, Maldon, for plaintiff; George Blagden, for defendant.

(1) Law Rep. 2 Ex. D. 324. And see *Blake v. Appleyard*, 47 Law J. Rep. Exch. 407.

[IN THE DIVISIONAL COURT FOR THE  
Q.B., C.P. AND EXCH. DIVISIONS.]

1879. }  
Jan. 14. } FINNEY v. HINDE.

*Practice—Charging Order on Stock standing in Name of Judgment Debtor—1 & 2 Vict. c. 110. ss. 14, 15—Death of Judgment Debtor.*

*An order obtained ex parte under 1 & 2 Vict. c. 110. ss. 14, 15, charging stock standing in the name of a judgment debtor, cannot be made absolute when it appears that the judgment debtor was dead at the date of the original order.*

In this action judgment had been obtained against the defendant, Thomas Hinde, which judgment remained unsatisfied at the time of the death of the judgment debtor on the 17th of June, 1878. Afterwards, the plaintiff applied for a charging order on certain stock standing in the name of the judgment debtor, under 1 & 2 Vict. c. 100, ss. 14, 15; which order was made absolute by Field, J., in chambers, on the 14th of December, 1878. These sections are substantially as follows:—

Section 14. If any person against whom any judgment shall have been entered up in any of Her Majesty's Superior Courts at Westminster shall have any Government stock, funds, &c., standing in his name in his own right, it shall be lawful for a Judge, upon the application of any judgment creditor, to order that such stock, &c., shall stand charged with the payment of the amount for which judgment shall have been so recovered.

Section 15. Every order of a Judge charging any Government stock, &c., under this Act shall be made in the first instance *ex parte* and without any notice to the judgment debtor, and shall be an order to shew cause only; . . . and unless the judgment debtor shall, within a time to be mentioned in such order, shew to a Judge sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute; provided that any such Judge shall, upon the application of the judgment debtor,

or any person interested, have full power to discharge or vary such order.

*Anstie*, on behalf of the widow of the judgment debtor, who was the executrix under his will, though the will had not been proved, moved by way of appeal to discharge the order of Field, J.—First, at the time when the *ex parte* application was made, there was no judgment debtor in existence, in whose name the stock could be said to be standing. Secondly, it was impossible for the judgment debtor, being dead, either to receive notice of the order or to shew cause against it.

*Wyatt Hart*, for the plaintiff.—By Order L., rule 1, no action shall abate by reason of the death of any of the parties. In *Stuart v. Cockerell* (1), a stop order obtained after bankruptcy prevailed over the title of the assignee.

[PER CURIAM.—But death has a very different effect from bankruptcy.]

In *Haly v. Barry* (2); a charging order *nisi* similarly obtained after the death of the judgment debtor was made absolute after a decree for administration granted in a creditor's suit.

[PER CURIAM.—But in that case a personal representative had been duly constituted, and a suggestion of death had been entered on the record.]

COCKBURN, L.C.J.—I am of opinion that this order must be discharged. When the Legislature abolished arrest on *meane* process, and substituted a new proceeding *in rem* for the old proceeding *in personam*, it was intended that the new remedy should be co-extensive with the old. In such a case as this there would have been no means of arresting the person of the debtor, and consequently there is now no means of charging his stock. The extraordinary power given by statute must be exercised strictly.

POLLOCK, B.—I am of the same opinion, having regard to the course of proceedings under ss. 14 and 15. The order is made *ex parte*, and can be set aside on cause shewn. But if the judgment

(1) 39 Law J. Rep. Chanc. 127; s. c. Law Rep. 8 Eq. 607.

(2) 37 Law J. Rep. Chanc. 723; s. c. Law Rep. 3 Ch. 452.

*Finney v. Hinde.*

debtor is dead, he can never appear to shew cause; and consequently in such a case every order would have to be made absolute. I think also that Order L. rule 1, has no application. This is not like a step in a cause, for judgment is signed and the action at an end. It is rather like a new mode of execution granted by statute; and the requirements of the statute must be followed.

*Appeal allowed without costs.*

Solicitors—J. E. Dunn, for plaintiff; Thomas White & Sons, agents for Brittan, Press & Inskip, Bristol, for the representatives of the deceased defendant.

[IN THE COMMON PLEAS DIVISION.]

1879. }  
March 1. } WRIGHT v. FREEMAN.

*Interpleader—Non Co-extensive Claims*—1 & 2 Will. 4. c. 58. s. 1, and 23 & 24 Vict. c. 126. s. 12—*Judicature Act, 1875, Order XVI. Rules 17 and 18.*

*The defendant, the proprietor of a horse repository, sold there by public auction a horse to the plaintiff, warranted quiet to ride and in harness, but subject to a condition, by which if considered by the buyer incapable of working from any infirmity or disease it might be returned on the second day after the sale, and the matter determined by veterinary surgeons according to the terms provided for in such condition. The horse was accordingly returned by the plaintiff, who demanded to have back the money he had paid for the purchase, and this being refused he brought an action against the defendant for damages for breach of the warranty.*

*A. B., who had placed the horse at the repository for sale, claimed of the defendant the proceeds of the sale, stating that the horse had left the repository perfectly sound:—*

*Held, that the defendant was not entitled to an interpleader order.*

The defendant is the proprietor of Aldridge's repository in St. Martin's Lane, and on the 3rd of February last, he received a brown mare from a Mr. James Quickfall for sale by auction at

such repository. The mare was accordingly sold there on the 5th of February, to the plaintiff who was the highest bidder at 19*l.* 19*s.* It was sold quiet to ride and quiet in harness, subject to certain published conditions of sale, by the 6th of which it was provided that if any horse sold warranted to ride or draw be considered by the buyer to be incapable of working from any infirmity or disease it might be returned on the second day after the sale with a certificate from a veterinary surgeon to that effect, and in case such certificate should not be confirmed by another to be furnished by the vendor within two days, or in case the vendor should neglect or refuse to furnish such certificate, the auctioneer was to appoint a veterinary surgeon whose decision was to be final, and the whole reference paid by the party in error.

The plaintiff paid the price for the mare and took her away on the day of sale, and on the next day, namely, the 6th of February, he returned her with a certificate, according to the 6th condition, and at the same time demanded to have back his money, but as this was refused the plaintiff stated that he should bring an action against the defendant to recover his money and the damages he had sustained by the vice of the horse. On the 8th of February the present action was brought, in which the claim, as indorsed on the writ, was for damages for breach of warranty of a horse.

On the 10th of February Quickfall wrote to the defendant for the proceeds of the sale, stating that the mare had left the repository perfectly sound. Under these circumstances the defendant applied for an interpleader order, but the same was refused by Master Kay and afterwards by Field, J., at chambers.

Lord now moved by way of appeal for an order that the plaintiff and Quickfall should interplead.—There is a suggestion that the plaintiff has a claim for damages for some injury the horse did to a cab into which the plaintiff put it, but no sum has been mentioned as regards such damage, and the horse having been returned in the way it was, the action in effect is an action to recover

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back the price which was paid for the purchase. It is clear that either the plaintiff or Quickfall is entitled to the horse or the price at which it was sold, and that is a question which should be determined in a proceeding between those two, and the defendant ought to be relieved. The case comes within the principle on which the Court of Appeal decided *Attenborough v. The London and St. Katherine's Docks Company* (1). The Court of Appeal in that case referred to the case of *Tanner v. The European Bank* (2), which was not cited when *Attenborough v. The London and St. Katherine's Docks Company* (1) was before this Court and which is strongly in favour of the claim to interplead.

*Petheram*, for Quickfall, opposed the application.—There is no common interest between the parties, and it is therefore not a case for interpleader. The defendant can by introducing Quickfall as a third party under Order XVI. of the Judicature Act, 1875, rules 17 & 18, get all the relief he is entitled to.

*Sims and Melsheimer*, for the plaintiff.—It is only when the same subject-matter is claimed by two parties that there can be an interpleader order either under the Interpleader Act (1 & 2 Will. 4. c. 58) or the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126. s. 12). Here Quickfall can only claim the price of the horse, whereas the plaintiff claims damages for the breach of the warranty. The plaintiff has had his cab injured by the horse, and he wants to recover for this in his damages for this breach of warranty.

*Lord* replied.

*LORD COLERIDGE, C.J.*—I think that this application must be refused. I decline to give any reason, but I do not wish it to be supposed that in so refusing to make an order to interplead we are deciding contrary to the decision of the Court of Appeal in *Attenborough v. The London and St. Katherine's Docks Company* (1) which of course binds us.

(1) 47 Law J. Rep. C.P. 763; s. c. Law Rep. 3 C.P. D. 450.

(2) 35 Law J. Rep. Exch. 151; s. c. Law Rep. 1 Exch 261.

*DENMAN, J.*—The two claims, namely, that of the plaintiff and that of Quickfall, do not depend on one another, and there is nothing in common between them, and therefore the case of *Attenborough v. The London and St. Katherine's Docks Company* (1) does not apply. Moreover, if we have a discretion in the matter. I think that this is not a case in which in the exercise of such discretion an interpleader order should be made. Therefore on both these grounds this application should be dismissed.

*Order refused.*

Solicitors—F. C. James, for plaintiff; Dixon, Ward & Co., for defendant; Venn & Woodcock, for Quickfall.

[IN THE QUEEN'S BENCH DIVISION.]

1869. }

Feb. 25. }

LAMB v. BREWSTER.

*Landlord and Tenant—Landlord's Property Tax—Deduction from next Rent—Agreement to pay Amount of Tax not deducted from Rent—5 & 6 Vict. c. 35. ss. 60 and 103—Voluntary Payment.*

*A landlord promised his tenant that if he would continue to pay his rent in full, without deducting anything for the landlord's property tax, he, the landlord, would repay to him all sums which he had paid or should pay for such property tax. The tenant having paid his rent in full to the landlord during his lifetime, claimed from his executors the amount of property tax so paid and not deducted from his rent:—*

*Held, on demurrer, in favour of the plaintiff's claim—first, that the promise by the landlord was made for good consideration, and the payment of the rent in full was not a voluntary payment by the tenant; secondly, that the agreement was not void as an "agreement for the payment of rent in full" within section 103 of 5 & 6 Vict. c. 35.*

This was an action to recover arrears of property tax by a tenant against the executors of his landlord.

From the notice in lieu of statement of

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claim referring to the indorsement on the writ, and from the particulars, it appeared that the claim was for 37l. for six years' landlord's property tax in respect of two tenements, paid by the plaintiff as tenant of the testator for the testator, and which the executors had refused to return to the plaintiff.

The statement of defence alleged that, assuming that the property tax was paid by the plaintiff, no demand, application or request was ever made by plaintiff for it to be allowed or deducted out of the rent which became due by the plaintiff to the testator next after each payment of property tax, but the plaintiff made each payment of rent without making or claiming any such deduction of the amount liable to be deducted in respect of property tax, according to the statutes in such case made and provided.

Reply—

1. Joinder of issue.

2. Demands or requests were frequently made by the plaintiff for the said property tax to be paid, allowed or deducted out of the rent which became due and payable by the plaintiff next after each payment of the said property tax respectively.

3. The said testator promised the plaintiff that if he would continue to pay the said rent in full, without deducting anything for the said payments of property tax, he, the testator, would pay to him all sums which he had paid or should pay for the said property tax, and the plaintiff did continue to pay the said rent in full, but the testator did not repay such sums as agreed.

Demurrer to the reply, on the grounds that any such agreement as alleged in the third paragraph would be void in law by reason of the Property Tax Acts; and that the payment of the full rent to the landlord was a voluntary payment by the tenant, and could not be recovered.

*A. P. Stone (F. M. White with him)*, in support of the demurrer.—When the tenant paid the full rent to the landlord it was, *quoad* the amount of the property tax which he had a right to deduct, a voluntary payment. There was no consideration for his paying in full.

*Denby v. Moore* (1) is an authority, not only on this point, but also on the other point that it was a payment in fraud of the Property Tax Act. That Act, 5 & 6 Vict. c. 35. s. 60, No. IV. rule 9, provides the mode in which alone tenants are to recover from their landlords the amount of property tax which they have paid. And section 103 makes an agreement such as this wholly void, as being an "agreement to pay rent in full" (2).

[FIELD, J.—Does that apply to a subsequent agreement?]

Yes; for the effect is to prevent the tenant availing himself of the Act. And the tendency would be to throw the tax on the tenant, because he would be wholly dependent on the honour of his landlord for repayment.

*J. O. F. S. Day (C. Dodd with him)*, *contra*.—The doctrine of voluntary payment does not apply in a case of forbearing to enforce payment; and in the cases cited there had been no request made not to deduct. Then there is ample consideration for the landlord's promise, and it is the tenant here who is suing. It is really as if the landlord had asked the tenant to lend him money, and it had been lent on a promise to repay. The statute does not apply unless the parties are trying to shift the burden from the landlord to the tenant. The Act was for the protection of the tenant, and this agreement was as to the mode in which the tenant should be repaid, and not for the purpose of exonerating the landlord. Nor is it an agreement to pay the rent in full; but a promise by the landlord to repay the amount of the tax if the tenant pays the rent in full. The tenant is, therefore, bound to nothing in derogation of his rights, but is guaranteed by the landlord against loss in case he does not enforce his rights at the time they arise.

*Stone*, in reply.

(1) 1 B. & Ald. 123.

(2) 5 & 6 Vict. c. 35. s. 103. "... All contracts, covenants and agreements made or entered into, or to be made or entered into, for payment of any interest, rent or other annual payment aforesaid, in full, without allowing such deduction as aforesaid, shall be utterly void."



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MELLOR, J.—Independently of the statute, I think there appears here to have been a sufficient promise upon a sufficient consideration, and that the plaintiff is entitled to maintain his action.

But section 103 of 5 & 6 Vict. c. 35 was relied upon as making this agreement void. Now I think that the section was intended to apply and is confined to all bargains, contracts, leases and covenants in which it is agreed that, notwithstanding the Property Tax Acts, the tenant shall pay. The provision was directed against any change being made by agreement in the incidence of the taxation, which the Legislature determined was to fall ultimately on the landlord, and it has been effectual in preventing the validity of deeds aiming at such change.

The cases cited shew that when a person does not take the opportunity of deducting the tax from his next rent, as he is authorised to do, he loses his right to it, and in any subsequent attempt to recover it, his payment in full is treated as having been a voluntary payment. This, however, is a very different case, for a demand of the deduction was made, and it was only on the request of the landlord that the tenant abstained from insisting on it. This makes *Denby v. Moore* (1) inapplicable, and as to the *dicta* in that case suggesting an evasion of the Act, we may usefully see how the matter is treated in the later case of *Stubbs v. Parsons* (3) by Holroyd, J., one of the Judges in the former case. He says, "The occupier has, as it seems to me, a lien on the next rent given him by the Legislature for the tax paid by him, but if he parts with the rent without making the deduction he loses his lien, and has only his remedy by action or set-off." This I think states the true principle. The bargain here was that if the tenant gave up his lien the landlord would pay at a future time; there was good consideration for the promise, and the promise was not to evade but to carry out the Act. Therefore our judgment must be against the demurrer.

FIELD, J.—I am of the same opinion. We have only to see whether any state of things can be proved under this reply

which is not illegal. The Legislature has determined that the landlord shall ultimately pay this property tax, and that the tenant shall not be able to make a contract by which he pays it instead of his landlord. How is this agreement a contract of such a character? I am unable to see that it was a fraud on the Property Tax Act, or that the payment of the whole rent to the landlord under these circumstances can be said, as has been suggested in the judgments of the distinguished Judges in *Denby v. Moore* (1), to countervail the provisions of the Act.

If not illegal because of the Act, was it a mere voluntary payment? This it is impossible to maintain when the facts are that it was made under a specific contract with the landlord. On both grounds, therefore, the defendant's demurrer fails, and judgment must be for the plaintiff.

*Demurrer overruled.*

Solicitors—J. W. Marsh, agent for Bescoby, East Retford, for plaintiff; Collyer-Bristow & Co., agents for Hett, Freer & Co., Brigg, for defendant.

[IN THE DIVISIONAL COURT FOR THE Q.B., C.P. AND EXCH. DIVISIONS.]

1879. }  
Jan. 13. } GAY v. LABOUCHERE.

*Practice—Mode of taking Objection to Interrogatories—Rules of the Supreme Court, November, 1878—Order XXXI. rule 5.*

*The object of the new rule 5, Order XXXI., in the rules of the Supreme Court, November, 1878, is to compel a party interrogated to make his objections with his answer, except in certain specified cases. It is no longer competent for him, before answer, to apply to have the whole set of interrogatories struck out, on the ground that some of them, or parts of some of them, are not such as he is bound to answer.*

This was an action for libel. There were substantially six counts in the statement of claim, and the plaintiff had exhibited to the defendant a set of in-

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interrogatories numbering twenty-six in all. It was not denied that some of these interrogatories, or at least portions of some of them, were such as the plaintiff was entitled to ask and the defendant was bound to answer. But the defendant, following the old practice under the original rule 5, Order XXXI., had applied in chambers for an order disallowing the whole set of interrogatories. The order was refused by the Master, and also by Field, J., sitting in chambers.

The present appeal was then brought by the defendant. This was the first case that had come before a Divisional Court since the date of the new rule, which came into operation on the 18th of November, 1878, repealing rules 5 and 8 of Order XXXI. The original rules were as follows :—

"5. Any party called upon to answer interrogatories, whether by himself or by any member or officer, may within four days after service of the interrogatories, apply at chambers to strike out any interrogatory, on the ground that it is scandalous or irrelevant, or is not put *bona fide* for the purposes of the action, or that the matter enquired after is not sufficiently material at that stage of the action, or on any other ground. And the Judge, if satisfied that any interrogatory is objectionable, may order it to be struck out.

"8. Any objection to answering any interrogatory may be taken, and the ground thereof stated, in the affidavit."

For these two rules the following two paragraphs, to be called rule 5, Order XXXI., have been substituted by the Rules of the Supreme Court, November, 1878 :—

"Any objection to answering any one or more of several interrogatories on the ground that it or they is or are scandalous or irrelevant, or not *bona fide* for the purpose of the action, or that the matters enquired into are not sufficiently material at that stage of the action, or on any other ground, may be taken in the affidavit in answer.

"An application to set aside the interrogatories on the ground that they have been exhibited unreasonably or vexatiously, or to strike out any interrogatory

or interrogatories on the ground that it or they is or are scandalous, may be made at chambers within four days after service of the interrogatories."

*Russell* (*Edward Clarke* with him), for the defendant.

*Lumley Smith* (*H. Reed* with him), for the plaintiff.

COCKBURN, L.C.J.—I am of opinion that my brother Field was quite right in refusing to strike out the whole set of interrogatories. This is a case which clearly comes within the first branch of the new rule; the second branch only applies where the interrogatories as a whole are objected to as unreasonable or vexatious, or where any single interrogatory is complained of as scandalous. It is not suggested that these interrogatories were improperly exhibited, or that they are scandalous; but only that some of them are such as the defendant is not bound to answer. Therefore the defendant should have taken his objection in his affidavit in answer, which he has not done. We have nothing to do with the question whether the new rule is an improvement on the old.

POLLOCK, B.—I am of the same opinion. If the old rule had stood, then we could have heard Mr. Russell, for his objection would have come under the words "or on any other ground." But by the new rule an antithesis was intended to be conveyed between interrogatories that are "scandalous"—a well-known term in equity—and those that are objected to on other grounds.

*Appeal dismissed with costs.*

Solicitors—G. S. & H. Brandon, for plaintiff  
Lewis & Lewis, for defendant.

## [IN THE HOUSE OF LORDS.]

1878. } WARD (*appellant*) v. HOBBS  
Nov. 8, 12. } (*respondent*).

*False Representation—Sale of Animals in Public Market—Implied Representation of Freedom from Infectious Disease—32 & 33 Vict. c. 70 (Contagious Diseases (Animals) Act, 1869), s. 57.*

*A man who sends animals to market does not thereby impliedly represent to a purchaser that they are not, so far as he knows, suffering from infectious disease, at all events where they are sold subject to an express condition that no warranty will be given.*

*Purchasers are not within the purview of 32 & 33 Vict. c. 70, s. 57, and cannot in consequence maintain an action upon a violation of the duty imposed by that section.*

*Whether the owner of other animals infected in the market could recover damages for their loss—Quære.*

This was an appeal from an order of the Court of Appeal reversing a judgment of the Queen's Bench Division. The judgments of the Courts below are reported 46 Law J. Rep. Q.B. 478 (where the facts are fully stated) and 47 Law J. Rep. Q.B. 90; s. c. Law Rep. 2 Q.B. D. 331, and 3 Q.B. D. 150.

The action was for damages caused by breach of warranty and false representation on the sale by the defendant to the plaintiff at a public market, of thirty-two pigs, which were suffering at the time from typhoid fever, and by the wrongful act of the defendant in offering the pigs for sale at public market. Damages were claimed for the loss of thirty of the pigs sold, which died of the disease and of others which were infected by them; also for medical expenses and for the loss of the use of 300 acres of stubble which became infected and consequently for a time useless.

Among the conditions of sale, subject to which the pigs were sold, were the following:—

4. "The lots with all faults and errors of description (if any) to be paid for and removed at the buyer's expense immediately after the sale."

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6. "No warranty will be given by the auctioneer with any lot, and as all lots are open for inspection previous to the commencement of the sale, no compensation shall be made in respect of any fault or error of description of any lot in the catalogue."

The jury found, in answer to questions of the learned Judge who tried the case (Brett, L.J.), 1. That the pigs died of a contagious fever; 2. That they had a contagious disease when sold; 3. That other pigs of the plaintiff caught the disease from the pigs the plaintiff bought; 4. That the defendant knew that the pigs had a disease dangerous to them and were worthless when he sold them.

The damages were assessed at 60*l.* 19*s.* and a verdict was thereupon entered for the plaintiff for that amount.

On motion, pursuant to leave reserved, to set aside the verdict and enter a nonsuit, on the ground that there was no evidence against the defendant of warranty, or fraud, or knowledge that the pigs were infected, the Divisional Court gave judgment for the plaintiff, holding that the act of the defendant in sending the pigs for sale to a public market, from which animals infected with a contagious disease are excluded by law, was an implied representation that the pigs were not so infected to his knowledge.

The judgment of the Divisional Court was reversed by the Court of Appeal.

The plaintiff then brought this appeal.

*Henry Mathews and Bros.*, for the appellant.—It being a penal offence to send animals suffering from a contagious disease to market, purchasers are justified in assuming that animals in a market are not contagious, at any rate to their owner's knowledge. The respondent therefore sent his pigs to a place, as it were, labelled "place for healthy animals." The jury found that he knew the pigs to be suffering from typhoid fever, and had a right to presume that he knew the conclusion which would be drawn from their presence in the market, and intended such conclusion to be drawn. The case supposed by Bramwell, L.J., of an extravagant man, who wears jewellery, &c., for display, and in consequence obtains

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credit from a tailor, differs from the present. First, there is no law which forbids extravagant display; to make the cases alike a sumptuary law must be supposed.

[THE LORD CHANCELLOR.—If a man take a glandered horse on the highway (a penal offence), and is met by some one who buys it, would there be a representation of freedom from glanders?] ]

There the sale would be an accidental result not intended by the owner. Here the pigs are sent to market for the express purpose of being sold. And that fact is a second point distinguishing the present case from the illustration of *Bramwell, L.J.* The Lord Justice says, "I do not think any person has a right to draw a conclusion from conduct which is not directed to him either as an individual, or as one of a class, or as one of the public, for the purpose of acting on it." Here the conduct was directed to the plaintiff as one of the class of purchasers for the purpose of acting on it. Yet, though the Lord Justice allows that injury by contagion to pigs of other owners in the market, who were not meant to suffer, would give a right of action, he holds that the person who was intended to be injured is not to recover.

There is no direct authority in favour of presuming from conduct a representation that such conduct is not criminal; but there is a dictum of Blackburn, J., who in *Bodger v. Nicholls* (1), said: "I entertain no doubt, but it is not necessary to decide the point, that the defendant by taking the cow to a public market to be sold, though he does not warrant her to be sound, yet thereby furnishes evidence of a representation that, so far as his knowledge goes, the animal is not suffering from any infectious disease." The same principle is implied in *Emmerton v. Matthews* (2), and *Burnby v. Bollitt* (3). That there may be a representation without words appears by *The King v.*

*Barnard* (4), where conduct alone was held to amount to a false pretence, and *The Queen v. Coulson* (5); and in *Hill v. Gray* (6), where the vendor of a picture knew that the purchaser was under a delusion, whereby its value was enhanced in his estimation, and did nothing to remove the delusion, it was held that the sale was void. See also *Jones v. Bowden* (7), *Richolz v. Bannister* (8), (where the sale was "with all faults,") *Morley v. Attenborough* (9), *Peto v. Blades* (10), *Schneider v. Heath* (11), *Fletcher v. Bowsher* (12). In *Pickering v. Dowson* (13), where the sale was held good, there was a written contract after full inspection by the plaintiff, and the Court refused to go behind the contract without proof of active fraudulent concealment.

The case is also within the class of cases, in which the sale of an article by name and description results in the delivery of something totally different. In *Shepherd v. Kain* (14), where a ship sold as "copper fastened" turned out not to be so, though the sale was "with all faults," it was held that this must mean such faults as were incident to copper fastened ships. So in *Nichol v. Godts* (15), where oil sold as "foreign refined rape oil warranted equal to sample," was found not to be foreign refined rape oil, though equal to sample, and in *Josling v. Kingsford* (16), and *Wicler v. Schilizzi* (17), where, in the one case "oxalic acid," in the other "Calcutta linseed," were delivered mixed with other materials, so as not to be

(4) 7 Car. & P. 784.

(5) 1 Den. C.O. 592.

(6) 1 Stark. 434.

(7) 4 Taunt. 847.

(8) 17 Com. B. Rep. N.S. 708; s. c. 34 Law J. Rep. C.P. 105.

(9) 3 Exch. Rep. 500; s. c. 18 Law J. Rep. Exch. 148.

(10) 5 Taunt. 657.

(11) 3 Campb. 606.

(12) 2 Stark. 561.

(13) 4 Taunt. 779.

(14) 5 B. & Ald. 240.

(15) 10 Exch. Rep. 191; s. c. 23 Law J. Rep. Exch. 314.

(16) 13 Com. B. Rep. N.S. 447; s. c. 32 Law J. Rep. C.P. 94.

(17) 17 Com. B. Rep. 619; s. c. 25 Law J. Rep. C.P. 89.

(1) 28 Law Times Rep. 442.

(2) 7 Hurl. & N. 586; s. c. 31 Law J. Rep. Exch. 139.

(3) 16 Mee. & W. 644; s. c. 17 Law J. Rep. Exch. 190.

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within the description as understood in commerce, the sales were held void. These animals were not pigs at all, but a mere mass of contagious disease, or at least they were so mixed with typhoid fever, as not to answer the description of pigs as a merchantable article.

Further, there is here a nuisance indictable at common law—*The Queen v. Henson* (18), *The King v. Vantandillo* (19), which, being followed by particular damage to the plaintiff, is actionable by him, as in the familiar instance of a log placed on the highway. There is also a breach of the Contagious Diseases (Animals) Act, which gives a right of action on the principle laid down as follows in *Comyn's Digest*, "Action on Statute," F. upon the authority of Lord Holt—"So in every case, where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute, for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law." Here the plaintiff, as a purchaser, was one of the persons for whose benefit the Act was enacted, and has suffered by the offering to sale contrary to the Act—*Rowning v. Goodchild* (20), *Couch v. Steel* (21) limited, but not overruled by *Atkinson v. The Newcastle and Gateshead Waterworks Company* (22).

Moreover, with respect to the damage done to the other pigs of the plaintiff and to the land, it is contended that the defendant by selling an article known by him to be dangerous, without disclosing the danger, is liable for the consequent damage—*Farrant v. Barnes* (23), *Brass v. Maitland* (24), *Blakemore v. The Bristol and Exeter Railway* (25). These were

not, it is true, actions upon sale, but in the case last cited Coleridge, J., delivering the judgment of the Court, said, "Would it not be monstrous to hold that, if the owner of a horse, knowing it to be vicious and unmanageable, should lend it to one who is ignorant of its bad qualities, and conceal them from him, and the rider, using ordinary care and skill, is thrown from it and injured, he should not be responsible?" This observation in reference to a mere voluntary and gratuitous bailment would apply *a fortiori* to sales, and the principle appears to be assumed in *Burnby v. Bollett* (3) and *Emmerton v. Matthews* (2). As to the right to consequential damages, *Mullett v. Mason* (26) is a clear authority for the plaintiff.

*Benjamin and H. D. Greene*, for the respondent, were not called on.

THE LORD CHANCELLOR (EARL CAIENS).

—In this case the respondent sold a certain number of pigs by auction at Newbury market, and the appellant became the purchaser of those pigs at the auction. There were conditions of sale under which the pigs were sold, and the fourth and sixth of those conditions ran in these words:—[His Lordship read the conditions.] It turned out that almost immediately after the sale the pigs in the hands of the purchaser shewed unmistakable symptoms of being affected with a contagious and infectious disease, viz., typhoid fever; they rapidly died off, and nearly all of them ultimately died. Your Lordships have not heard the counsel for the respondent in this case, and therefore all that I shall say upon this head is this: that if the finding of the jury is a correct inference from the facts of the case, that the pigs were infected with this disease at the time of the sale, and the respondent knew it, then, beyond all doubt, the respondent was, both morally and legally, highly culpable.

But the question is, is there a right of action on the part of the appellant?

Now the appellant in his claim puts the case in this way: he says that by warranting the pigs to be free from any

(18) 1 Dears. C.C. 24.

(19) 4 M. & S. 73.

(20) 2 W. Black. 906.

(21) 3 E. & B. 402; s. c. 23 Law J. Rep. Q.B. 121.

(22) 46 Law J. Rep. Exch. 775; s. c. Law Rep. 2 Ex. D. 441.

(23) 11 Com. B. Rep. N.S. 553; s. c. 31 Law J. Rep. C.P. 137.

(24) 6 E. & B. 470; s. c. 26 Law J. Rep. Q.B. 49.

(25) 8 E. & B. 1035; s. c. 27 Law J. Rep. Q.B. 167.

(26) 35 Law J. Rep. C.P. 209; s. c. Law Rep. 1 C.P. 559.

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infectious disease, the defendant induced him to buy them; and then he alleges that "even if the defendant did not warrant the pigs, the plaintiff says that the defendant, either knowingly, or having good reason for believing that the pigs were suffering from an infectious disease, offered them for sale at a certain open and public market held at Newbury, and sold thirty-two of them to the plaintiff for 44*l*." Then he says that "the defendant knew that the plaintiff was a farmer, and that the pigs would be placed with other pigs, and would also be turned into certain stubble fields."

Now, with regard to the allegations in the statement of claim, undoubtedly there was no warranty, and the case in that respect is unsupported. As to the other allegation in the claim that, *simpliciter*, from the fact of his sending the pigs when they were in this state to the market, a right of action arises, that was not mainly, if at all, the ground upon which the case was rested at your Lordships' bar. The counsel for the appellant contended that from what took place at the trial and afterwards, any technicality founded upon the claim was out of the question, and that the appellant might succeed, if he could, by shewing that on the facts as they were proved, there was any right of action on his part on any ground whatever.

The great contest at your Lordships' bar was this: the appellant contended that the respondent had made a representation which was untrue in point of fact, and that the action lay as in the nature of an action for deceit. Now there can, I apprehend, be no doubt of this proposition, that if a man expressly states upon a sale that he gives no warranty, and that the goods sold must be taken with all their faults, but if he goes on expressly to say, in addition to that, that so far as he knows or believes, or has reason to believe, the goods are free from any particular fault, and that the animals (if it be animals that are sold) are free from any disease, if, I say, he expressly states that, and if it can afterwards be proved that to his knowledge the animals were tainted with the disease to which he referred, then there can be

no doubt that, notwithstanding the negation of warranty, an action would lie for deceit for the false representation. There is no difficulty in reconciling these two express statements, viz., the one express statement that he does not warrant, and that the property must be taken with its faults, and the other express statement that, so far as he knows or believes, the article sold is free from a particular fault. Upon that part of the case, even if your Lordships had heard the counsel for the respondent, there would, I think, have been no controversy.

But the question here is, not how two express statements of the kind that I have described are to be made to stand together, but whether in addition to the express negation of warranty which I have described, there was any other representation at all,

Now any representation in words there clearly was not in this case. The statement, and the only statement, actually made was the one contained in the two conditions of sale which I have read. Beyond that not a word was said or is alleged to have been said on the part of the auctioneer, and the respondent never, in any way, came in contact with the appellant. But what was contended at your Lordships' bar was this, that although there was no express representation made in words, yet there was conduct on the part of the respondent which amounted to a representation, and it was endeavoured to make that out in this way:—It was said, There is an Act of Parliament, the Contagious Diseases (Animals) Act, which enacts that any person (I am stating the effect of the clause) who sends an animal having, at the time, upon it an infectious or contagious disease, to any public or open place, shall be guilty of an offence under the Act, unless he shall prove that he was not aware that the animal was so tainted with disease; and it was said, therefore, that the respondent here from the mere fact of sending his pigs into a public market must be taken, being of course held to be aware of the law upon the subject, to be representing that he was complying with, or at all events not infringing the law, and that

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the animals were not tainted with any infectious or contagious disease.

Now I think it always desirable to abstain as far as possible from expressing an opinion upon a case which is not actually the case under consideration, and I desire here to be held free from expressing any opinion as to what, in a case in which, there being no negation of warranty, no statement such as I have read from the two conditions of sale in this case, ought to be the law as to a man who sent his pigs to a public market knowing them at the time to be tainted with disease. I observe that in a case in the Court of Queen's Bench, *Bodger v. Nicholls* (1), coming on appeal I think from a decision of a County Court Judge, my noble and learned friend, Lord Blackburn (or, as he then was, Mr. Justice Blackburn), seems to have thrown out an opinion that in a case of that kind, there being nothing upon one side in the shape of statement or negation, and there being simply the fact of a man sending diseased animals to a public market to be sold, that must be held to be a representation by conduct that the animals were free from disease, and that the person so sending them might be liable for the consequences of that representation, if it turned out to be untrue. I repeat that I desire, so far as I am concerned, to hold myself unpledged if such a case had to be considered. But that, as it seems to me, is not the case which your Lordships have now to consider. Your Lordships have here to consider an actual, clear, unqualified statement in writing, on the one hand, and no statement whatever, even in mere words, upon the other hand, but an attempt to raise a conclusion as to an implied statement from conduct. The words of the statement on the one side are perfectly clear; they are that the vendor will not warrant the goods—that they are open to inspection, that the purchaser might inspect them, and that the purchaser must take them with all their faults. Now I hold that in order to countervail or qualify that, and to cut it down, there must be something as clear in statement in an opposite direction. If there had been that representation in words which I began by supposing,

namely, that notwithstanding that negation of warranty the vendor said that he believed the animals were free from disease, there might be the foundation of an action for deceit; but it seems to me that there is no authority and no principle upon which, in the face of a clear and unqualified statement on the one hand, such as I have described, that the purchaser must take the articles with all their faults, you are to raise, from the mere circumstance of his sending the animals to the market, the implication of a representation on the other hand that the animals were in the belief of the vendor free from disease.

I, therefore, on this part of the case entirely agree with that which was the unanimous conclusion of the Court of Appeal in this case.

But there were some minor points in the case suggested as arguments upon which the appeal might be sustained, and I will refer to them very shortly. Your Lordships have not heard the counsel for the respondents, and possibly there might be some question whether some of those points were open, but I will take them as they were urged.

The first of these which I call the subsidiary points in the case was this: it was said that there was here a breach of a statutory duty, and that wherever you have a breach of a statutory duty and any person wronged by it, the person wronged has a right of action. Now I do not stop to consider how far that proposition can be supported as a general proposition; a good deal might be said upon that subject, but it is sufficient in the present case to point out to your Lordships that the statutory duty here is of this kind: it is a duty not to send infected animals into a public place for an obvious reason, lest they should by contact or neighbourhood taint other animals and thereby occasion injury to the public. If in that state of things some person had come forward and said, "You" (the respondent) "sent tainted animals into this public place, and my animals, in that public place, by contact or neighbourhood were infected, and I suffered a loss," then I could understand the argument. But that is not what occurred here. What occurred in

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the public place was the buying and selling, and no tainting of other animals, although it is said that after the pigs became the property of the purchaser and were taken to his farm they tainted other animals which were there. But that is not the gist of the enactment, and therefore it appears to me that this argument altogether fails.

The next of the subsidiary points was this: it was said that that which was sold here (this I think was rather a figurative expression than a serious argument) was not really a lot of pigs but a mass of disease—of typhoid fever. To that all I can say is, that a pig having typhoid fever appears to me not to lose its identity any more than a man having typhoid fever ceases to be a man; and therefore the thing sold was that which it was professed to sell.

Then again it was said, and this was the last of the minor points, that what was sold here was not merely infected by disease, but was a noxious and dangerous thing, certain not only to be useless in itself but to be a source of evil and danger wherever it might be carried, and it was likened to the case of a person selling explosive substances without any warning being given to the purchaser, and without its being known or being made clear that the possession of the substances was attended with danger. There again I should not wish to express any opinion as to how far that argument might be urged in a case where there was no express statement upon the subject of the thing sold; it is sufficient to say that it seems to me that where you have an article sold with a statement, not merely that the vendor does not warrant it, but that the purchaser must take it with all its faults, this point really becomes a branch of the first point to which I have referred; and you cannot therefore contend that the purchaser is afterwards to be at liberty to turn round and say, "There was this fault in the article which I bought which makes it a dangerous article for me to become the possessor of."

Those were the arguments which your Lordships heard urged with great skill and ingenuity by the learned counsel on

the part of the appellant, but it appears to me that they all failed, and that the decision of the Court below ought to be affirmed. I move your Lordships, therefore, that the appeal be dismissed with costs.

LORD O'HAGAN.—I do not regard this case as free from difficulty. That it is not, the conflicting judgments we are required to consider make that very plain; but, on the whole, I see no sufficient reason for declining to concur with the Court of Appeal.

The matter, as presented for the appellant, is of the first impression. No authority supports his contention. And its success would involve the establishment of a new principle, and the recognition of a legal presumption heretofore unknown.

The statement of claim relies upon a warranty, but makes no case of deceit or fraud, or failure of consideration, and contains no averment that the plaintiff was misled by any representation of the defendant. Warranty there was none; but, on the contrary, the conditions of sale expressly declined the giving of any; and purchasers were informed that they might make what inspection they pleased before the commencement of the sale, and that no compensation would be given "in respect of any fault or error of description of any lot in the catalogue." The very ingenious and exhaustive argument of Mr. Mathews addressed itself to several points which, as I observe, were not made in the pleadings, and with which the Lord Chancellor has dealt sufficiently; but the real question is that which alone seems to have been raised and considered in the Courts below, whether the offer for sale in open market, of itself, under the circumstances proved in evidence, amounted to a representation of soundness, imposing responsibility on the defendant for the loss which the plaintiff undoubtedly incurred? I assume, for the purpose of the argument—according to the verdict of the jury—that the defendant knew of the diseased condition of the pigs when he sent them to market; although, for my own part, having looked through the report of the



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trial, I am more than doubtful of the correctness of the finding in that respect. The positive testimony of the defendant to the contrary has strong corroboration in that of the inspector (a veterinary surgeon) under the Contagious Diseases (Animals) Act. He examined the pigs in the discharge of his official duty, and believed them to be perfectly sound. But taking it as proved that the animals were known by the respondent to have disease, I should not be prepared to say, even in the absence of the conditions of sale on which he relies, that the non-disclosure of the fact would, without more, have cast liability for loss upon him.

We must deal with the law as we find it, even though we might desire, in cases of bargain and sale, to compel more full and candid statements on peril of grave responsibility; and that law is stated thus by Judge Story in his book on contracts (27): "The general rule both of law and equity, in respect to concealment, is, that mere silence with regard to a material fact which there is no legal obligation to divulge, will not avoid a contract, although it may operate as an injury to the party from whom it is concealed." And again (28), "Although a vendor is bound to employ no artifice or disguise for the purpose of concealing defects in the article sold, since that would amount to a positive fraud on the vendee; yet, under the general doctrine of *caveat emptor*, he is not ordinarily bound to disclose every defect of which he may be cognisant, although his silence may operate virtually to deceive the vendee."

I take it that this is a correct statement, and, if so, as there was not in the present case any "legal obligation" to divulge the knowledge assumed to belong to the defendant, his simple failure to divulge it did not nullify the contract; and could not be taken, as the appellant insists, either as a representation of the soundness of the animals, or as a representation that he did not know them to be unsound. If the vendee bought at his own risk and in reliance on his own inspection without requiring a warranty,

which he might have made the condition of his purchase, and if there was not—and no one says there was—any artifice or disguise on the part of the vendor, for the purpose of concealment, then I should be disposed to hold, if it were necessary to decide upon such a state of facts, that the mere silence, which he was not asked to break, did not impose responsibility. However, the case of the respondent is different and stronger, and we are not required to pronounce such a decision.

The argument of the appellant rests upon implication and inference arising from conduct; and, no doubt, conduct may amount to representation as clearly as any form of words. But the express declaration made in the conditions of sale, in my opinion, forbade the implication and repelled the inference. The purchaser was informed that he would have no warranty, and that he was not to expect compensation for any fault. He was told to inspect for himself and to judge for himself, and warned that he must take the consequences of any error he might commit in making a bad bargain. He had the clearest intimation that the vendor, whatever might be his state of knowledge, expressly refused to give any help to a right decision or make any disclosure of any kind.

The legal result is stated very plainly by Lord Ellenborough in the familiar case of *Baglehole v. Walters* (29) the authority of which has never, so far as I know, been called in question: "Where an article is sold with all faults, I think it is quite immaterial how many belonged to it within the knowledge of the seller, unless he used some artifice to disguise them, and to prevent their being discovered by the purchaser. The very object of introducing such a stipulation is to put the purchaser on his guard, and to throw upon him the burden of examining all faults, both secret and apparent. I may be possessed of a horse I know to have many faults, and I wish to get rid of him for whatever sum he will fetch. I desire my servant to dispose of him, and instead of giving a warranty of

(27) P. 511.

(28) P. 551.

(29) 3 Campb. 154.

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soundness, to sell him with all faults. Having thus laboriously freed myself from responsibility, am I to be liable if it be afterwards discovered that the horse was unsound?" Now the defendant in this case did precisely what was held by Lord Ellenborough to protect a vendor against liability for all faults "secret or apparent." And I repeat, it has not been pretended that he was guilty of any contrivance to conceal or to deceive. The condition of sale, by declining to compensate, suggested that there existed, or might exist, a state of things which, but for it, would entitle to compensation. It at once challenged inspection, and aroused attention to the probable necessity of making it, and so left the purchaser without reason to complain.

How is the force of this authority sought to be evaded? Only, so far as I understand the argument, by reliance on the Contagious Diseases (Animals) Act. It is said that this Act, making the exposure in a market of animals affected by contagious disease, a criminal offence, warrants purchasers in presuming that persons so exposing them intend to represent them, and represent them in fact, as free from such disease, and that, therefore, responsibility attaches as on a warranty created through a representation by conduct. This is very subtle and not very tangible reasoning, and it has failed to satisfy my mind.

In the first place, the condition of sale, by its express refusal of warranty or compensation, appears to me to negative the existence of any representation of the kind. It is distinct notice to all the world that there may be faults which the vendor does not choose to disclose, and for which he will not be accountable. Next, the assumption, and the gratuitous assumption, is, that vendors and purchasers generally know not merely of the existence, but also of the terms of the Act, and of its penal operation, and of its effect in probably deterring the owners of unsound cattle from bringing them to sale. There may be no such knowledge, and even if it exists, what reason have we for supposing that men will not violate the law and brave its penalties, taking the risk of discovery and the

chance of escape? What right or reason has anybody to presume that the dealer, by the fact of his offers to sell, demonstrates, or intends to demonstrate, his compliance with the Act, and consequently affirms the soundness of the animal?

In this case if the jury's finding was correct, the defendant, knowing he would be guilty of a breach of the statute subjecting him to punishment, ventured on it notwithstanding, and got off scot-free, for his pigs passed the inspector, and were pronounced to be without disease. Many similar transactions may and must take place, for obedience to the law cannot always be expected when evasion of it may be the source of profit, and I find it impossible to hold that the mere appearance of animals in a market can be reasonably presumed to imply their immunity from contagious illness in any case, and certainly not in a case in which the owner negatives any such implication by refusing to warrant and insisting on an acceptance "with all faults."

I cannot see any real relation between the penal statute and the contract we are considering, and I agree with Lord Justice Brett that the attempt to connect them is "illusory." The Act was passed for the benefit of the general public, it has nothing to do with the bargains of particular persons.

Under such circumstances as are now before us, the presumption on which the appellant rests his claim to recover the compensation which the condition of sale forbade him to expect, seems to me to have no foundation in fact or law, and I concur with my noble and learned friend that the appeal should be dismissed with costs.

LORD SELBORNE.—I feel compelled to agree in the judgment moved by my noble and learned friend on the woolsack, though I confess I do so with some reluctance.

Upon the question of implied representation I have never felt any doubt. Such an implication should never be made without facts to warrant it, and here I find none, except that in sending for sale (though not in selling) these

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animals, a penal statute was violated. To say that every man is always to be taken to represent, in his dealings with other men, that he is not, to his knowledge, violating any statute, is a refinement which (except for the purpose of producing some particular consequence) would not I think appear reasonable to any man.

The argument which, for some time, most weighed with me was, that for a man to sell to another, without disclosing the fact, an article which he knows to be positively noxious, and which the other man does not know to be so (even though he expressly negatives warranty, and says that the purchaser must take his bargain with all faults) is an actionable wrong. I confess I should not be sorry if the law were so, but I know no authority for the proposition that such is the law, even with respect to the particular case of infectious disease in animals sold. The very nature of the condition that the buyer is to take the animals with all faults implies that they may be diseased, without any distinction between infectious and non-infectious disease, and I cannot think that the legislation which has recently taken place in the public interest, against particular acts tending to propagate such disease, can make that an actionable wrong, as between the parties to a private contract, which would not be so without it.

*Judgment of the Court below affirmed, and appeal dismissed with costs.*

Solicitors—Abbott, Jenkins & Co., agents for Lucas, Newbury, for appellant; Rickards, Walker & Maude, agents for W. H. Belcher, Newbury, for respondent.

[IN THE COURT OF APPEAL.]

1878. { THACKER v. HARDY.  
Dec. 7. { SAME v. HARDY.  
          { SAME v. WHEATLEY.\*

*Stock Exchange—Purchase and Sale of Shares—Contract between Broker and Principal—"Time Bargains"—Wagering Contract—8 & 9 Vict. c. 109. s. 18.*

*Where a speculator employs a broker on the Stock Exchange to effect sales and purchases of stock according to the rules of the Stock Exchange for delivery on a future day, with the intention that he shall not be called upon actually to deliver or accept such stock as may be sold or purchased, but only to pay or receive, as the case may be, the difference between the price of the stock at the day of the sale and the price on the day named for delivery, the contract between the speculator and the broker is not a "contract by way of gaming or wagering," within the meaning of 8 & 9 Vict. c. 109. s. 18.*

*Grizewood v. Blane (11 Com. B. Rep. 538; s. c. 21 Law J. Rep. C.P. 46) explained.*

These were three actions brought by a broker on the Stock Exchange against customers to recover in each case the balance of an account in respect of speculative transactions on the Stock Exchange carried on by the defendants respectively through the plaintiff as their broker in the ordinary way.

In the case of *Thacker v. Ince Hardy* the plaintiff was employed by the defendant as broker from the beginning of 1877 till the 1st of June in the same year. Towards the end of May a balance of about 18,000*l.* was due from the defendant to the plaintiff in respect of differences, which the defendant refused to pay. The plaintiff consequently endeavoured to close the defendant's accounts, and actually closed some of them by purchasing stocks and shares to meet the liabilities incurred by him for the defendant.

On the 1st of June the plaintiff, in consequence of the defendant's failure to

\* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

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meet his engagements, became a defaulter on the Stock Exchange, and all his accounts, including those which were still open on account of the other two defendants, Wheatley and H. Hardy, were closed in the usual manner by the official assignee of the Stock Exchange.

Before the closing of the accounts by the official assignee, the defendant Wheatley, seeing that such a result was inevitable, had authorised the plaintiff to do what he thought best in the matter. The plaintiff had accordingly closed some of Wheatley's accounts before the rest were closed by the official assignee. Henry Hardy, the other defendant, had given no authority to the plaintiff or to the committee of the Stock Exchange to close such accounts as were open on his account on the 1st of June, and was not unable to meet his engagements or to pay for having the account carried forward.

In each of the three cases the statement of claim alleged—

That the plaintiff was at the times thereafter mentioned a stockbroker and a member of the London Stock Exchange, carrying on business at 6A, Austin Friars, in the City of London.

That before the dates mentioned in the accounts thereafter mentioned and referred to, the defendant had employed the plaintiff as such broker, and given him orders and directions to sell for him in his, the plaintiff's own name, and to carry over, according and subject to the rules and customs of the London Stock Exchange for commission and reward to the plaintiff in that behalf, certain stocks, shares and public securities to the amounts and of the description mentioned and set forth in the said accounts, and the plaintiff had accordingly so sold the said stocks, shares and securities, subject and according to the said rules and customs, to the said amounts and at and for the said prices, and the commission of the plaintiff for so doing and payable by the defendant to him in that behalf was the commission mentioned in those accounts.

That at or about the dates mentioned in the said accounts the defendant employed the plaintiff as such broker to

carry over and continue the said stocks, shares and securities according to the rules, usages and customs of the said Stock Exchange for commission and reward payable by the defendant to the plaintiff in that behalf.

That such employment was given and accepted, and such stocks, shares and securities were contracted to be sold and carried over and continued upon the terms that the plaintiff should be paid and repaid by the defendant all such moneys as the plaintiff might have to pay or become liable to pay on account of the said stocks, shares and securities, and of the said carrying over and continuing the same according to the rules, regulations and customs of the said Stock Exchange, and upon the further terms that he, the plaintiff, might do all things in accordance with the rules, regulations, usages and customs of the said Stock Exchange, and that in case the defendant should at any time become incapable of performing, or should not perform, his said contracts, the plaintiff might forthwith settle and close the said contracts and sales in manner thereafter mentioned, and that in that case or in case the plaintiff should, by the said rules, regulations, usages and customs, be called upon and compelled to settle and close the said contracts and sales, or in case he should do so by the authority of the defendant by paying or becoming liable to pay the purchasers of the said stocks, shares and securities, the differences between the contract prices and the market prices of the same on the day when the said contracts and sales might be so settled and closed, then that he, the defendant, would pay to the plaintiff the moneys that he might so pay or become liable to pay for and on account of the said last-mentioned differences; but subject nevertheless to the condition as regarded the stocks, shares and securities, if any, with respect to which the said contracts and sales should be so settled and closed without the defendant's authority, but in accordance with the said rules, regulations, usages and customs of the said Stock Exchange, that the said last-mentioned moneys were not greater than the amounts which the plaintiff would have been compelled to

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pay in case the said contracts and sales had been settled and closed upon the day or any time before the day to which the same had been carried over or continued as aforesaid.

That the plaintiff, acting under his said employment, and in compliance with the said orders and directions, did sell and carry over for the defendant the said stocks, shares and securities; and, in respect of such sales and carryings over, paid, and became liable to pay, moneys to a large amount.

That after the said contracts and sales had been so made and carried over and continued as aforesaid, the plaintiff, with the authority of the defendant, did settle and close a part of the said contracts and sales, and the defendant became unable to and did not perform his said contracts, and the plaintiff was then entitled to, and was, by the rules, regulations and customs of the said Stock Exchange, called upon and compelled to settle and close the residue of the said contracts and sales by paying or becoming liable to pay to the said purchasers of the said stocks, shares and securities, moneys to a large amount, being the differences between the contract prices of the same and the market prices of the same on the days when the said contracts and sales were so settled and closed, and none of the moneys so paid, or which the plaintiff became liable to pay as last aforesaid, were greater than the amounts which the plaintiff would have been compelled to pay in case the said contracts and sales had been settled and closed upon the day or any time before the day to which the same respectively had been carried over and continued as aforesaid.

The plaintiff then claimed in each case the amount due from each defendant in respect of purchases and sales made by the plaintiff for the defendant at his request, and also the amount of the loss on the closing of the various accounts, whether by the plaintiff or by the committee of the Stock Exchange.

The substantial defence in each case was that the transactions in respect of which the action was brought were contracts by way of gaming and wagering within the meaning of the Wagering Act

(8 & 9 Vict. c. 109), and the defendants further denied their liability in respect of the losses consequent upon the enforced closing of the plaintiff's accounts by the committee of the Stock Exchange.

The actions came on for trial at the sittings at Guildhall in February, 1878, before Lindley J., by whom they were referred to special examiners to take evidence and report.

The special examiners having made their reports, the further hearing of the three cases took place at the Guildhall on the 2nd of July, 1878, when the following judgment was delivered:—

LINDLEY, J.—I have taken some pains to study these cases and the facts, and although the transactions are numerous, and a little difficult to trace, in substance they come out easily enough. I do not propose to go through the evidence in detail, except so far as may be necessary upon one point in reference to Henry Hardy.

The three actions are brought by a broker against his principals for indemnity against liabilities incurred by the broker in buying and selling stocks and shares upon the Stock Exchange for the defendants by their authority. The main defence in each case is that the claim is founded on gaming and wagering transactions, in respect of which no action can be brought. In order to decide the point thus raised, it is necessary to consider first, the real nature of the agreement between the plaintiff and the defendants; and secondly, how the law stands with respect to gaming and wagering transactions in stocks and shares.

As regards the true nature of the agreement between the plaintiff and the defendants, the conclusions at which I have arrived are as follows:—

First, that all the defendants were speculators, and that the plaintiff knew them to be so.

Second, that the defendants employed the plaintiff to speculate for them on the Stock Exchange.

Third, that he knew, or must be taken to have known, that, in order to carry out their transactions, the plaintiff would have to enter into contracts to buy or sell,

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as the case might be, and that, in order to protect himself and them, to enter into other contracts to sell or buy respectively.

Fourth, that there was, in fact, no other way in which the plaintiff could speculate for the defendants as they desired.

Fifth, that the plaintiff did buy and sell accordingly.

Sixth, that the defendants never expected, or intended, to accept actual delivery of what the plaintiff might buy for them, nor actually deliver what he might sell for them, and that the plaintiff knew that the defendants never expected or intended so to do.

Seventh, that the defendants, nevertheless, knew that they incurred the risk of having to accept or deliver, as the case might be, but were content to run that risk in the expectation and hope that the plaintiff would be able so to arrange matters as to render nothing but differences actually payable to or by them, as the case might be.

Eighth, that unless the plaintiff could arrange matters as expected, the defendants would be wholly unable to pay for what was bought for them, or deliver what was sold for them, and that the plaintiff knew perfectly well that the defendants would be unable so to do.

I proceed next to examine the law applicable to transactions of this kind. The only statute now in force and material to be noticed is the 8 & 9 Vict. c. 109. s. 18, which, in effect, declares all contracts by way of gaming and wagering null and void, and renders actions for the recovery of money won on any wager unsustainable.

This Act does not expressly mention or allude to Stock Exchange transactions; but it has been decided that agreements between buyers and sellers of shares and stocks to pay or receive the differences between their prices on one day and their prices on another day, are gaming and wagering transactions within the meaning of the statute. *Grizewood v. Blane* (1), *Barry v. Croskey* (2) and

*Cooper v. Neal* (3), all decide that. But the plaintiff did not agree to buy or sell from or to the defendants; and I have the authority of Lord Justice Brett for saying that the statute only affects the contract which makes the bet or wager.

(3) *COOPER v. NEAL.*

This was an action by the plaintiff, trustee of one Bailey, a broker on the Stock Exchange, against the defendant, a clerk in the City, to recover about 5,000*l.* for "differences" on sales and purchases of stock effected by Bailey on the Stock Exchange for the defendant.

The defendant instructed Bailey to purchase railway stock and carry over to account. Before the account day Bailey had bought "*Caledonians*" to the amount of 50,000*l.*, on which the differences in question had arisen.

At the trial before Lindley, J., the jury found in answer to questions put to them—first, that Bailey was instructed to buy and sell according to the rules of the Stock Exchange; second, that he was instructed to make "time bargains," and not *bona fide* purchases of shares; third, that Bailey acted in accordance with his authority. On these findings Lindley, J., on the authority of *Grizewood v. Blane* (1), entered judgment for the plaintiff, and the Divisional Court of Queen's Bench affirmed the judgment on the same authority.

On appeal (May 27, 1878),

*Herschell* and *Fullarton*, for the plaintiff.

*Morton*, for the defendant.

BRETT, L.J.—In my opinion the Gaming and Wagering Act affects the validity of any contract which in itself constitutes a bet, but not that of any *bona fide* contract collateral to the bet itself; and in my opinion the findings of the jury in this case as to the nature of the contract between Bailey and the plaintiff are not satisfactory. It may be one of three contracts which have been suggested in the course of the argument.

It may be that Bailey and the defendant expressly agreed that Bailey should enter into contracts upon the Stock Exchange, and that the defendant should pay or receive the differences, but that whatever happened to Bailey on the Stock Exchange, the defendant should never pay or receive more than the differences. It seems to me that such a contract might possibly be a wagering contract between Bailey and the defendant, so that Bailey could not recover upon it. Of such a contract as this, however, I can see no evidence. In the second place the contract might be, as the jury have found, that Bailey should make "time bargains," that is to say, not real sales and purchases, but merely bets ending in a payment or receipt of differences, with the jobbers on the Stock Exchange. That would be a gambling transaction in respect of which the jobber could not sue, and therefore Bailey would have incurred no liability, and consequently could not sue the defendant. Such bargains would be void as between the broker and the jobber, and the defendant would consequently be entitled to succeed. But,

(1) 11 Com. B. Rep. 588; s. c. 21 Law J. Rep. C.P. 46.

(2) 2 Jo. & H. 1.

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The agreement between the plaintiff and the defendants rendered it necessary that the plaintiff should himself, as principal, enter into real contracts of purchase and sale with jobbers, and the plaintiff accordingly did so, and in respect of these contracts he incurred obligations for the non-performance of which actions could and can now be brought against him. It is against the liability so incurred that he seeks to be indemnified.

Upon general principles, an agent is entitled to indemnity from his principal against liabilities incurred by the agent in executing the orders of his principal, unless those orders are illegal, or unless the liabilities are incurred in respect of some illegal conduct of the agent himself, or by reason of his default. What the plaintiff was employed in these cases to do was to buy and sell on the Stock Exchange; and this he did; and everything he did was perfectly legal, unless it was rendered illegal as between the defendants and himself by reason of the illegality of the object they had in view, or of the transactions in which they were engaged.

Now, if gaming and wagering were

in my opinion, the jury have misunderstood the evidence, in coming to the conclusion that this was the contract between the parties. The third contract which may be found is this. It may be that the defendant employed Bailey to make contracts upon the Stock Exchange in the ordinary way according to the rules of the Stock Exchange. Such contracts, as far as the jobbers are concerned, would always be real contracts which might have to end in a transfer of stock. Then Bailey might have agreed always so to manage, or to endeavour so to manage, that, although the contracts as far as the jobbers were concerned were *bona fide*, yet the defendant should never be called upon to pay more than the differences; though Bailey would be personally liable to the jobbers on the contracts. In that case it may well be that there was an implied contract on the part of the defendant to indemnify Bailey against any liabilities he might incur otherwise than by his own fault.

Perhaps part of such a transaction might be a gambling transaction as between Bailey and the defendant. But as the arrangement would involve an authority given to Bailey by the defendant to make himself liable on real *bona fide* contracts with the jobbers, a collateral implied contract of indemnity would arise, such a contract would not be in any sense by way of gaming or wagering, and if such a contract did in fact exist, the plaintiff would be entitled to recover.

I am therefore of opinion that the case should go down again for a new trial.

COTTON, L.J., and THESIGER, L.J., concurred.

illegal, I should be of opinion that the illegality of the transactions in which the plaintiff and the defendants were engaged would have tainted, as between themselves, whatever the plaintiff had done in furtherance of their illegal designs, and would have precluded him from claiming, in a Court of law, any indemnity from the defendants in respect of the liabilities he had incurred—*Cannan v. Bryce* (4), *McKinnell v. Robinson* (5), *Lyne v. Siesfeld* (6). But it has been held that although gaming and wagering contracts cannot be enforced, they are not illegal. *Fitch v. Jones* (7) is plain to that effect. Money paid in discharge of a bet is a good consideration for a bill of exchange—*Oulds v. Harrison* (8); and if money be so paid by a plaintiff at the request of a defendant, it can be recovered by action against him—*Knight v. Combers* (9), *Jessopp v. Lutwyche* (10), *Rosewarne v. Billing* (11); and it has been held that a request to pay may be inferred from an authority to bet—*Oldham v. Ramsden* (12). Having regard to these decisions, I cannot hold that the statute above referred to precludes the plaintiff from maintaining these actions.

It was, however, suggested that, independently of that statute, the gambling here was of so pernicious a nature as to be illegal on grounds of public policy. That the defendants were reckless speculators, and that the plaintiff knew it, I consider to be beyond all doubt; but it does not follow that what they did or aimed at was illegal. In one sense, they were all gamblers; but care must be taken not to be misled by an epithet; and, in order to avoid ambiguity, I have already pointed out exactly what the real nature of their transactions was. Such gambling

(4) 3 B. & Ald. 179.

(5) 3 Mee. & W. 434; s.c. 7 Law J. Rep. Exch. 149.

(6) 1 Hurl. & N. 278.

(7) 5 E. & B. 233; s.c. 24 Law J. Rep. Q.B. 293.

(8) 10 Exch. Rep. 572; s.c. 24 Law J. Rep. Exch. 66.

(9) 15 Com. B. Rep. 562; s.c. 24 Law J. Rep. C.P. 121.

(10) 10 Exch. Rep. 614; s.c. 24 Law J. Rep. Exch. 65.

(11) 15 Com. B. Rep. N.S. 316; s.c. 33 Law J. Rep. C.P. 55.

(12) 44 Law J. Rep. C.P. 309.

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as this, however demoralising and reprehensible, does not appear to me to be illegal, and my reasons for this opinion are as follows:—

It required a statute of 7 Geo. 2. c. 8, to prevent gambling in the public funds; and notwithstanding the strong condemnation, in the preamble, of such gambling, the Act was itself repealed in 1860: see 23 & 24 Vict. c. 28. Moreover even when the Act was in force, gambling in shares and foreign stocks was held not to be illegal either under the Act or at common law. Lord Tenterden, indeed, was of opinion that such gambling was illegal at common law. He said so in *Bryan v. Lewis* (13); but this opinion was declared erroneous in *Hibblewhite v. M'Morine* (14). Under these circumstances, I am unable to hold that the transactions engaged in by these parties were illegal, or that the purchases and sales made by the plaintiff were made in pursuance of or to attain an illegal object. This view is supported by the judgment of Lord Justice Brett in *Cooper v. Neal* (3), and by the case of *Ashton v. Dakin* (15).

In answer to the argument that a contract which is void and unenforceable cannot be made the foundation of an implied promise to indemnify, it appears to me sufficient to say that an obligation to indemnify is created whenever one person employs another to do a lawful act which exposes him to liability, and that, in my view of the evidence, the defendants did authorise the plaintiff to incur liability by buying and selling as above described. I am unable to draw the inference which the jury drew in *Cooper v. Neal* (3), namely, that the plaintiff was instructed to make time bargains, and that he did in fact make such bargains. A real time bargain is, I suspect, a very rare occurrence. *Grizewood v. Blane* (1) affords an instance of one, and *Cooper v. Neal* (3), as understood by the jury, afforded another. But what are called time bargains are, in fact, the result of two distinct and perfectly legal bargains, namely, first, a bargain

to buy or sell, and secondly, a subsequent bargain that the first shall not be carried out; and it is only when the first bargain is entered into upon the understanding that it is not to be carried out that a time bargain, in the sense of an unenforceable bargain, is entered into. Such bargains are very rare, and this is what I understand the witnesses to mean when they say that there are no such things as time bargains on the Stock Exchange. For the above reasons I hold that the plaintiff is entitled to indemnity, notwithstanding the gambling nature of the transactions between himself and the defendants.

It remains to consider the extent of his rights as against each of these defendants.

First, as regards Wheatley. It was urged that he only authorised speculations to a limited extent, namely, to an extent which would not expose him to lose more than his funds in the hands of the plaintiff. But Wheatley's own evidence is quite inconsistent with this contention. I hold, upon the evidence, that he authorised everything that was done, including the final closing of all his accounts. It is true he gave no authority to the Stock Exchange Committee to close his accounts; but he knew that they had to be closed, and, knowing this, he authorised the plaintiff to do the best he could for him. The best for him was immediately to close his account. Whether this was done by the plaintiff himself, or by the Committee of the Stock Exchange, is not, I think, material, as the defendant is shewn not to have been damnified, but, on the contrary, he has been somewhat benefited by what was done.

The plaintiff's right to indemnity against Wheatley is not, in my opinion, confined to the amount paid by the plaintiff before action, but extends to the full amount for which the plaintiff was at the commencement of the action himself legally liable to pay—*Lacey v. Hill* (16), *Cruse v. Paine* (17). This has always

(13) Ry. & M. 386.

(14) 5 Mees. & W. 462; s. c. 8 Law J. Rep. Exch. 271.

(15) 7 W. R. 384.

(16) 42 Law J. Rep. Chanc. 86; on appeal, 657; s. c. Law Rep. 18 Eq. 182; s. c. Law Rep. 8 Chanc. 921.

(17) 37 Law J. Rep. Chanc. 711; s. c. 38 Law J. Rep. Chanc. 225; s. c. Law Rep. 6 Eq. 641.



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been the established rule in Equity, and also at law, if the action was properly framed, as may be seen from *Spark v. Heslop* (18). Even if the plaintiff were bankrupt, his trustees could recover the full amount of the plaintiff's liability, although his estate might only have paid a small dividend in respect thereof. That was settled in *Cruse v. Paine* (17) and confirmed on appeal. In Wheatley's action, therefore, I give judgment for the plaintiff for the full amount claimed, and also with costs. I say with costs, because although I disapprove highly of such gambling as I have had to consider, I am unable to see that the plaintiff's conduct has been worse than the defendant's, and the plaintiff being legally entitled to what he demanded in the action, I see no sufficient reason for departing from the general rule by which the costs follow the event.

In Henry Hardy's case, I am also of opinion that the plaintiff is entitled to judgment for so much of his claim as is founded on purchases and sales made by himself, namely, 421*l.* 11*s.* 3*d.* But I disallow so much of his claim as relates to losses sustained by reason of the closing of this defendant's accounts by the Committee of the Stock Exchange. I hold upon the evidence that it is not proved that this defendant authorised the closing of the accounts which were closed by the committee; nor is it proved that he has so ratified or adopted such closing as to have rendered him liable in respect of it. It is true that he does not appear to have been damnified by it, but this circumstance cannot confer a right of action on the plaintiff. The defendant was in no default himself. He never authorised the closing of these accounts; and, as between himself and the plaintiff, the plaintiff had no right to close them. Upon this point I am unable to distinguish the case in principle from *Duncan v. Hill* (19). In this case, therefore, my judgment is for the plaintiff for 421*l.* 11*s.* 3*d.* only, but again with costs.

(18) 1 E. & E. 563; s. c. 28 Law J. Rep. Q.B. 197.

(19) 40 Law J. Rep. Exch. 137; s. c. 42 Law J. Rep. Exch. 179; s. c. Law Rep. 6 Exch. 255; s. c. Law Rep. 8 Exch. 242.

His failure to sustain the whole of his claim is not, I think, sufficient to deprive him of costs. No appreciable costs have, I apprehend, been occasioned by that part of his claim which has failed.

Then, thirdly, Ince Hardy's case. This case differs from the other two, inasmuch as the defendant was himself unable to meet his engagements, and was the principal cause of the plaintiff's becoming a defaulter. The inability of the defendant to continue his speculations gave the plaintiff a right to close all the defendant's accounts. That appears from *Lacy v. Hill* (16), which was a celebrated case in Chancery. Whether they were closed by the plaintiff, or by the Stock Exchange Committee, is, I think, immaterial, it not being proved that the defendant was in any way prejudiced by what was done. Consequently in his case I give judgment for the plaintiff for the full amount claimed with costs.

Against the above decision the defendant Ince Hardy appealed.

*Muir Mackenzie*, for the defendant.—These are gambling transactions. They are not bets between the plaintiff and the defendant, but transactions in which the plaintiff and the defendant are jointly interested in the result of speculative transactions or wages. *Grisewood v. Blane* (1) shows that such dealings are opposed to public policy. The question is, what was the intention of the parties? It is clear that in the present case the intention was to gamble; this is shewn by the long course of speculative transactions in which they were engaged, and by the fact that they had no capital to take up the shares purchased, and that they trusted to the machinery of the Stock Exchange to relieve them from the necessity of taking up the shares they purchased or delivering those they sold.

*Horne Payne*, for the plaintiff, was not called upon.

BRAMWELL, L.J.—I am of opinion that this judgment ought to be affirmed. I agree entirely with Mr. Justice Lindley's findings, and with the reasoning with which he supports his judgment upon

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those findings. The question here is not what was the bargain between the jobber and his principal. Between the broker and the jobber in the Stock Exchange it is admitted that these bargains actually are what they purport to be, and there is nothing in the dealings between the jobber and his principal by which the jobber can tell whether the purchase is made as an investment or by way of speculation. Accordingly Mr. Mackenzie does not rely on the contract between the jobber and the broker as a wagering contract. If the facts were such as they were supposed to have been, I think erroneously, in *Grizewood v. Blane* (1), though perhaps rightly on the evidence before the Court, then perhaps it might be rightly held that there was a wagering contract. But that is not so in point of fact. All these bargains are in truth real bargains, when made in the Stock Exchange, and really mean what they purport to express—an actual sale of stock. The learned counsel for the defendant admits this, but he brings a new suggestion before us and says—"Suppose that to be the case, and suppose the jobber can enforce exact performance of this contract against the broker, the bargain between the broker and the defendant is that although the broker is to buy and sell for the defendant, yet the defendant is never to pay for and accept stock, nor to receive and pay for it, but when the time arrives for taking and paying for stock, or for delivering it and receiving payment, the broker is bound to make another bargain in such a way that the defendant may set off one transaction against another, so as not to have to pay or to receive more than the differences." I am not sure that that ever is the bargain between the broker and his principal. Certainly it is not so in isolated transactions. If I instruct my broker to sell 10,000*l.* consols for next account, I should not be entitled as a matter of right to insist on my broker buying them back for me. Where the transactions are continuous it is more doubtful whether such a duty may not arise on the part of the broker. Possibly under such circumstances a jury might find that it had been agreed between the parties, not indeed that the buying and

selling should go on *ad infinitum*, but that there was an arrangement between the broker and the principal that every transaction for an account should be disposed of by another transaction in a contrary sense—that is to say that the principal might say to the broker, "You have undertaken a bargain to receive and pay for certain shares, you must now undo the result of that transaction by a sale, so that I may only be called upon to receive or pay the difference." The jury might come to such a conclusion, except that it would be open to the broker to contend that he was not bound actually to effect this result but only to endeavour to do so. Let us, however, assume in the defendant's favour that the contract was such as I have indicated. In my opinion there is nothing in such contract which comes within the Gaming and wagering Act. The principal would have a clear right to say—"I will go no farther with this business. I will take what I have now purchased, and hold it as an investment." It is obvious that this must be often actually the case where stocks have been bought with a view to a rise and a resale, and the purchaser has been met by a fall and has been so disgusted with the idea of having to pay continued brokerage or "backwardation" that he prefers to keep the stock and pay for it. Therefore, even if the contract is of the nature contended for by the defendant, the principal may either elect to take or deliver the stock, or he may endeavour to neutralise the transaction. Sometimes, however, he may not be able to do so. Suppose for instance the defendant had bought Glasgow Bank stock. He could not have got rid of it, and would have had to keep it. What then is the illegality of the proceeding? There is no wager between the broker and his principal, and it does not matter to the broker, so far as his commission goes, whether the stock rise or fall before the account. But it is the essence of gaming that the gains shall depend upon the event. In *Grizewood v. Blane* (1), according to the facts stated, it was of importance to both parties, according as they were buyers or sellers, whether the stocks rise or fall, but in the case I have

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put, there is no gaming or wagering whatever between the principal and broker. The gamester, if any, is the principal, but the broker does not wager at all. If, therefore, all the facts were found here as the counsel for the defendant desires, the present case would not come within the wagering Act.

I wish to make one observation with respect to the phrase "time bargain." Mr. Justice Lindley has shewn what he considers to be a time bargain and invalid. But no bargains are invalid merely because they are time bargains. If I buy the crop of apples which grow next year on a particular tree, that is a time bargain, but it is not invalid. But where the bargain is in reality different from that which it purports to be, for instance, if it purports to be a sale of stock, but in reality is merely a contract to receive or pay the difference between the price of the stock at one time and the price at another, that is something in the nature of gaming. A time bargain in that sense is a "gaming and wagering" contract.

I am clearly of opinion therefore that this judgment ought to be affirmed. And though speculation of this kind may be a very shocking affair, that is not the question we have to consider. And I am not by any means sure that the fact that a place exists where people know there is a market in which they can freely speculate in shares is not for the public good; since it is to the certainty of people finding such a market that the public are indebted for a variety of useful undertakings.

BRETT, L.J.—I am no admirer of the rules or practice of the Stock Exchange, but I think that as a matter of law, the judgment in this case is right, and that the facts have been rightly found. Mr. Justice Lindley has clearly stated as facts the actual proceedings on the Stock Exchange. He has found the facts correctly and has applied the law to them correctly. I do not think it necessary in the present case to discuss supposed cases. In *Cooper v. Neal* (3) we thought it necessary to deal with certain

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supposed cases for a reason to which I will refer by and by; but here we need only deal with the facts that are before us; for they have been rightly found by Mr. Justice Lindley. He has properly found that the plaintiff was employed as an agent for a principal, and therefore that he was empowered to deal for the defendant as a broker on the Stock Exchange; and he has found properly that that authority (taking the defendant to have known the practice of the Stock Exchange) authorised the plaintiff to make him liable on certain contracts with various persons, which those persons might enforce against him as real contracts; and that the plaintiff has obeyed and fulfilled this mandate. He has, therefore, made for the defendant contracts which were real, and which might be enforced by the persons with whom he dealt insisting on a real delivery of shares or a real payment of prices for a real purchase of shares. And Mr. Justice Lindley comes to the conclusion that the plaintiff did not agree to buy or sell from or to, but only as *agent* for the defendant. Then he says: "The agreement between the plaintiff and the defendants rendered it necessary that the plaintiff should himself, as principal, enter into real contracts of purchase and sale with jobbers, and the plaintiff accordingly did so, and in respect of these contracts he incurred obligations for the non-performance of which actions could and can now be brought against him." Under the circumstances, therefore, he comes to the conclusion that the real ground of action is for commission as agent to make contracts for the purchase or sale of shares, and on the defendant's contract of indemnity for liabilities incurred in respect of contracts entered into for the defendant within his authority. The contract between the parties being one of employment only, though the defendant desired to speculate, yet the contract is not within the Act 8 & 9 Vict. c. 109, and is not in any way illegal, and the plaintiff is in my opinion entitled to recover, both on his claim for commission, and on the contract of indemnity.

Mr. Justice Lindley then goes on to

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say: "I am unable to draw the inference which the jury drew in *Cooper v. Neal* (3), namely, that the plaintiff was instructed to make time bargains, and that he did in fact make such bargains." And I think he is right. Now Mr. Mackenzie has not contended that if the facts here were rightly found the law has been wrongly applied, but he has endeavoured to dispute the findings of fact, and to bring the case within the supposititious case in *Cooper v. Neal* (3). That case was argued elaborately before us, and the Court said at an early stage that it must go down for a new trial. There the jury had found that the plaintiff had been instructed to buy and sell shares according to the rules of the Stock Exchange, but that he had been employed to make time bargains and not *bona fide* contracts, and that he had acted in accordance with those instructions and had entered into time bargains merely. Now the meaning obviously attached here to the expression "time bargain" is that a bargain had been made not for the future delivery or acceptance of shares, but that the plaintiff had been instructed to make such bargains as would only make him liable to pay for the fall or rise of the market. Now if those findings stood, the plaintiffs might possibly have recovered in respect of commission, but the verdict in that case was in respect of a claim of indemnity; and if the plaintiff had only made such bargains as I have described, there would have been no liability, for the contracts would have been such that the jobber could not sue upon them, because they would have been wagering contracts. The broker therefore could not sue on his indemnity. We endeavoured in that case to express ourselves so as to be a guide to the Judge on a new trial, when it would have to be considered whether, as a matter of fact, the broker had instructions to make time bargains in the sense in which the word was used, and whether if he had made bargains of another sort so as to become really liable, he would not have been acting beyond the scope of his authority. If, then, the plaintiff was instructed to make real

bargains, then neither his contract with the defendant nor with the jobber were within the statute. In that case, the defendant would be liable both for commission and on the indemnity. Mr. Fullarton suggested another hypothetical case. He suggested that the broker and the plaintiff came to an express agreement that the broker should enter into real contracts as principal, which might end either in gain or loss, but that whatever happened, the plaintiff should only pay or receive differences, as if the broker had said; "I will go upon the Stock Exchange and will make real bargains. In them I shall be the principal, and I may be liable to pay for real losses, or to receive real gains; but though I may have to receive or deliver shares, I will not call upon you to do more than pay the differences, that is to say, we will have a gambling transaction, though in carrying it out I am obliged to deal in the usual way." Such a case might be within the statute. But the vice of that suggestion, both in *Cooper v. Neal* (3) and the present case, is that there is no evidence of such a state of things. Mr. Justice Lindley has guided his enquiries on the lines laid down by this Court in *Cooper v. Neal* (3), and I am of opinion that he is right in his finding of the facts, and in his statement of the course of proceedings on the Stock Exchange, and also in his application of the law. As to the case of *Grizewood v. Blane* (1), I will say no more than my Lord has said. The law there laid down may have been right on the evidence then before the Court, though the evidence may have been wrong or may have been misunderstood.

COTTON, L.J.—I think that the judgment in this case was right, and, in my opinion, it is best to decide in accordance with established principles. With regard to the question of public policy, I am not at all sure that we are not more likely to check gambling transactions, by deciding that speculators are liable in cases like this to their brokers, than if we decided that the contract was void. It is not contended that, if the facts have been rightly found in the present case,

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we should be bound by the decision in *Cooper v. Neal* (3); but I still remain of the same opinion that I expressed in that case. The defendant employed the plaintiff as his agent to enter into transactions on the Stock Exchange, on which the plaintiff would be liable to pay the price of the stocks purchased, and though it was never intended, as far as the defendant was concerned, that there should be a real purchase, yet, as he entered into a contract on which his agent was liable, he was bound to indemnify his agent. In this case it was attempted to question the second and seventh findings of Mr. Justice Lindley and Mr. Mackenzie said that the employment of the plaintiff was not of the kind there indicated, but that the plaintiff and defendant agreed that whatever happened, the plaintiff should only be liable for differences. I am not quite certain whether he wished the plaintiff to be considered an agent or not. But that being the assumed bargain between the parties, the defendant's counsel relied upon an expression of Brett, L.J., in *Cooper v. Neal* (3), to shew that that bargain was null and void. But even assuming that in such a bargain the plaintiff was not merely an agent, but in some way or other a principal, in what sense was the contract a gaming or wagering contract? Both parties in a wager must stand to win or lose. If the event is decided in one way, A. wins, and in the other, B. But here the result of the contract does not depend on which way the speculation turns out; the broker neither gains nor loses according to the result. He gets his commission in either case, and the necessary element of gaming and wagering is absent. It is said the case of *Grizewood v. Blane* (1) shews it to be a gaming and wagering contract. But that case lays down nothing of the sort. We must understand the decision according to the evidence before the Court; the plaintiff was selling to or buying from the defendant in form, but neither party intended that there should be any real sale; the supposed sales were according to the price of the day, for future delivery, and the person selling was to gain

or lose, according to the fall or rise in the price. Both parties, then, stood to gain or lose, according to the event, and it was found that the contract was merely a mask to hide gambling. But not every transaction in which parties stand to gain or lose is gambling. For instance, if a man sells next year's crop of apples at a certain price; if the apples are few, the price will turn out to be a high one, if many, a low one. When there is an actual contract for purchase or sale, it is no gaming or wagering contract. It is not contended that such a contract as suggested was made in express words; but it is said that the acts of the parties and their course of dealing was evidence of such a contract. But, in my opinion, that is not so. The defendant, no doubt, authorised the plaintiff to make purchases to such an extent that he must have known that the defendant had no intention of taking up the stock. That does not establish the contract suggested. According to Mr. Justice Lindley's finding, both parties knew that there was no such intention, but the contract was only that, as far as possible, the defendant should not be liable for any loss except differences, which is quite a different contract from that suggested by Mr. Mackenzie. It is suggested that this is contrary to the doctrine in *Grizewood v. Blane* (1), but we cannot be bound as to the result of facts by any other case, unless it is positively laid down on certain facts that the jury is not entitled to come to any other conclusion, that is to say, unless there are facts which, as a matter of law, lead to a particular conclusion. But the only decision in that case was, that the jury were justified in coming to the conclusion that there was such a bargain. I do not, indeed, see how the facts justified that finding, for I do not see how the transactions could have been carried out without a real contract. Here, however, we have quite a different state of things: the plaintiff does not propose to buy or sell to the defendant, but merely to buy and sell for him, the relation between them being that of principal and agent. I am therefore of opinion that no such agreement

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as has been suggested can be shewn, and even if it could, the case would not come within the statute.

*Judgment affirmed.*

Solicitors — Morley & Shirreff, for plaintiff;  
Bury Hutchinson, for defendants.

[IN THE DIVISIONAL COURT FOR THE  
Q.B., C.P. AND EXCH. DIVISIONS.]

1879. } THE QUEEN v. SIR R. HARRINGTON,  
Jan. 16. } BART., AND OTHERS.

County Court—Injunction to restrain a  
Nuisance—Power to enforce Obedience by  
Attachment—Judicature Act, 1873, s. 89.

*In an action for nuisance brought in a  
County Court, where the claim for damages  
is within the limit of its jurisdiction, the  
Judge has power to grant an injunction re-  
straining the nuisance, and also to enforce  
obedience by attachment.*

*Such an attachment differs from a com-  
mitment for contempt as being a process  
which ensures to the remedy of the plaintiff.*  
—PER POLLOCK, B.

This was a rule in the nature of a man-  
damus, which had been obtained by the  
plaintiff in a County Court action of  
*Martin v. Bannister and another*, calling  
upon Sir Richard Harrington, Bart., the  
Judge of the Coventry County Court,  
and the defendants in that action, to  
shew cause why he (the Judge) should  
not proceed to hear and adjudicate upon  
an application made by the plaintiff for  
the attachment of the defendants, for dis-  
obedience to an injunction granted by the  
Judge.

The action of *Martin v. Bannister  
and another* claimed damages for a nu-  
isance caused to the plaintiff by the de-  
fendants' manufactory. It was originally  
heard in 1876, when the Judge awarded  
5*l.* as damages, and also granted a per-  
petual injunction to restrain the nuisance.  
On the 8th of October, 1878, the plaintiff  
applied for an order of attachment against  
the defendants, for disobedience to this in-  
junction. The defendants took the pre-  
liminary objection that a County Court

Judge had no jurisdiction to grant such  
an order. On the 12th of November the  
Judge delivered a written judgment,  
giving effect to this objection (1). The  
present rule nisi was then obtained by  
the plaintiff.

*Dugdale and Knott*, for the defendants  
in *Martin v. Bannister and another*, shewed  
cause against the rule.—First, the County  
Court Judge had no power to grant the  
injunction at all. The first statute autho-  
rising Courts of Common Law to grant  
injunctions is the Common Law Procedure  
Act of 1854 (17 & 18 Vict. c. 125. s. 79);  
but this does not extend to County Courts.  
The County Court Act of 1865 (28 & 29  
Vict. c. 99) invests County Courts with  
power and authority to grant all such re-  
lief as could then be obtained only in the  
Court of Chancery, within a certain pecu-  
niary limit. But this only applies to the  
equitable side of their jurisdiction. Then  
comes the Judicature Act of 1873, which  
in section 89 enacts as follows:—

“Every inferior Court which now has,  
or which may after the passing of this  
Act have, jurisdiction in Equity, or at  
Law and in Equity, and in Admiralty, re-  
spectively, shall, as regards all causes of  
action within its jurisdiction for the time  
being, have power to grant, and shall  
grant, in any proceeding before such  
Court, such relief, redress, or remedy, or  
combination of remedies, either absolute  
or conditional, and shall in every such  
proceeding give such and the like effect to  
every ground of defence or counter-claim,  
equitable or legal, in as full and ample a  
manner as might and ought to be done  
in the like case by the High Court of  
Justice.”

But this section was not intended to ex-  
tend the jurisdiction, but only to autho-  
rise the adoption of equitable principles.  
If it were otherwise, a plaintiff might ob-  
tain an injunction affecting property to  
the value of many thousands of pounds, if  
only he coupled with his application a  
claim for a trifling amount of damages.  
Again, an injunction is not a cause of  
action, within the meaning of the section.

(1) See this judgment, *post*, page 303.

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As a matter of fact, a difference of opinion exists amongst the County Court Judges themselves on this point, and some of them have refused to grant injunctions.

Secondly, a County Court Judge has no power to commit to prison for breach of an injunction. In the case of *The Queen v. Lefroy*; *sub nom. Ex parte Jolliffe* (2), it was decided that the Judge of a County Court has no power to commit for contempt, except where the contempt is committed in the face of the Court. By the County Court Act of 1865 (28 & 29 Vict. c. 99. s. 8), an express power is given to enforce the equitable injunction; and by Rules of the Supreme Court, 1875, Order XLII. rule 5, a similar power is given to the High Court of Justice. In the present case the County Court Judge has no such express power conferred on him by statute. To give him such power by implication would be a violation of the well-known principle that the liberty of the subject cannot be taken away except by clear words of the Legislature. If the injunction cannot be enforced by attachment, it is not therefore necessarily useless, for the plaintiff may apply to the Court of Chancery, or perhaps proceed by way of indictment before the grand jury.

*Bigham*, for the plaintiff in the original action, was not called upon to argue.

KELLY, C.B.—This is a case of great importance; and if it were not that the view which I take of it admits of very little doubt, I should have taken time to consider my judgment. I hope that I should be the last to deliver a judgment tending to abridge the liberty of the subject. But, in truth, no considerations of that kind enter into the present case. The sole question we have to decide is whether the Judge of a County Court—being one of a class of inferior Judges whose jurisdiction has been gradually extended by various changes—has power to grant an injunction, and to enforce it in the only way in which it can be enforced by a Court of Equity. I am of opinion that under

the circumstances of the present case he has the power to grant an injunction, and therefore the same power to enforce it as the Court of Chancery has.

The action was originally brought to recover damages for a nuisance caused to the plaintiff by the defendants' carrying on of a manufacture. The circumstances of the case are not material. The plaintiff recovered a verdict with 5*l.* damages, and also obtained an injunction. Now, the first question we have to decide is whether the Court had power to grant the injunction. By section 25 of the Judicature Act, the High Court of Justice has power to grant an injunction by interlocutory order. It is impossible to read section 89 of the same Act without seeing that this is the very case in which the Legislature contemplated that a similar power should be exercised by a County Court. "Every inferior Court . . . shall have power to grant . . . such relief, redress or remedy, or combination of remedies . . ." The phrase "combination of remedies" appears to me exactly appropriate to the present case. The granting of an injunction to restrain a nuisance, in addition to pecuniary damages, is precisely within the meaning of these words.

The further question then arises, whether this is a bare and naked power to enjoin a party against an illegal practice. Is it not a necessary consequence that it must be enforced? And if so, what other way is there but by attachment? I cannot concur in the view that the Legislature could have meant to give the County Court power to grant injunctions, but not power to enforce them. Attachment in certain cases has already been authorised by the County Court Act of 1865. Since that date further powers have been granted to inferior Courts. I think, therefore, that there is nothing unreasonable in considering that section 89 of the Judicature Act in its natural interpretation confers the power of commitment. If it were otherwise, look what the consequences would be:—The party affected by a nuisance would be allowed to recover damages in an inferior Court, but the Judge could apply no further remedy. The nuisance might continue for ever, and the plaintiff would be left to

(2) 42 Law J. Rep. Q.B. 121; s. c. Law Rep. 8 Q.B. 134.

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bring action after action, and thus, despite the words of this section, obtain no real remedy. Notwithstanding my reluctance to extend the power of commitment, yet, looking at the language of the section, and having regard to common sense, I think it is the just, true and reasonable construction that the Judge has power to enforce his injunction by attachment.

POLLOCK, B.—I also think that the order ought to go to the County Court Judge to adjudicate upon the application for an attachment. We have derived great assistance from the arguments of the two learned counsel for the defendants, and also from the written judgment of the learned Judge, who has very clearly expressed his reasons for refusing the application.

There are two questions in the case, of which the first—whether the injunction can go? does not present any great difficulty. Its answer depends upon the true construction of section 89 of the Judicature Act. Before then the power to grant injunctions was only given in equitable cases, limited and defined by section 1 of the County Courts Act of 1865. Subsection 8 of that section, relating to “orders in the nature of injunctions,” does not include the present case. By section 89 of the Judicature Act the same jurisdiction as is possessed by the High Court of Justice is conferred upon the County Court “as regards all causes of action within its jurisdiction.” The difficulty as to the phrase “causes of action,” was clearly put by Mr. Dugdale. But the section is not limited strictly to causes of action. According to the Common Law Procedure Act, an injunction is dealt with as part of the procedure of the Court for enforcing judgment, then first conferred upon a Court of law. It is a point of some nicety whether the injunction should be allowed to affect property of a value beyond the limit of County Court jurisdiction. As to that, the answer is that the plaintiff has nothing to do with the sources of the nuisance, but only with his own damages, which in this case fall within the 50*l.* limit.

Then comes the much more difficult question—whether the inferior Court has

now power to issue attachment for disobedience? Here two important principles of law come into apparent collision. On the one hand, the liberty of the subject cannot be taken away except by clear language; and on the other, where the jurisdiction is extended, we must give fair effect to the intention of the Legislature. In the first place, the cases treating of imprisonment for contempt, such as *The Queen v. Lefroy*; *sub nom. Ex parte Jolliffe* (2) must be carefully distinguished from the present. If it is necessary to look at the course of legislation in order to interpret a statute, it is no less necessary to look at the origin and growth of a Common Law jurisdiction. The origin of attachment is traced in *The Queen v. Almon* (3). Wilmot, C.J., there says, after remarking that attachment is a very ancient process contemporary with the common law, “It is a constitutional remedy in particular cases; and the Judges, in those cases, are as much bound to give an activity to this part of the law as to any other part of it. Attachments are very properly granted for resistance of process . . .” Attachment is not like committal for contempt, but may rather be described as a process that enures to the remedy of the plaintiff. That being so, we come to the language of section 89, “shall grant . . . remedy . . . in as full and ample a manner . . .” Surely these words must mean that the same relief must now be given by the County Court as formerly by the Court of Chancery. But if the injunction is not to be enforced by attachment, the County Court would not be able to give as full and ample remedy as Chancery can. It is true that in the County Court Act of 1865 the Judge is expressly empowered in certain cases not only to grant injunctions, but also to issue attachments. Much stronger language is there used than in section 89. But still the language does not differ so pointedly as to imply that the Legislature contemplated different results in the two cases. It must be remembered that by the first statute the Legislature has already given the power of attachment, and therefore no jealousy of such a power is

(3) Wilmot, 254.



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to be presumed. We are only carrying out the spirit of the course of legislation. We do not mean to draw any analogy between attachment as a remedy of the plaintiff, and committal of a stranger for contempt.

*Rule absolute. Costs to be costs in the cause. Leave to appeal.*

Solicitors—Chester & Co., agents for Giles, Nuneaton, for plaintiff; Fluker, agent for Esther, Nuneaton, for defendants.

The following is the judgment of the learned County Court Judge :—

SIR R. HARRINGTON.—This was an application to commit the defendant for his contempt in disobeying an order of this Court. The action was tried at the Court holden on the 24th of May, 1876, the plaintiff claiming damages for a nuisance occasioned to him by stench issuing from a manure manufactory of the defendants, and under section 89 of the Judicature Act, 1873, 36 & 37 Vict. c. 66, claiming an injunction against the continuance of the nuisance. At the hearing judgment passed for the plaintiff, and the injunction claimed was granted. It is now alleged that this injunction has been disobeyed, and the plaintiff in analogy to the practice in use in the High Court of Justice prays that the defendant may be punished for his contumacy by imprisonment. The defendant filed affidavits in answer to the application on the merits, but he relied also upon an answer, which if sufficient, renders it unnecessary to consider the question of merits at all, for he contended that the Court had no jurisdiction to punish him for his contempt, that contempt not being committed *in facie curiæ*, and not being one of the contempts specified in the statute 9 & 10 Vict. c. 95. The question thus raised is one of the most serious importance, and in deciding it, it will be well to refer somewhat in detail to those parts of the complicated mass of statutes out of which the present jurisdiction and powers of the County Court, when not sitting in Admiralty or Bankruptcy, have been evolved. The County Court as constituted by the Act of 9 & 10 Vict. c. 95, was obviously intended to be in the strictest sense of the word an inferior Court. But for the express enactment in section 3 it would probably have

been held to be like the Court whose name it inherited, a Court not of record. But being thus made a Court of Record, it would have followed, but for sections 113 and 114 of the same Act, and the judicial interpretation put upon these sections in the case of *The Queen v. Lefroy* (2), that the Court might have exercised the ordinary jurisdiction of an inferior Court of Record of punishing by fine or imprisonment of any reasonable amount or duration, contempts committed in the face of the Court. But it would have had no jurisdiction to punish by fine or imprisonment any contempt committed out of the limits of the Court itself. Postponing for a moment the consideration of sections 113 and 114, and the decision in *The Queen v. Lefroy* (2), the next statute affecting the question is 12 & 13 Vict. c. 101, section 2, which did no more than define the prisons to which prisoners committed by the County Court might be sent. Next in order comes the Act of 1850, by which the jurisdiction of the Court was increased in point of pecuniary value, and this was followed in 1856 by the 19 & 20 Vict. c. 108, containing a fresh code of regulations of the practice of the Court which cannot be read by any one without perceiving that the Court, which under the original statute of 9 & 10 Vict. c. 95, had been established for the more easy recovery of small debts and demands in England, had grown into a local jurisdiction of very considerable importance. Neither of these Acts, however, contains anything qualifying or extending the power and authority of the Court in punishing contempt. Passing over the Act of 1858, which relates only to matters foreign to the purpose, and the repealed section of the Act of 1859, 22 & 23 Vict. c. 57, section 1, we come to the Act of 1865, 28 & 29 Vict. c. 99, which made a most important addition to the jurisdiction and authority of the County Court. By section 1 of that Act, in certain matters then only otherwise cognisable in a Court of Equity, the Court is to have and exercise all the powers and authority of the High Court of Chancery, and by section 2, in all such suits and matters the Judge was, in addition to all the powers and authorities then possessed by him, to have all the powers and authorities for the purposes of that Act of a Judge of the High Court of Chancery. By the Act of 1867, 30 & 31 Vict. c. 142, the jurisdiction of the Court was extended so as to enable it to try questions of title to land, the whole of the undefended debt collecting business handed over to the registrar, and the Court now emerges from the crucible of legislation armed with all the jurisdiction, except as to

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locality, value, and the power to try actions of defamation, seduction, breach of promise of marriage, actions on judgments of the superior Court, and questions arising on the validity of devises, &c., and except also the limited power to grant equitable remedies conferred on the superior Courts of Common Law by the Common Law Procedure Act of 1854, possessed by the superior Courts themselves, and being, moreover, in regard to the limited jurisdiction in equity conferred by the Act of 1865, 28 & 29 Vict. c. 99, a superior Court in all things except in name and in the rank of its Judges and officers. It was at this stage of the history of County Court legislation that the case of *The Queen v. Lefroy* (2), to which I have referred, was decided, and I have been thus particular in going through the history of the growth of the County Court jurisdiction, because it is important to recollect that the Court was then a very different institution, both in powers and jurisdiction, from the old small debts Court of 1846. Section 113, 9 & 10 Vict. c. 95, is as follows:—

“And be it enacted that, if any person shall wilfully insult the Judge, or any juror, or any bailiff, clerk or officer of the said Court for the time being during his sitting or attendance in Court, or in going to or returning from the Court, or shall wilfully interrupt the proceedings of the Court, or otherwise misbehave in Court, it shall be lawful for any bailiff or officer of the Court, with or without the assistance of any other person, by the order of the Judge, to take such person into custody and detain him until the rising of the Court; and the Judge shall be empowered, if he think fit, by a warrant under his hand, and sealed with the seal of the Court, to commit any such offender to any prison to which he has power to commit offenders under this Act for any time not exceeding seven days, or to impose on any such offender a fine not exceeding 5*l.* for every such offence, and in default of payment thereof to commit the offender to any such prison as aforesaid for any time not exceeding seven days, unless the said fine be sooner paid.”

Section 114 contains a summary power, to be exercised either by the Judge or magistrates, to punish assaults on and rescues from bailiffs of the Court out of Court.

It is not unimportant to observe that these sections, whilst they qualify the general power of commitment or fine which would have followed upon the commission of those of the specified offences which would take place in *facie curiæ* by force of section 3, in one case specified in section 113, namely,

that of an insult to a Judge, &c., in going to or retiring from Court, and in all the cases specified in section 114, extend the power of punishment to offences not committed in the face of the Court, and in respect to the procedure confer a power not possessed even by the superior Court, for they authorise the summary arrest of the offender, even out of Court, without warrant or process of attachment. In the case of *The Queen v. Lefroy* (2), Mr. Lefroy, a Judge of County Courts, had taken upon himself to issue a summons against a solicitor, calling upon him to appear and answer for his contempt in publishing in a local newspaper a libel on the Court. A prohibition was moved for on behalf of the solicitor, and the rule made absolute, upon the main point decided. I have always been astonished that the case was considered arguable. I should hardly have supposed it would have been doubted that the jurisdiction of an inferior Court to punish contempts was limited to those contempts which were actually or constructively committed in *facie curiæ*, and that the jurisdiction to punish other contempts was derived from the rank of the Court, and not from the circumstance whether it is a Court of Record or not. A familiar illustration might have been found in the relative powers of the old Court of Chancery and the Court of Quarter Sessions. The Court of Chancery, which, on its equity side, was not a Court of Record, but was a superior Court, always exercised the jurisdiction of punishing contempts to the same extent as the superior Courts of Common Law, and indeed it made use of its process of contempt to a much greater extent than they did, for having no power to issue process of execution it could only enforce its orders for the payment of money by sequestration or attachment, both of which were processes for punishing contempts. On the other hand, the Court of Quarter Sessions, which is an ancient Court of Record, but an inferior Court, could not, until Baines's Act, 12 & 13 Vict. c. 45, by any process of its own enforce its orders even for the payment of costs, and the only mode of enforcing them was by indictment. This, I think, there can be no doubt, arose from the circumstance that it was an inferior Court, having no process of execution against the goods of a civil nature, and being unable, like the Court of Chancery, to attach or sequester for contempts committed *extra faciem curiæ*. If, therefore, the Court of Queen's Bench, in the case of *The Queen v. Lefroy* (2), had confined itself to the question of the dis-

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inction between the powers of superior and inferior Courts, the only point I should have had to consider would have been whether there is anything in section 89 of the Judicature Act which impliedly confers upon the inferior Courts therein referred to the power to enforce as well as to grant the relief, redress and remedy which they are thereby required to grant. But the Court of Queen's Bench does not stop at this point. The *ratio decidendi* of the Lord Chief Justice and of Mr. Justice Mellor proceeds on the assumption that the jurisdiction to punish contempts is, by sections 113 and 114 of the Act of 1846, expressly limited to the contempts and amount of punishment therein described, and that the Court has no jurisdiction to punish in any way any other contempt.

The Lord Chief Justice says:—"But it is said that, although the Legislature has thus limited the power as to contempt in Court, that was not intended to alter the law as to the general jurisdiction of a Court of Record, as it is possessed by inferior Courts, of fine or imprisonment to any extent in their discretion. This would lead to a singular inconsistency. If contempt were committed in the face of the Court the Judge could only imprison the offender for seven days or fine him 5*l.*, while for a contempt out of Court he might fine him several hundreds or commit him for months or even years. We therefore must understand the Legislature to have confined the power to the instances given and to the extent limited."

The attention of the learned Lord Chief Justice does not appear to have been called during the arguments to the provisions of 28 & 29 Vict. c. 99. ss. 1 and 2, or we should probably have heard some further observations on the inconsistency and anomaly introduced by the Legislature itself in giving to a Judge of these limited powers in ordinary matters the power to punish by imprisonment at discretion the breach of any order of Court, in however trivial a matter, made under the powers of that Act; for notwithstanding *The Queen v. Lefroy* (2) I do not think that it can be doubted that the language of 28 & 29 Vict. c. 99. s. 2 is strong enough to give the Judge of the County Court the same power to punish contumacious disobedience to orders of Court, *quoad* the subject matter of that Act, as was then possessed by a Vice-Chancellor, and if this had been a proceeding under that Act I should have no hesitation in exercising, if I had thought it otherwise just, the power of commitment. The case of *The Queen v. Lefroy* (2) was decided on the 31st of January, 1873,

and it was in the session of that year that the Judicature Act became law. The framers of that Act must, therefore, be taken to have had a judicial exposition of the existing law as to the power of the County Court in the exercise of its general jurisdiction to punish for contempt before them, and in that state of things section 89 was enacted. It is as follows:—

"Every inferior Court which now has or which may after the passing of this Act have jurisdiction in equity or at law and in equity and in admiralty respectively shall, as regards all causes of action within its jurisdiction for the time being, have power to grant and shall grant in any proceeding before such Court such relief, redress or remedy or combination of remedies either absolute or conditional, and shall, in every such proceeding, give such and the like effect to every ground of defence or counter claim . . . in as full and ample a manner as might and ought to be done in the like case by the High Court."

It is not enacted as in the Act of 1865 that the Judge shall exercise any of the powers of the High Court, nor is there any provision analogous to that of section 8 of the Act, 1865, rendering lawful any writ or process for enforcing orders to be made. It was not argued in opposition to the grant of this injunction, and I do not think it could be successfully maintained, that the powers and duties thus imposed on inferior Courts are limited exclusively as regards equity to those special instances in which prior to the Act the Court could exercise an equitable jurisdiction. Such a construction would, I think, be inconsistent with the general scope and object of the Judicature Act. It would, as regards County Courts, have been mere surplusage, and would, under the section itself, which directs the relief, &c., to be granted in any proceeding, self-contradictory. I proceed, therefore, to determine this question on the assumption that the Judicature Act intended the County Court to grant relief, &c., in all actions in which the new High Court of Justice, if the action had been commenced there, could have done so. Does, then, this section carry with it the power to enforce as well as grant relief, &c., by process of imprisonment? Now, the first thing which strikes one on reading this section is the enormous and unlimited extent of the jurisdiction which it confers on the County Court. With the exception of the five causes of action of defamation, seduction, breach of promise of marriage, construction of a devise, &c., and judgment of a superior Court, to which the provisions of section 89 could

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in no way be applicable, the County Court has jurisdiction over all pleas of personal actions, subject only to the pecuniary limit of 50*l.* as the maximum of debt or damage recoverable. It follows, therefore, that a plaintiff can, by simply limiting his claim to pecuniary damages to 50*l.*, sue in the County Court for an injunction to stop the repetition of any act, the discontinuance of which might be enjoined by the High Court of Justice without any regard to the pecuniary interests involved or the expense or loss to which the defendant would be put by obeying the injunction. Moreover, the plaintiff could in cases where no question of title arises by limiting his claim to pecuniary damages to a sum under 20*l.*, sue for the same remedies without the defendant having any right of appeal except by leave of the Judge; and by limiting his claim to a sum under 40*s.* he might, however vexatiously he was proceeding, put the defendant to the peril and expense of defending a right of the possible value of hundreds or even thousands of pounds without being liable himself if defeated to more than nominal costs, the defendant's only remedy in such a case being to remove the action as soon as commenced into the High Court of Justice by *certiorari*. Let us take an illustration. A manufacturer spends say 5,000*l.* in erecting a manufactory, and in so doing obstructs the lights of a neighbouring cottage. It would, as it seems to me, be competent for the owner of the cottage to sue in the County Court for 20*s.* damages for the obstruction of the light, and if no question of title arose, it would be in the absolute discretion of the Judge, without appeal, to grant an order in the nature of an injunction, requiring the demolition of the manufactory. I hope that it would be found in practice that such an order would only be granted in proper cases, but one cannot fail to remark that this discretion is a wide one to entrust to a Court which the Legislature has deliberately considered unfit to be entrusted with the discretion given by the common law to the most inexperienced recorder of a small borough. I am asked, however, to hold not only that this wide power of granting a discretionary order is vested in this Court, but that the power of enforcing it by an arbitrary sentence of imprisonment is impliedly given. Had I been sitting in a Court of co-ordinate jurisdiction with that in which *The Queen v. Lefroy* (2) was decided, I should, having regard to the fact that the prosecutor was not put to declare in prohibition, but the matter decided on the rule, have ventured with all respect, while agreeing entirely that Mr.

Lefroy exceeded his jurisdiction, to dissent from that part of the judgment of the Lord Chief Justice and Mr. Justice Mellor which proceeds on the implied restriction contained in 9 & 10 Vict. c. 95. ss. 113, 114. I should have observed that the first of those sections relates in part, and the second entirely, to contempts out of Court, which upon the view taken of the other ground of the application could not be punished by the Judge without special statutory power. I should have noticed that the list of contempts in *facie curiæ* contained in section 113 is not exhaustive, that, for instance, it could not be made except by a straining of the words "otherwise misbehave in Court" to apply to the case of a witness who intentionally and contumaciously, but secretly and without having been guilty of actual disrespect to the Court in language or demeanour or of actual interruption to the business remained in Court after having been ordered to quit it; and that the contempts in *facie curiæ* specified in section 113 are of a character likely to be specially personally offensive to the Judge, whom, considering his inferior position, and that his proceedings are not upon so public an arena as those of the superior Judges, I should have thought it might have been felt desirable to save from the temptation to inflict an excessive punishment induced by feelings of personal irritation. Upon these grounds I should have thought it too much to hold that a power most convenient for the due administration of justice, and which, if properly exercised, is highly beneficial to the public, had been impliedly taken away from the County Courts. And if I had felt at liberty to act upon my opinion in this respect I should have been inclined to hold, although not without doubt and hesitation, considering that the liberty of the subject is involved, either that the appearance of the defendant and his refusal in Court to obey, or his allegation in Court of a feigned excuse for disobeying its order was in itself a sufficient contempt in *facie curiæ*, or else that the power given to the County Court to grant relief, redress and remedy was wide enough impliedly to engraft upon the ordinary jurisdiction given by the common law to a Court of Record a power to enforce its orders made in exercise of the power conferred by the section in question. But in this Court, whatever my opinion, it is my duty to follow and give effect to, as far as I understand it, the judgment of the superior Court, and I feel bound in consequence to decide this case as if there were contained somewhere in the County Court Acts a provision to the effect

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that the Court shall have no power to inflict any punishment for contempt of Court except where it is expressly conferred by those Acts. The Judicature Act is not a County Court Act, and is not incorporated with them. Unless, therefore, section 89 impliedly repeals this (if I may so call it) judicially imported provision the power which I am asked to put in force is not conferred. I cannot say that I am so clear that it is, that I ought to venture on exercising so serious and important a jurisdiction, trenching seriously upon the liberty of the subject, until it has been decided by the High Court of Justice that I can. The imprisonment of the defendant is not relief to the plaintiff. I need only quote the words of Chief Baron Kelly in giving judgment in *Dawkins v. Lord Rokeby* (4):—"No punishment inflicted (in that case on a false witness) affords redress to the party injured," to shew that it is not "redress." Is it then a remedy? In my opinion the word remedy is more applicable to the grant of the injunction itself than to this proceeding, which is an application for the enforcement of a remedy already granted and not for the remedy itself. I come to the conclusion, therefore, that the safer and better course is to decline jurisdiction, and on that ground only I refuse the present application. It may be asked then: "Is the plaintiff's remedy by injunction wholly nugatory, and section 89 of the Judicature Act a dead letter?" Certainly not. For the defendant may be proceeded against for his disobedience by indictment at the assizes or sessions, or perhaps in analogy to the course open to a plaintiff who had under the old law obtained a decree in equity in an inferior Court, by action in the Chancery Division of the High Court of Justice (see *Com. Dig.* tit. Chancery 6). The former proceeding would, it is true, constitute the Court of Oyer and Terminer, or as the case may be, of sessions, in effect an appellate tribunal from the County Court, because, although the only question for the jury in such a case would be, whether the order of the inferior Court had been disobeyed or not; yet upon a verdict of guilty the criminal Court could, by imposing a nominal fine, practically overturn the decision of the County Court. That this consequence might have been foreseen and intended, *quoad* the assizes is natural enough, but it does not seem so likely that the framers of the Judicature Act or Parliament intended the Quarter Sessions to exercise this kind of appellate jurisdiction over the County Courts,

though doubtless there are those who think the sessions the more efficient tribunal of the two. But, be this as it may, so long as the plaintiff is competent to prefer his bill of indictment, it cannot be said that this remedy by injunction is nugatory and useless.

I cannot conclude without observing that, if I have, in my desire to give full effect to the judgment of the Queen's Bench, taken too narrow a view of the intention of the Legislature, the remedy of the plaintiff, for the correction of my error, is simple and easy, for he can, without appealing, apply for a rule to compel me to hear the application on the merits; and I am bound to add that, in view of the importance of this question as affecting the powers of the Court, I hope he will do so; and for the sake of the usefulness of the Court, that whether he succeeds or not, the calling of public attention to the difficulty which has thus arisen, may induce those who influence the action of the Legislature in such matters to reconsider the policy of placing the County Courts in the position they now occupy. I am far from desiring the extended powers claimed by Mr. Lefroy. I am one of those who think that the surest safeguard of a Judge against such attacks as those made upon him, is the faithful and honest discharge of his duties to the best of his ability, and with the patience and courtesy which every gentleman ought to exhibit towards those with whom he has to deal. And if a Judge who does not fail in the performance of these duties is unjustifiably and maliciously attacked by persons whose censures carry too much weight to be passed over with silent contempt, it is far better for the sake of the person aggrieved, as well as for the public, that the punishment of the offence should be entrusted to a tribunal other than that consisting of the party aggrieved alone. But those restrictions upon the action of the Court which diminish its powers of enforcing respect to the law, are, in my opinion, useless and mischievous. I have occupied so much time already in delivering this judgment, that I will not travel further into matters foreign to the immediate question in hand, but merely conclude by observing that a confirmation of these views will be found in a most able and logical paper on the subject of the encouragement given to fraudulent judgment debtors by the indirect operation of 9 & 10 Vict. c. 95, section 86, circulated in the earlier part of the year by my friend Mr. Summer, the Judge of County Court Circuit, No. 53.

For the present this application is dismissed for want of jurisdiction.

[IN THE COMMON PLEAS DIVISION.]

1879. } SHAW AND ANOTHER v. THE  
Feb. 26. } EARL OF JERSEY.

*Injunction—Judicature Act, 1873, sect. 25, sub-sect. 8—Landlord and Tenant—Restraining Distress for Rent.*

*The Court will not grant an injunction to restrain a landlord from distraining for rent, even though it is doubtful whether he is entitled to such rent, without providing for the landlord having the amount of such rent secured to him in the event of his ultimately being found to be entitled to it.*

This was an application on the part of the plaintiffs for an injunction to restrain the defendant from levying any distress on the property of the plaintiffs for rent alleged to be due under a lease dated the 1st of April, 1840, in respect of certain blast furnaces, until after the decision of the Court on a Special Case.

The lease of the 1st of April, 1840, was a lease by which the Right Honourable George, Earl of Jersey, an ancestor of the defendant, let to John Vigurs certain lands and mines in the county of Glamorgan, for a term of ninety-nine years from the 1st of January, 1839. The lease contained the following power to the said John Vigurs or his assigns, namely, "to pull down, remove or alter any of the furnaces, works, buildings and machinery whatsoever, now standing, or hereafter to be erected and built on the said demised premises, but so nevertheless that if any of the furnaces, works, buildings and machinery now standing on the said demised premises shall be so pulled down or removed, other furnaces, works, buildings and machinery of equal or greater value shall with all convenient speed be erected instead thereof by the said John Vigurs, his executors, administrators or assigns, except only where the buildings so pulled down or removed shall have been erected for the purposes of the works, manufactories or businesses now carried on, or hereafter to be carried on, upon the said demised premises, or for the habitation or convenience of the workmen employed thereon, and shall have become unnecessary, useless or unprofitable." The rents reserved, in

addition to a rent for the surface lands and a rent in respect of the coal "used and consumed in all or any of the works then or thereafter to be erected on the said demised premises, exclusive of any iron blast smelting furnace or furnaces," were, *inter alia*, a yearly rent of 500*l.* for and in respect of the coal to be used in two blast furnaces then erected on the said premises for the smelting of iron, and also an additional yearly rent of 250*l.* for and in respect of the coal "to be used and consumed in each and every additional blast iron smelting furnace to be erected on the said demised premises over and above the said hot blast iron smelting furnaces so erected thereon as aforesaid," such last mentioned rent to be in lieu of royalty for all the coal used in every such additional blast iron smelting furnace, and to be paid half yearly, the first of such payments "to be made on such of the half-yearly rent days as shall first happen next after any such additional furnace or furnaces for the smelting of iron which shall have been so as aforesaid erected and built and shall have been used for the smelting of iron, and to continue thenceforth for and during the continuance of this present indenture of lease."

It appeared that three additional blast furnaces beyond the said two blast iron smelting furnaces above referred to had been erected on the premises since the granting of the said lease, so that at one time there were as many as five blast furnaces existing on the premises. The plaintiffs had become the assignees of such lease and there were now and had been for more than a year past only two blast furnaces existing, the other three having become useless and unnecessary, and as such, pulled down under the power contained in the lease.

The question in dispute between the parties was whether the plaintiffs were liable to pay the additional rent of 250*l.* in respect of each of these three blast furnaces which no longer existed. The defendant was advised that he was entitled to such rent so long as the lease lasted, and this being denied by the plaintiffs the defendant had distrained for the same. The plaintiffs had replevied and the present

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action was brought, the matter being referred to an arbitrator to hear evidence and to state a Special Case for the opinion of the Court. In the meantime a further half-year's rent being claimed to be due in respect of such furnaces a Judge's order was made on the 29th of July, 1878, by which on payment into Court by the plaintiffs of 375*l.*, an injunction was granted restraining the defendants and his servants from levying any distress for such rent pending the decision of the Court on the Special Case. The present application was in respect of the half-year's rent claimed in respect of such furnaces, as due in December, 1878, the plaintiffs seeking such injunction without being obliged to pay further money into Court. The application was originally before Field, J., at chambers, and was referred by him to the Court.

*W. G. Harrison and Anderson*, in support of the application.—All the rents reserved by the lease have been paid except those in respect of these furnaces which no longer exist, and which the plaintiffs contend are not due according to the true construction of the lease. It is very hard that the plaintiffs should be subjected to the annoyance of constant distresses for these rents pending the determination of the dispute. There has been already a replevin and a payment of money into Court, and there is no affidavit that the defendant will be likely to lose anything if he be restrained from distraining for the future rents until the Special Case has been heard. It is clear that the Court has power to grant the injunction under section 25, sub-section 8 of the Judicature Act, 1873, which has extended the large power given by the Common Law Procedure Act, 1854, to "all cases in which it shall appear to the Court to be just and convenient"—*Beddow v. Beddow* (1).

[*O. Bowen*, for the defendant, stated that the defendant was willing to consent to a similar order to that which had

been made on the 29th of July, 1878, on payment of money into Court.]

It is not reasonable to require money to be paid into Court as a condition for granting the injunction. It is not a case in which rent is clearly due. On the contrary the fair meaning of the lease is against any such rent. In *Kerr on Injunctions*, 2nd ed. p. 119, the principles on which the Court of Equity has acted in restraining trespass is thus stated: "If the right at law is clear and the breach of that right is clear, and serious damage is likely to arise to the plaintiff if the defendant is allowed to proceed with what he is doing or threatens to do, or has given notice of doing, an injunction will be granted pending the trial of the right. If the case is in the opinion of the Court free from doubt, the Court may interfere at once without putting the plaintiff to establish his legal right and grant a perpetual injunction. But if the right at law is not clear or the breach is doubtful, and no irreparable injury can arise to the plaintiff pending the trial of the right, the case resolves itself into a question of comparative convenience and inconvenience whether the defendant will be more damaged by the injunction being granted, or the plaintiff by its being withheld." The convenience here was in favour of restraining the landlord from distraining instead of subjecting the plaintiffs to constant distresses, which were in fact repeated trespasses.

*O. Bowen*, for the defendant.—No case has been found in which an injunction has ever been granted to restrain a landlord from the exercise of what is his legal right, namely, that of distraining for rent. The passage cited from *Kerr on Injunctions* has reference only to trespass. In *Sanster v. Foster* (2), Lord Cottenham, L.C., stated that "the Court ought not to interfere for the purpose of preventing a party from enforcing a legal claim without securing to itself the means of putting him in the same position in the event of his turning out to be right, as if the Court had not interfered," and *Whitworth v. Rhodes* (3) shews that payment

(1) 47 Law J. Rep. Chanc. 588; s. c. Law Rep. 9 Ch. D. 89.

(2) 1 Cr. & Ph. 802.

(3) 20 Law J. Rep. Chanc. 105.

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of money into Court is one of the conditions which the Court will impose for so interfering.

*Anderson in reply.*

[LORD COLERIDGE, C.J.—Why will the plaintiffs not bring the amount of rent into Court?]

This is not a case in which the rent is clearly due, and it is hard to require them to do so and to lose the interest on their money when the defendant in fact runs no risk by its not being brought into Court.

LORD COLERIDGE, C.J.—I wish that some arrangement had been come to, for the construction of the lease is open to doubt, and it would be presumptuous for me now to pronounce any opinion upon it. As both parties insist on standing on their rights I must act accordingly. Distress is an old and undoubted right which a landlord has for rent. The defendant in claiming to be entitled to distrain is acting only in the exercise of a legal right. Now it is admitted that no instance can be found in which the Court of Chancery has ever granted an injunction to restrain the exercise of such right even when the exercise of it has been said to be unjust. I certainly can find no precedent for such an injunction, and I decline to make one. The Judicature Act empowers the Court to give an injunction in all cases in which it may appear just to do so. What seems to me to be just is to secure to the defendant the money if it should turn out that he is entitled to the disputed rent. I think, therefore, that the money ought to be brought into Court, but I cannot order the plaintiffs to do so. What will be just, therefore, will be to restrain the defendant for a fortnight from distraining, and if at the end of that time the money be brought into Court, the injunction against distraining will continue, and so from time to time as the half-year's rent becomes due and further money is brought into Court. If the money be not so brought into Court, the injunction will be dissolved.

DENMAN, J.—I am of the same opinion. I have only to add that with regard to the objection that the plaintiffs would

lose interest on their money, there would be no difficulty in preventing that if the parties would agree to an investment.

*Order accordingly.*

Solicitors—Argles & Argles, for plaintiff; Freshfields & Williams, for defendant.

[IN THE COMMON PLEAS DIVISION.]

1879. }

March 6. }

HARRIS v. WARRE.

*Pleading—Statement of Claim—Setting out Words of Libel—Order XIX. rules 4 and 24.*

*Notwithstanding Order XIX. rules 4 and 24, the precise words alleged to be libellous must be set out in a statement of claim for libel.*

The following was the statement of plaintiff's claim:—

1. The plaintiff is a farmer residing at Sloughcombe Farm, Milverton, in the county of Somerset, and the defendant is the rector of the parish of Hillfarrance in the said county.

2. In or about the month of June, 1878, a man by name Frederick Merry, a packer in the employ of the Great Western Railway Company, was found dead on the railway between Taunton and Watchet, and at the inquest held on the body of the said Frederick Merry a verdict of accidental death was returned.

3. The defendant subsequently wrote and sent to the chief constable of the county of Somerset letters, in which he charged the plaintiff with having been concerned in or guilty of the murder of the said Frederick Merry, and required the said chief constable to cause the plaintiff to be arrested on such charge.

4. The defendant also sent to Mr. Goldsmith, the superintendent of police for the district wherein the plaintiff resides, and charged the plaintiff with having been guilty of the said murder,



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and required the said superintendent to arrest the plaintiff upon the said charge.

5. The said superintendent of police in consequence thereof endeavoured himself to arrest the plaintiff, and directed a police constable to proceed to the plaintiff's residence and to arrest and detain the plaintiff upon the said charge of murder so made against him by the defendant.

6. The said police constable accordingly on several occasions went to the plaintiff's residence, and endeavoured to arrest him, and would have done so but that he was unable to meet with the plaintiff.

7. The defendant had no reasonable or probable cause for making the said charge, and the same was false, and was made by the defendant maliciously and with intent to injure the plaintiff.

8. By reason of the said wrongful and malicious acts of the defendant the plaintiff's credit and reputation has been greatly injured and the plaintiff has suffered great loss and injury.

Demurrer to such statement of claim on the ground that no prosecution of any kind was shewn, and that if the plaintiff meant to complain of libel or slander the words ought to have been set out.

*Bray*, in support of the demurrer.—The statement of claim is bad. The words alleged to be libellous are not set out. It has been always held to be necessary that the precise words should be stated—*The Queen v. Bradlaugh* (1) and *Cook v. Cox* (2); and there is nothing in the Judicature Act, 1875, and the orders thereunder, which has altered this mode of pleading. Then, if the cause of action is not libel but malicious prosecution, the statement is bad in not shewing that there had ever been any prosecution at all. *Austin v. Dowling* (3) is an authority that there is no prosecution until the matter is before the magistrates, and that it is not constituted by merely giving a person in charge.

(1) 48 Law J. Rep. M.C. 5; s. c. Law Rep. 3 Q.B. D. 60.

(2) 3 M. & S. 110.

(3) 39 Law J. Rep. C.P. 260; s. c. Law Rep. 5 C.P. 534.

*Petheram, contra.*—If the statement does not disclose a cause of action the plaintiff has suffered a wrong without a remedy. No doubt the practice before the Judicature Acts was to set out the words of the libel and to amend at the trial in the case of any variance, but since the Judicature Act, 1875, there is no longer the necessity for setting out all the words. Order XIX. rule 4 states that "every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved;" and the 24th rule of the same order provides that "whenever the contents of any document are material it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material." Further, the statement shews that the defendant charged the plaintiff with a felony, and directed the police to arrest him on such charge. It therefore sufficiently shews that the defendant put the law in motion, although it is true that it does not, in fact, shew that there was a prosecution.

LORD COLERIDGE, C.J.—I am of opinion that this demurrer must be allowed. For the purpose of our decision, we will assume that something improper has been done on the part of the defendant. The plaintiff's statement of claim puts his case apparently on two grounds, namely, malicious prosecution and libel. As to the first, Mr. Petheram has admitted that the facts do not disclose a malicious prosecution. No prosecution was ever instituted, and none was determined in favour of the plaintiff, who is, therefore, out of Court on this ground. With regard to the second point, the libel is stated in most general terms. It is also admitted that such a form of pleading is new, and that according to the old practice it was necessary to set out the actual words complained of. The reasons for this necessity have often been stated by Judges of high authority, and are by no means technical. If it were otherwise, how could the defendant shape his de-

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fence? Everything may turn, and sometimes does turn, upon the peculiar form of the words. In old days, a small, but important variation, proved fatal, if the difference in form amounted to a difference in substance. In cases of libel and slander, the very words are the very facts, and it is *these* defamatory words, and not defamatory expressions generally, which form the ground of action. It is stated in a book of the highest authority—*Starkie on Libel*, 3rd ed., p. 343, "Generally the very words used should be set out, for it has frequently been held that it is not sufficient to describe them by their sense or meaning, substance, purport or effect." This principle was strongly re-affirmed in a recent case in the Court of Appeal—*The Queen v. Bradlaugh* (1), and the practice in pleading, therefore, was perfectly clear before the Judicature Acts. But Mr. Petheram contends that Order XIX. rule 4, enables him to do what he has done here. The answer is that in libel the words are "the material facts" mentioned in that rule. It is evident also that no alteration in the practice was intended to be made, for there is no form of a statement of claim for libel in the forms appended to the rules of Court. The old practice, therefore, must be retained.

DENMAN, J.—I am of the same opinion. The only thing I wish to add is that Order XIX. does not really aid the plaintiff's contention. By rule 24 of that order, the precise words of a document need not be set out, "unless the precise words thereof are material." In libel, according to all the decisions, the precise words are most material.

*Judgment for the defendant (4).*

Solicitors—Torr, Janeways & Co., agents for Carslake & Barham, Bridgwater, for plaintiff; Whitakers & Woolbert, for defendant.

(4) Leave was given to the plaintiff to amend generally on payment of costs.

[IN THE COMMON PLEAS DIVISION.]

1879. { THE VAL DE TRAVERS ASPHALTE  
Feb. 28. { PAVING COMPANY (LIMITED) v.  
THE LONDON TRAMWAYS COMPANY (LIMITED).

*Parties—Substitution or Addition of other Plaintiffs—Rules of Court, 1875, Order XVI. rule 2.*

*The plaintiffs contracted with a vestry to pave a public road with asphalt and to keep the pavement in repair for fifteen years, the pavement when laid to be the property of the vestry. Shortly after the pavement was completed the defendants, acting under statutory powers, laid down a tramway along the pavement, but so constructed and maintained their tramway as to occasion unnecessary damage to the pavement.*

*It being doubtful whether an action, commenced by the plaintiffs against the defendants on the above facts, was brought in the name of the right plaintiffs, the Court, under Rules of Court, Order XVI. rule 2, ordered the vestry to be added or substituted as plaintiffs, on the terms that the vestry was to be indemnified by the original plaintiffs for all costs and expenses.*

This was an action brought to recover the sum of 3,901l. 8s. from the defendants which came on for trial at the Guildhall in the city of London, on the 1st of June, 1878, before the Hon. Mr. Justice Denman and a special jury, when, by the consent of the parties, and the order of the Judge, it was ordered that the question of the right of the plaintiffs to maintain the action either in their own name or by the joinder or substitution of that of other parties should be raised by a Special Case, and this case was accordingly stated.

CASE.

1. The plaintiffs are a company, duly incorporated under the provisions of the Companies Acts of 1862 and 1867, for the purpose, amongst others, of making, laying down and maintaining asphalt paving, the defendants being also duly incorporated under the said Acts, for the purpose of constructing, laying down and working tramways.

2. In the year 1871 the vestry of the

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parish of St. Mary, Newington, were desirous of having certain portions of the New Kent Road, Newington, paved with rook asphalt, and thereupon contracted with the plaintiffs to pave the same.

3. By a contract (1) which bears date the 12th of July, 1871, the plaintiffs contracted with the said vestry to pave the said road to the satisfaction, in all respects, of the surveyor of roads of the said vestry, and to keep and preserve, at their own expense, the pavement of the said roadway in a perfect state of repair, to the satisfaction of the said surveyor, for two years after the pavement was first completed, and from the expiration of the said two years to repair, and maintain in a perfect state of repair, the said roadway for the space of fifteen years, upon being paid by the said vestry at the rate of 9d. per square yard over the entire surface of the asphalt laid down under the said contract.

4. Pursuant to the said contract the plaintiffs, in or about the month of July, 1871, paved the said road to the satisfaction, in all respects, of the said surveyor of roads, and fully completed the same, and also, pursuant to the said contract, have, since the said pavement was so completed, from time to time entered upon and maintained the said pavement in a perfect state of repair, as they were bound to do by the said contract, and as was required by the vestry.

5. In the year 1871 the Pimlico Tramways Company, having obtained powers in that behalf, laid down a tramway along the said New Kent Road, and laid their said tramway along the asphalt pavement laid down by the plaintiffs under the contract aforesaid.

6. In the year 1873 the defendants, under and by reason of the provisions of 36 & 37 Vict. c. cciv. (which said Act is to be taken as part of this case, and is annexed hereto), purchased the undertaking of the said Pimlico Tramways Company, and by section 15 of the said Act it is enacted that, from and after the

dissolution of the said Pimlico Tramways Company, the defendants shall to all intents represent the dissolved company, as if the two companies had originally been, and had continued without interruption to be, one and the same body corporate.

7. It is to be taken, for the purposes of this case, that the said Pimlico Tramways Company, and since its dissolution, which has long since taken place, the defendants have so constructed and maintained their tramway upon and along the asphalt pavement laid by the plaintiffs as aforesaid, as to occasion unnecessary damage thereto, and that, if due skill and proper appliance had been used by the said Pimlico Tramways Company and the defendants, such damage would not have occurred.

8. The 9d. per square yard contracted to be paid by the said vestry to the plaintiffs, as in paragraph 3 of the case is set forth, is an amount sufficient to cover the ordinary wear and tear to which asphalt pavement, situated as the pavement in question, is usually exposed, and this action is brought to recover the costs and expenses the plaintiffs have been put to by reason of the great and unnecessary damage done to the said pavement, as above stated.

9. No consent of any person or persons to the use of their names as plaintiffs in this action has been obtained or asked for, and it is to be taken, for the purpose of this case, that no such consent can be obtained.

10. Upon the hearing of the action, the pleadings in which are attached to and form part of this case, it was objected by the counsel for the defendants that the plaintiffs were not entitled to maintain an action against the defendants in respect of the extra costs and expenses mentioned in paragraph 8 of this case.

11. The Judge thereupon, with the consent of the parties, made an order, under Order XXXIV. rule 2, of the Supreme Court of Judicature Act, 1875, that the question of law should be raised for the opinion of the Court by a Special Case.

12. It is agreed by the parties hereto

(1) The contract was annexed to the Special Case; by the 18th condition, the pavement when laid complete was to be the property of the vestry.

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that the Court shall have all the powers as to joinder of parties as a Judge at Nisi Prius.

13. The Court is to have power to draw all inferences of fact.

The question for the opinion of the Court is—

First. Whether the plaintiffs can maintain the present action against the defendants for any and which of the extra costs and expenses they have been put to as aforesaid.

Second. If the plaintiffs cannot maintain this action, whether the Judge at Nisi Prius ought to have joined or substituted any other parties who can maintain the action against the defendants for the said costs and expenses.

Third. If the Court shall answer either of the said questions in the affirmative, then if necessary the writ and proceedings are to be amended by the addition or substitution of other parties as plaintiffs, and the action is to be remitted, as agreed upon by the parties, to an arbitrator, to adjudicate upon the facts of damage and the amount thereof.

*Charles Russell (A. L. Smith with him)*, for the plaintiffs.—It is admitted that the defendants would not be liable for the proper exercise of their statutory powers. The question is whether the plaintiffs, having been injured by undue skill on the part of the defendants, can maintain this action. The analogy nearest to the present is the case of the railway held liable for injury caused by the sparks from their locomotive, in which the best appliances for preventing the emission of sparks have not been used—see *Vaughan v. The Taff Valley Railway Company* (2); see also *Geddis v. The Bann Reservoir Company* (3)—though it must be admitted that in these cases the actions were brought by the person having the property in the thing injured, whereas in the present case the property of the highway is in the vestry; but there

is a *quasi* property in the plaintiffs, inasmuch as they are charged with the possession, for fifteen years, for the purposes of repair, and have therefore a possession which gives them a right of action against a wrongdoer. The Court has power, by Order XVI. rule 2, of the Judicature Act, 1875 (4), to substitute or add the vestry as plaintiffs. Want of consent on the part of the vestry is immaterial. The only instance where consent is absolutely necessary is in the case of a plaintiff suing without a next friend, or as the next friend of a plaintiff under disability, in rule 13 of Order XVI. The words in the rule, *bona fide* mistake, have been held to include mistake of law as well as of fact—*Duckett v. Gover* (5).

*Kempe (Humphreys with him)*, for the defendants.—The plaintiffs must shew a breach of duty, and that the damage was the result of the breach. In *Alton v. The Midland Railway Company* (6), where a master sought to recover damages for the loss of services of his servant, injured while a passenger in the defendants' railway, caused by neglect of their duty to carry the servant safely, according to their contract with him, Byles, J., says—"No one can sue for a breach of duty except for a breach of duty to himself;" and after citing several instances of the inconveniences attending a departure from this rule, the learned Judge goes on to say—"The moment we depart from the rule that the action for a breach of duty cannot be brought except for a breach of duty against the party suing, the door is opened to most extensive and

(4) Order XVI., rule 2.—"Where an action has been commenced in the name of a wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff or plaintiffs, the Court or a Judge may, if satisfied that it has been so commenced through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person or persons to be substituted or added as plaintiff or plaintiffs upon such terms as may seem just."

(5) 46 Law J. Rep. Chanc. 407; s. c. Law Rep. 6 Ch. D. 82.

(6) 19 Com. B. Rep. N.S. 213; s. c. 34 Law J. Rep. C.P. 292.

(2) 3 Hurl. & N. 743; s. c. 28 Law J. Rep. Exch. 41; 5 Hurl. & N. 679; s. c. 29 Law J. Rep. Exch. 247.

(3) 11 Irish Rep. C.L. 160.

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unknown liabilities." In the present case there may be many sub-contractors of the plaintiffs' company, each of whom might be let in to sue. If the plaintiffs have made an improvident contract they must abide by it. The amendment asked for ought not to be made. Order XVI. rule 2, only applies when the real cause of action, and that cause only, is to be decided, but when the substitution of another plaintiff would alter the action, then such substitution is not to be made. By section 16 of 33 & 34 Vict. c. 74, the plaintiffs are, if required by the vestry, to lay down granite to the extent of so much of the road as lies between the rails of the tramway and eighteen inches beyond. Had this been done the damage would not have occurred, and if the vestry are substituted as plaintiffs the question might be raised as to whether the vestry should or did require the granite to be laid down, which would raise an entirely different case. In *Turquand v. Fearon* (7) Mellor, J., and Field, J., refused to add a third party's name, on the ground that it was unreasonable to do so without his consent, or without being satisfied that he would be indemnified.

LORD COLERIDGE, C.J.—In that case the Queen's Bench appear to have considered it unreasonable to make the order, but in the present I think we ought to make the order, and add the vestry as plaintiffs, on a full indemnity, to be given to them by the original plaintiffs.

DENMAN, J., concurred.

*Order accordingly.*

Solicitors—Ellis & Crossfield, for plaintiffs; H. C. Godfray, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]  
1879. } LA GRANGE v. M'ANDREW  
Jan. 11. } AND OTHERS.

*Practice—Security for Costs—Failure to give Security as ordered—Dismissing Action for Want of Prosecution—Rule of Equity—Judicature Act, 1873, section 25, sub-section 11.*

*The rule in Equity that, where a stay of proceedings has been ordered until plaintiff give security for costs, and plaintiff has failed within a reasonable time to give security, defendant may apply to dismiss the action for want of prosecution, is now of general application to all actions in the High Court of Justice, and a Judge, when so applied to, has discretionary power to dismiss the action without requiring the defendant to abandon the previous order on the plaintiff to give security for costs.*

This was an appeal from an order of Field, J., dismissing the action for want of prosecution.

The plaintiff was a foreigner, residing out of the jurisdiction, and the defendants, who were the directors of the Standard Discount Company, Limited, had obtained an order, requiring the plaintiff to give security for costs, and staying proceedings in the meantime.

The time for delivering the statement of claim having elapsed, and the plaintiff not having given the security as ordered, and being, therefore, unable to proceed further in the action, the defendants took out a summons, upon which Field, J., made the order now appealed against.

*J. D. Fitzgerald*, for the plaintiff, contended that, during the pendency of the former order for security for costs, the defendants were not entitled, according to the universal practice at common law before the Judicature Act, to have the action dismissed, and cited *Chitty's Practice*, vol. ii. p. 1420; their proper course being to abandon the order for security, if they wished either to force the action to trial, or have it dismissed for want of prosecution.

*Charles Russell* (*O. H. Anderson* with him), for the defendants, while admitting that the practice at common law had

*La Grange v. M'Andrew, Q.B.*

been as alleged, argued that, by virtue of sub-section 11, section 25, of the Judicature Act, 1873, the practice in Chancery must be followed, where the rule has always been that a Vice-Chancellor had a discretion as to dismissing a bill, if the terms as to giving security for costs had not been complied with by a plaintiff.

COCKBURN, L.C.J. — It seems to me that the rule in Chancery is so obviously founded in justice, that it ought to be upheld if it comes within the provisions of the Judicature Act, and can, therefore, prevail over the undoubted practice of the common law Courts before that Act. Though I may have some little doubt whether sub-section 11 of section 25 is wide enough to embrace the case, I am satisfied to rule in this Court that it is, and leave it to the plaintiff to question the decision on appeal. I think that the learned Judge has rightly exercised his discretion upon the application which he therefore had the power to entertain, and this appeal must be dismissed.

HAWKINS, J., concurred.

*Appeal dismissed.*

Solicitors—A. G. Ditton, for plaintiff; L. J. B. Rawlins, for defendants.

*Hyson v. L.N. & S.W. Ry. Co. 79.*

[IN THE COURT OF APPEAL.]

(*Appeal from the Common Pleas Division.*)

1878.	} THE LONDON, BRIGHTON AND SOUTH COAST RAILWAY COM- PANY (appellants) v. WATSON (respondent).*
Dec. 20.	
1879.	
Feb. 1.	

*Railway Company—Bye Law—Travel-  
ling without a Ticket—Action for Fare  
from Place whence Train started—8 Vict.  
c. 20. ss. 103, 109, 145.*

*By 8 Vict. c. 20. s. 103, it is provided  
that if any person travel in a carriage of  
the company without having previously paid  
his fare, and with intent to avoid payment*

*thereof, he shall forfeit a sum not exceeding  
forty shillings. By section 108, the com-  
pany may make regulations for regulating  
the travelling upon the railway. By  
section 109 the company are empowered to  
make bye-laws provided such be not re-  
pugnant to the provisions of the Act.*

*A railway company made a bye-law,  
which provided that any person travelling  
without a ticket should be required to pay  
the fare from the station whence the train  
originally started to the end of his journey,  
and under this bye-law the company sued  
in the County Court, for the amount of the  
fare from the place whence the train  
originally started, a passenger who had,  
without any intention to defraud, entered  
a train at an intermediate station, and  
travelled therein without a ticket:—*

*Held (affirming the judgment of the Com-  
mon Pleas Division), that the action could  
not be maintained, that a debt could not thus  
be created, and that the amount if claimed  
as a penalty could not thus be recovered.*

*Appeal by the railway company from  
the judgment of the Common Pleas  
Division.*

The respondent went without a ticket as a second-class passenger by the railway of the appellants, from Norwood Junction to Lower Norwood. On arriving at the latter place, he stated that he had not had time to take a ticket and he paid sevenpence, the second-class fare from Norwood Junction, but refused to pay eightpence, which was the fare from Croydon whence the train had started, and which the company insisted on his paying according to one of their bye-laws which was as follows:—"Any person travelling without a ticket, or failing or refusing to shew or deliver up his ticket as aforesaid, shall be required to pay the fare from the station whence the train originally started to the end of his journey." As the respondent declined to pay the penny in excess of the fare for which he had travelled, the appellants sued him for it in the County Court.

On the trial it was admitted that in travelling without a ticket the respondent had no intention to defraud the railway company, and that the case did not come within section 103 of 8 & 9 Vict. c. 20,

\* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

*London, Brighton, &c., Rail. Co. v. Watson (App.), C.P.*

which enacts that any passenger travelling without having previously paid his fare with intent to avoid payment, shall forfeit to the company a sum not exceeding forty shillings.

Judgment was given for the respondent, and on appeal the judgment was affirmed by the Common Pleas Division. The case is reported 47 Law J. Rep. C.P. 684.

The railway company appealed.

*Jeune*, for the appellants.

*Macmorran* and *Macaskie*, for the respondent.

The same arguments were urged and the same cases cited as in the Court below.

*Our. adv. vult.*

The judgment of the Court was (on Feb. 1) read by—

BRAMWELL, L.J.—If the sum claimed in this case is a penalty it is not recoverable in the County Court, nor elsewhere than before justices as provided by 8 Vict. c. 20. s. 145 (1). For it is the case of a liability created by statute, with a special provision for its enforcement, and with provisions inconsistent with there being a concurrent jurisdiction in the ordinary Courts—see section 151 (1) and *Cates v. Knight* (2), and also the opinion of Lord Coleridge, in *The London, Brighton and South Coast Railway Company v. Watson* (3). Accordingly it was argued

(1) 8 Vict. c. 20. s. 145, provides that "Every penalty or forfeiture imposed by this or the Special Act, or by any bye-law made in pursuance thereof, the recovery of which is not otherwise provided for, may be recovered by summary proceedings before two justices."

Section 151.—"No person shall be liable to the payment of any penalty or forfeiture imposed by virtue of this or the Special Act, or any Act incorporated therewith, for any offence made cognisable before a justice, unless the complaint respecting such offence shall have been made before such justice within six months next after the commission of such offence."

(2) 3 Term Rep. 442.

(3) 47 Law J. Rep. Q.B. at p. 685; s. c. Law Rep. 3 C.P. D. at p. 432.

for the appellants that it was a fare and not a penalty, and therefore recoverable not before justices as a penalty but as a debt in the County Court.

I am of opinion that it is not a debt, and that the appellants have no power to create such a debt. The statute by section 109 gives power to enforce bye-laws only by a penalty against the offender. I have no doubt that a railway company may demand and insist on payment before taking a passenger, and that if they give him credit for his fare they may insist on any sum they think fit, and if he agrees to it, that it would be a valid debt and recoverable as such. But if he does not agree to it he may indeed be a trespasser in getting into the carriage, and liable to damages as such, or they may waive the tort and recover a fare on the *quantum meruit* scale; but they cannot fix and insist on a fare at their pleasure. In this case it is only one penny, but if they can fix it at their pleasure they might make it 5s. or 5l. They have not sued for a trespass or tort, but for a fare. They have not shewn and of course could not shew that this defendant ought to pay more than the ordinary fare. Consequently the appellants fail and the judgment should be affirmed.

My brother Brett wishes to add to this, that in his opinion the claim is based on that which is repugnant to the statute, inasmuch as the statute only authorises the exacting of an additional sum in the case of fraudulent conduct. Lord Justice Cotton and myself desire it to be understood that we express no opinion either one way or the other on that matter.

*Judgment affirmed.*

Solicitors—Norton, Rose, Norton & Brewer, for appellants; H. S. Smith for respondent.

[IN THE COMMON PLEAS DIVISION.]

1879. }  
 March 6, 7. } STEVENSON v. WATSON.

*Arbitration—Architect—Want of Care and Skill in certifying—Builder's Contract.*

*A statement of claim set out an agreement under which the plaintiff contracted with a company to build for them a hall, the defendant being employed as architect thereof; the defendant was to be allowed to order additions and deductions, the amount of which were to be ascertained by him in a certain manner; all matters of dispute were to be left to the defendant, and his decision was to be final; the plaintiff was to be paid on the certificate of the defendant. The statement of claim then alleged that the work was done and the certificate given, but that the defendant did not use due care and skill in ascertaining the amounts to be paid by the company to the plaintiff, and neglected and refused to ascertain the amount of the said additions and deductions in the manner aforesaid, and knowingly and negligently certified for a much less sum than was, in fact, the net balance payable; and further—that the defendant refused to reconsider the said certificate and allow the plaintiff to point out to him the said errors in the bill of quantities:—*

*Held, that no cause of action against the defendant was disclosed by the above statement of claim; the defendant's duties involving the exercise of judgment and skill.*

*Per LORD COLERIDGE, C.J.—Had the defendant's duties been merely ministerial, an action would have been maintainable.*

**Statement of Claim:—**

1. The plaintiff is a builder who carried on business in partnership with Field Weston at Nottingham.

2. The defendant is an architect carrying on business in Nottingham.

3. Early in the year 1874 the Nottingham Temperance Hall Company, Limited, since named the Nottingham Albert Hall Company, Limited, and herein referred to as the company, proposed to build a Temperance hall, and employed the defendant as architect to prepare, and he accordingly prepared plans, drawings,

specifications, general conditions of contract, and the bill of the quantities of the artificer's works required to be done in the erection and completion of the proposed hall. Thereupon the defendant was employed by the company as architect under the contract proposed to be entered into by the company with the contractors for the works.

4. Early in the month of April, 1874, the company advertised for tenders for the execution of the works, and directed applications, with reference thereto, to be made to the defendant, and after examining the plans, drawings and specifications, and bill of quantities of the proposed works, at the office of the defendant in Nottingham, the plaintiff and the said Field Weston tendered for the execution of the works, and their tender was accepted by the company.

5. On or about the 16th of April, 1874, the defendant requested the plaintiff and the said Field Weston, to come to his office in Nottingham to execute the contracts for the works, and accordingly on that day the plaintiff and the said Field Weston signed the contract for the works at the office of the defendant, and their signature thereto was witnessed by the defendant.

6. The said contract was dated the 16th day of April, 1874, and was made between the plaintiff and the said Field Weston, of the one part, and the company, of the other part, and is as follows:—  
 "The said Richard Stevenson and Field Weston agree to erect and build for the said company upon a certain piece of land situate in North Circus Street, in the town of Nottingham, the Temperance Hall, according to the drawings, general conditions of contract and bills of quantities now produced and signed by the parties hereto, and intended to form parts of this agreement, and shall and will finish and complete the said Temperance Hall in such manner and of such materials, and within such time as is provided by the said general conditions of contract and bills of quantities, and according to the said drawings, and further, that they, the said Richard Stevenson and Field Weston, will well and truly observe and perform all and every the said conditions and



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stipulations contained in the said general conditions of contract on the part of the contractors required to be observed and performed, and in consideration thereof, the said company to pay unto the said Richard Stevenson and Field Weston the sum of thirteen thousand five hundred and sixty pounds in the manner set forth in the said general conditions of contract, and, in other respects, to perform and keep the conditions of contract, so far as the same on their part is, or ought to be, performed and kept."

7. The said general conditions of contract referred to in the said contract, so far as they are material to this case, are as follows:—

"The general conditions of contract for artificer's works required to be done in the erection and completion of a new hall for the Nottingham Temperance Hall Company, Limited, Nottingham, Fothergill Watson, architect, Clinton Street, Nottingham, January, 1874.

"The architect is at all times to have access to the works, which are to be entirely under his control and his clerk of the works. The architect may order any additions to or deductions from the contract without in any way vitiating the contract, and the amount of such additions to or deductions from the contract shall be ascertained by the architect in the same manner as the quantities have been measured, and at the same rate as they have been priced at.

"The contractor and the directors will be bound to leave all questions or matters of dispute which may arise during the progress of the works or in the settlement of the account to the architect, whose decision shall be final and binding upon all parties.

"The contractor will be paid on the certificate of the architect."

8. The said bill of quantities contains (amongst others) the following stipulations:—

"Note.—These quantities will, with the drawings and general conditions, form the basis of the contract.

"Should there be more or less measure than is here given, there will respectively be an addition to or a deduction from the contract.

"All measurements to be made in the same manner as the quantities have been taken, or all additions and deductions to be priced out at the same rate by the architect."

9. The plaintiff for greater certainty begs leave to refer to the contract, general conditions of contract and the bill of quantities.

10. The said contract was signed by the plaintiff and the said Field Weston in the belief and expectation, as the defendant well knew, that the defendant would use due care and skill in ascertaining the amounts to be paid by the company to the plaintiff and the said Field Weston under the said contract.

11. Thereupon the plaintiff and the said Field Weston proceeded with the execution of the works, and the defendant acted as the architect of the works, and undertook the duties of the architect under the contract.

12. The defendant from time to time during the progress of the works ordered additions to and deductions from the contract.

13. There were errors in the bill of quantities, and there was, in fact, more measure in certain descriptions of the works than was given in the bill of quantities.

14. The defendant from time to time during the progress of the works by his certificates certified that certain sums of money were payable to the plaintiff and the said Field Weston in respect of the works executed by them, and gave the same to them, and the said sums amounting to 10,100*l.* were paid by the company upon the said certificates.

15. The plaintiff after the completion of the works sent to the defendant accounts in respect of the works executed, shewing, as the fact was, that after adding to the contract the amount of the additions ordered by the defendant, and deducting the amount of the deductions ordered by the defendant, and making the stipulated additions in respect of the said errors in the bill of quantities and giving the company credit for the said sum of 10,100*l.* paid by them as aforesaid, there remained a balance of 1,616*l.* 6*s.* 7*d.* unpaid in respect of the works executed,

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and for which they were entitled to have the defendant's certificate.

16. The defendant, without calling upon the plaintiff or the said Field Weston for any explanation of the said accounts, and without any communication with them on the subject thereof, made and sent to the plaintiff and to the company his certificate, certifying that the net balance due to the plaintiff, over and above the amounts which he had previously certified, was 251*l.* 14*s.* 4*d.*

17. The defendant did not use due care and skill in ascertaining the amounts to be paid by the company to the plaintiff under the said contract, but in ascertaining the net balance due to the plaintiff neglected and refused to ascertain, and did not ascertain, the amount of the said additions to and deductions from the contract in the same manner as the quantities had been measured, and at the same rate as they had been priced out, or that there was more measure in the said descriptions of works than was given in the bill of quantities, by making measurements in the same manner as the quantities had been taken, and neglected and refused to price out, and did not price out the excess at the same rate, and make the stipulated addition to the contract in respect thereof, according to the terms of the contract, nor did he use due care and skill to ascertain, in the manner provided by the contract, what was, in fact, the net balance payable to the plaintiff by the company in respect of the works executed, for which the defendant was entitled to his certificate, but the defendant, knowingly or negligently, certified as aforesaid for a much less sum than was, in fact, the net balance payable to the plaintiff in respect of the works executed.

18. Upon receipt of the said certificate the plaintiff requested the defendant to inform him of the data upon which the same was based, but he refused to furnish the plaintiff with them, or to give him any information on the subject. The plaintiff thereupon requested the defendant to reconsider the said certificate, and offered to point out to him the said errors in the bill of quantities, and to give him any explanation he might re-

quire of the said accounts, but the defendant refused to reconsider the said certificate, and to allow the plaintiff to point out to him the said errors in the bill of quantities, or to explain the said accounts, or to hear any objection whatever on the part of the plaintiff to the said certificate.

19. By reason of the premises the plaintiff is unable to obtain payment from the company of the said balance, and has been deprived of and has wholly lost the same and the use thereof from the time when he was entitled to the certificate of the defendant for the amount thereof.

20. After making the said contract the plaintiff and the said Field Weston dissolved partnership, and the causes of action, which are the subject of this action, became and are vested in the plaintiff alone.

The plaintiff claims—

1. Damages, 1,364*l.* 12*s.* 3*d.* and interest on that sum, at the rate of five per cent. per annum, from the 10th of January, 1878, until payment or judgment.

2. Such further or other relief as the nature of this case may require.

Demurrer:—

The defendant demurs to the plaintiff's statement of claim, and says that the same is bad in law, on the ground that it shews that the defendant was in the position of arbitrator, and that he acted and declared his decision, and does not allege fraud or *mala fides*, and therefore shews no cause of action; and on other grounds sufficient to sustain this demurrer.

*Alfred Wills* (Graham with him), in support of the demurrer.—The defendant was acting as arbitrator between the company and the plaintiff, and there was no duty on his part, except, perhaps, to act honestly, and there is no allegation in the statement of claim that he did not act honestly. It is alleged in paragraph 17 of the statement of claim that the defendant did not use due care and skill in ascertaining the amounts payable to the plaintiff under the contract. No action will lie against a person who acts as arbitrator for not using due care and skill in

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the matter—*Pappa v. Rose* (1), *The Tharsis Sulphur and Copper Company v. Loftus* (2). If there be any duty at all it must be one arising out of a contract, and in this case there was no contract, express or implied, between the plaintiff and defendant. If there was in such a case a contract, on which an action could be brought, there would be found some precedent for it, whereas there is not, and partiality or improper conduct is only ground for setting aside an award. The present is an action of the first impression, and there are strong grounds, on public policy, why it should not be allowed. The breach stated in the 18th paragraph of the statement of claim is, that the defendant refused to reconsider his certificate, that is to say, that he refused to give a second certificate. After he had given his certificate he was *functus officio*, and could give no other. Moreover, if the allegation amounts to a refusal to adjudicate, that gives no cause of action, for there is no legal obligation to adjudicate. There is no such duty, except arising out of contract, and there is no such contract in this case.

*Cave* (Wood-Hill with him), for the plaintiff.—In the first place the defendant was not in the position of an arbitrator; secondly, if he was, the statement sufficiently shews misconduct on his part, for which he is liable to an action. He had no judicial function to perform in ascertaining the amount to be paid to the plaintiff by the company. The quantities could be ascertained by measurement, and the prices were fixed by the bill of quantities; all, therefore, that he had to do, was to measure up the work done, which was a duty which would probably be performed by his clerk, and which required no judicial mind to perform. Now the complaint is that the defendant acted so negligently in ascertaining the measurement of what had been done by the plaintiff, that when what he had ascertained was priced according to the prices which had been fixed by the con-

tract, the amount was as much as 1,364*l.* less than it ought to have been. To constitute an arbitration there must be a dispute between two parties, or at least it must be a case in which evidence would have to be heard, and some judicial discretion exercised. None of these things existed in this case. "When it is stipulated," said Lord Cranworth, L.C., in *Ranger v. The Great Western Railway Company* (3), "that certain questions shall be decided by the engineer appointed by the company, this is, in fact, a stipulation that they shall be decided by the company. It is obvious that there never was any intention of leaving to third persons the decision of questions arising during the progress of the works. The company reserved the decision to itself, acting, however, as from the nature of things it must act, by an agent, and that agent was for this purpose the engineer." See also *Scott v. The Corporation of Liverpool* (4). *Collins v. Collins* (5) shews that an agreement to purchase at a price to be fixed by another does not constitute that person an arbitrator. *Leeds v. Burrows* (6) is to the same effect. Then *Story v. Richardson* (7) and *Jenkins v. Betham* (8) are authorities that this action will lie for negligence, and even want of competent skill, if the defendant stood in the position of a person employed. The defendant was the architect appointed by the company, the building owner, and his name is in the contract which is referred to in the contract between the company and the plaintiff to do the work, and in consideration of the plaintiff entering into that contract, the defendant, as such architect, may be said to undertake to measure and value the work done under it. Unless the builder has a remedy against the architect he has

(3) 5 H.L. Cas. at p. 80.

(4) 1 Giff. 216; s. c. 27 Law J. Rep. Chanc. 641.

(5) 26 Beav. 306; s. c. 28 Law J. Rep. Chanc. 184.

(6) 12 East, 1.

(7) 6 Bing. N.C. 123; s. c. 9 Law J. Rep. C.P. 43.

(8) 15 Com. B. Rep. 168; s. c. 24 Law J. Rep. C.P. 94.

(1) 41 Law J. Rep. C.P. 11, and in Exch. Ch. 187; s. c. Law Rep. 7 C.P. 32, 525.

(2) 42 Law J. Rep. C.P. 6; s. c. Law Rep. 8 C.P. 1.

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no remedy at all—*Clarke v. Watson* (9). Even if the architect be in the position of an arbitrator he contracts to act honestly and impartially, and, therefore, if he acts fraudulently and in collusion with the building owner he is liable to an action at the suit of the builder—*Batterbury v. Vyse* (10), *Ludbrook v. Barrett* (11). The word “knowingly” in par. 17 brings the case within these decisions. The statement of claim here shews that the defendant acted partially and was guilty of misconduct in refusing to allow the plaintiff to point out the errors or to hear him.

*Alfred Wills*, in reply.—The contract contemplates work to be measured afterwards, work caused by the alteration of the original contract, which would not be clerk's work, but work requiring the exercise of considerable judgment. There are many things as to which the defendant must exercise his judgment. Measuring itself is an exercise of judgment; it is well known that in the measurement of quantities architects of undoubted honesty differ in their respective calculations to a large amount. The architect has in fact to exercise his judgment as had the broker in *Pappa v. Rose* (1). There is no trace of agency. The builder merely consents to be satisfied with what the architect allows him; the whole scope of the contract negatives agency, the architect is placed there to protect the employer and to be a check on the builder. The cases of *Story v. Richardson* (7) and *Jenkins v. Betham* (8) are cases of employment and therefore inapplicable. It is stated that if this action was not allowed to be maintained the builder who takes such a contract puts himself at the mercy of the architect, but the answer to this is that the builder who accepts such a contract is content to take his chance with the architect, as in *Clarke v. Watson* (9). In that case Erle, C.J., says, “If it had been alleged that the defendants and their surveyor colluded to withhold

the giving of the certificate in order to prevent the plaintiffs from being paid for their work, there is abundant authority both at law and equity, to shew that the defendants could not shelter themselves by means of any such misconduct.” So here if it had been alleged that the defendant “fraudulently” or “collusively” certified, the statement of claim would have disclosed a cause of action, but no such allegation is made. The only word approaching such allegation is the word “knowingly,” and that is quite consistent with the knowledge that the figures did not work out the result they should have worked out according to the terms of the contract, which would be an honest mistake. If it was intended to allege fraud such an allegation could easily have been made, and the Court will not strain what is at worst a doubtful expression into an expression involving fraud sufficient to support this action; an allegation which the plaintiff could easily have made had he ventured to do so (12).

LORD COLERIDGE, C.J.—This case involves a principle of importance, and but for an intimation that the parties intend in any event to appeal, we should have taken time to deliver our judgment. If it could have been fairly shewn that the plaintiff, having undertaken to perform certain work under a contract, to which contract the defendant, although no party, had assented by performing work under it—work which required from him no exercise of judgment or opinion, but only the exercise of mechanical powers—then if the performance of his duty was necessary in order to enable the plaintiff to recover under the contract, I should have held that the action was maintainable. I am not aware that such an action has ever been maintained, certainly none of the cases which have been cited were cases in which the supposed duty was of the kind I have described, or the breach whereof was of the sort which I have represented; therefore this would have been a fresh form of action uncondemned by authority, and one which, in

(9) 18 Com. B. Rep. N.S. 278; s.c. 34 Law J. Rep. C.P. 148.

(10) 2 Hurl. & C. 42; s.c. 32 Law J. Rep. Exch. 177.

(11) 46 Law J. Rep. C.P. 798.

(12) See *Turner v. Goulden*, 43 Law J. Rep. C.P. 60; s.c. Law Rep. 9 C.P. 57.

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my judgment, would have been well grounded in law.

But in my opinion this is not such an action and cannot be reduced to such a form of complaint. It really is an action for that which has been attempted again and again without success, i.e. to bring an action against a person for the performance of a duty in which the exercise of judgment and discretion are necessary. Such appears to me to be the true view of the statement of claim, and that being so the cases which have been cited are binding.

It is an action brought by a contractor, not against the building owner, but against the architect of himself and the building owner, for causes of action I will presently proceed to describe. The action is brought under the contract which we have before us at full length, but which is sufficiently well abstracted in the statement of claim as follows [his Lordship read paragraph 7]. The work appears to have been done, and during the progress the defendant ordered additions and deductions to be made. The plaintiff states that there were errors in the bill of quantities and more measure in certain descriptions of the works than was given in the bill of quantities, or, in other words, that he had done more work than he had contracted to do. Then paragraphs 15, 16, state what next took place, and on these facts the plaintiff in paragraph 17 states the cause of action [his Lordship read paragraph 17].

It is said by the plaintiff that this is the statement of a cause of action of this limited kind, namely, that the only duty cast on the defendant was a duty of a purely ministerial character—he had to make certain arithmetical calculations, which demanded the exercise of no judgment or discretion, but he did not and would not make these calculations, and for the breach of that purely ministerial duty, action lies. I have said that if that had been the construction of the contract, as at present advised, I am of opinion that an action would lie. And I say so, assuming as I do the true view of the words “knowingly or negligently” to be the view presented by the able argument of Mr. Wills, namely, that “knowingly”

need not be “fraudulently,” but that all that is expressed by it, is, that knowing, as is known, that every arithmetical calculation should bring out a certain sum, it did not in the present instance do so, but brought out another sum, and therefore must be wrong within the person's means of knowledge. But I do not think that the construction presented by the plaintiff is the true construction of the contract. When the contract is looked at it would seem that the duty of the defendant was not merely a clerk-like duty, and it is manifest, on looking at the contract itself and the bills of quantities, that in order to arrive at the amount to be paid, much more than a mere arithmetical calculation is necessary. There is the quality of the work, whether it comes within this or that head of quantities, &c. These must be matters for the discretion of the architect, and in any case requiring the exercise of considerable judgment and skill. Before the arithmetical result of the work can be arrived at by the architect there must be a knowledge of the work, a familiarity with this bill of quantities, and an exercise of judgment to say under which head the deductions or additions are to be classed. I think, therefore, that when the documents are looked at it is plain that in order to arrive at the result—no doubt one of figures—there must be the exercise of considerable professional knowledge and skill.

If, then, I have rightly described the position of the defendant and the plaintiff, it follows that this action does not lie. It must be left to the Court of Appeal to overrule the decisions before it can be successfully contended that such an action can be maintained. The Courts of Exchequer and Common Pleas have decided that when a building owner, as in the case of *Batterbury v. Vyse* (10), and an architect, as in the case of *Ludbrook v. Barret* (11), collude and fraudulently abstain from doing their duty to the injury of a party, that then an action will lie. These cases seem to me to be founded on the clearest reasoning, but they are not applicable in this case. In this case neither “fraud” nor “*mala fides*” is alleged, and it is therefore

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within the authority of the decided cases which decide that when the exercise of judgment or opinion on the part of a third person is necessary to decide between two persons, such as a seller and purchaser, that then, notwithstanding in the opinion of the seller or the purchaser, the judgment is exercised negligently or wrongly, an action will not lie against the third person for such wrongful exercise of judgment. I will not take up time by considering the policy of such a doctrine, suffice it to say that such is the doctrine pronounced by Courts of co-ordinate authority as well as of the Court of Appeal, and I bow to such authority and agree with such doctrine.

So far the demurrer must be allowed. There remains only to consider paragraph 18, which alleges as follows. [His Lordship read the paragraph.] This appears to me to afford no ground of action. Here again *mala fides* is not suggested. It is merely stated that the architect who is to form and has formed his opinion, declines to say on what grounds he has formed it. If his position be such as I consider it to be, he was not bound to give reasons for his decision or to reconsider it. He is—I will not say an arbitrator, as that does not exactly describe his position, but—a person whom the builder has taken for better or for worse, as one on whose opinion he is content to rely as a condition precedent to receiving his money. He cannot therefore bring an action against him for refusing to give the ground of his decision.

DENMAN, J.—I am of the same opinion. The plaintiff, a builder, has entered into a contract with a company to build for them a large building, and the defendant is an architect appointed by the parties to do certain acts. There is no direct contract between the plaintiff and the defendant, the defendant does not sign the contract, he is only mentioned in it, but it is contended he is bound by that contract so as to be liable either as a person who has entered into a contract with two parties, or as one who by virtue of his office has entered into a contract towards two parties.

It seems to me we should consider what is the duty which the defendant has undertaken. He appears to have undertaken no more duty than honestly to perform his duty. I do not intend to hold that to all intents and purposes he is an arbitrator, but I think the duties are analogous to those of an arbitrator and quite as much so as were those of the defendant in *Pappa v. Rose* (1), and in *The Tharsis Sulphur and Copper Company v. Loftus* (2).

The argument of Mr. Cave was that the defendant is not an arbitrator at all, that no exercise of judgment or discretion was required, but that he was rather in the position of a mere appraiser or valuer, and that his duties were those of a clerk and not judicial; but to hold in accordance with such a contention would be to ignore the experience of those who at the bar or on the bench have had to consider these building contracts. One knows in point of fact and practice it happens over and over again that skilled architects, called in to decide questions of measurement of work and bills of quantities, differ as to hundreds and thousands of pounds, and that is, I think, sufficient answer without going into details to shew that an architect is a mere caster up of figures, and so could be held guilty of negligence. Their duties are matters of judgment, requiring the exercise of opinion and discretion. If that is so, the cases of *Pappa v. Rose* (1), and *The Tharsis Sulphur and Copper Company v. Loftus* (2), apply. The only distinction in the latter case, is that there a dispute had arisen and therefore the defendant was in reality an arbitrator, but it appears to me that the defendant in the present case is an arbitrator to this extent, that he is from the beginning to the end to keep an eye on the work, in order to exercise a judgment in the matter.

Such being the case, it appears to me that from the first the parties to this contract trusted to the defendant, and the only duty that he can be charged with is the duty of exercising an honest judgment, and if he violates that duty I should say an action would lie.

Par. 17 does contain a word which has

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been described as importing more than negligence, namely, "knowingly," but in my opinion it would be bad precedent to hold that by the insertion of such a word into a statement of claim, fraud, *mala fides* or corruption should be included. As here used, the word "knowingly" is consistent with knowing that the figures have been worked out wrong, and it ought not to be stretched into what would have been so easy to say if the plaintiff had chosen to say it.

There only remains the 18th paragraph to be considered. After the certificate had been received the plaintiff requested the defendant to inform him of the data on which it was based, and it is contended that the defendant departed from the impartiality he should have exercised because he refused to give the data asked for, and to reconsider his decision. In answer to that the defendant would in my judgment have done wrong if he had reconsidered the certificate on the mere complaint of the plaintiff. No question had arisen within the words of the contract. There was only a dispute between the architect and the builder, and the defendant had no right to re-open the whole question because the builder was dissatisfied. I agree, therefore, there must be judgment for the defendant upon the demurrer.

*Judgment for the defendant.*

*Cave* applied on behalf of the plaintiff for leave to amend, which was granted by the Court upon condition of the payment of the costs of the amendment.

Solicitors—Field, Roscoe & Co., agents for Richards & Woodward, Nottingham, for plaintiff; Taylor, Hoare & Taylor, agents for Maples & McCraith, Nottingham, for defendant.

[IN THE COURT OF APPEAL.]

1879. } SHARPE v. THE METROPOLITAN  
Feb. 24. } DISTRICT RAILWAY COMPANY.\*

*Statute; Construction of—Consolidation Act—Incorporation with Special Act—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 34—Costs of Arbitration—Ascertaining Amount—Condition Precedent—Lands Clauses Consolidation Act, 1869, 32 & 33 Vict. c. 18. s. 1.*

*By a private Act of Parliament a company were empowered to do certain acts, paying compensation to injured parties to be assessed by a special tribunal for arbitration provided by the private Act.*

*By the same Act the Lands Clauses Consolidation Act, 1845, was incorporated therewith, "except where expressly varied" by the Special Act:—*

*Held, that the provisions of section 34 of the Lands Clauses Consolidation Act as to costs of arbitration were not "expressly excluded" by the section of the Special Act, which provided a new tribunal of arbitration, and therefore applied to arbitrations under that section.*

*The assessment of costs by a master under section 1 of the Lands Clauses Consolidation Act, 1869, is not a condition precedent to the claimant's right to bring an action for such costs where the right to costs is disputed.*

This was an appeal from an interlocutory judgment of Manisty, J., at the trial.

The plaintiff was the occupier of a house and premises in Mansion House Street, Hammersmith. By the Metropolitan District Railway Act, 1875, the defendants were empowered to connect their railway at Hammersmith with the railway of the London and South Western Railway Company, and for the purpose of the undertaking to lower the level of the roadway in Mansion House Street and Cambridge Road.

Section 2 of the same Act incorporates therewith the Lands Clauses Consolidation Acts, 1845, 1860 and 1869, "except where expressly varied" by the special Act.

\* *Coram* Brett, L.J.; Cotton, L.J.; and Thesiger, L.J.

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Section 14 enacts that "the company shall compensate the owners and lessees of any houses not purchased by the company abutting upon such portion of Mansion House Street and Cambridge Road aforesaid as shall be lowered under the powers of this Act in respect of the deterioration in value, if any, which may be caused to such houses by reason of such lowering, and the amount of such compensation if any shall be determined in the event of a dispute by a single arbitrator, to be appointed by the Board of Trade on the application of the parties or the company, and all questions of compensation arising out of the interference by the company with the said street and road shall be referred to the same arbitrator. Provided, that if the company shall think fit to purchase and take any houses in respect of which such claims for compensation shall be made, they shall be at liberty to do so, and the amount of the purchase money or other compensation shall be determined by such arbitrator as aforesaid" (1).

The plaintiff's house adjoined the part of Mansion House Street which was interfered with by the company under their Act, and she claimed compensation in respect of damage to her property.

In August, 1877, the defendants gave notice to the plaintiff that the arbitrator appointed by the Board of Trade would

proceed to arbitration on the 22nd and 23rd of August, and that the plaintiff's claim would be heard before the arbitrator on the 23rd.

The plaintiff accordingly appeared before the arbitrator by counsel, with witnesses, and on the 18th of September the arbitrator published his award, by which he awarded to the plaintiff a sum of 30*l.* in respect of a part of her claim.

This amount was duly paid by the company to the plaintiff. Afterwards the plaintiff delivered to the defendants' solicitors her bill of costs with notice of taxation for the 15th of December. The defendants then denied their liability to pay the plaintiff's costs of the arbitration, and this action was thereupon brought to try the question of their liability, the plaintiff claiming 134*l.* 1*l.* 1*d.* for her costs in and about the said arbitration, subject to the taxation of one of the taxing masters of the High Court of Justice.

The case came on for hearing before Manisty, J., without a jury, on the 6th of December, 1878.

His Lordship gave judgment to the effect that the plaintiff was entitled to her costs of and incidental to the arbitration, and that the amount should be ascertained by one of the Masters of the Divisional Court of the Queen's Bench Division.

From this judgment the defendants appealed.

*The Solicitor-General and Pollard*, for the defendants.—There are two questions:—1st. Whether the plaintiff is entitled to recover her costs against the defendants, and 2nd, whether, if so, the plaintiff can bring her action before the costs have been ascertained by the arbitrator or master.

As to the first point, the provisions of the Lands Clauses Act have been expressly varied by section 14 of the special Act. That section provides a completely new system of procedure with respect to the two named streets to which section 34 of the Lands Clauses Act cannot apply, for it applies merely to the costs of "such" arbitration, i.e. such arbitration as is provided by the previous sec-

(1) By sections 25 to 33 inclusive of the Lands Clauses Consolidation Act, 1845, the course of proceedings in arbitrations under the Act is laid down.

By section 34 all the costs of any such arbitration and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions.

By section 1 of the Lands Clauses Act, 1869 (32 & 33 Vict. c. 18), where in England under the Lands Clauses Consolidation Act, 1845, or any Act incorporating the same, any question of disputed compensation is determined by arbitration, the costs of and incidental to the arbitration and award shall, if either of the parties so require, be taxed and settled by any one of the taxing masters of the superior Courts of law.



*Sharpe v. Metropolitan District Rail. Co., App.* tions of the Lands Clauses Act itself. This is not "such" arbitration, but a completely different one. *In re the Officers of the Ordnance and Laws* (2) shews that it does not necessarily follow that because the plaintiff has a right to compensation she has a right to costs. It is not necessary that a provision should be varied in express terms in order to come under the denomination "expressly varied." Any inconsistency with the general Act is an express variation—*Weld v. The South Western Railway Company* (3), *The Queen v. The Lord Mayor of London* (4). Where one tribunal is substituted for another in which costs are regulated by statute, it does not follow that the costs of proceedings before the new tribunal will be regulated in the same way—*Ex parte Reynal* (5), *Corydon v. The Blackwall Railway Company* (6).

As to the second point, the award is really incomplete before costs are ascertained. By the Act of 1845 they were assessed by the arbitrator and formed part of the award. By the Act of 1860 a master has been substituted for the arbitrator where the parties wish it. But he does not act as an officer of the Court, but as a *persona designata* to perform a part of what was the arbitrator's duty—*Holdsworth v. Wilson* (7). This is in fact an outstanding arbitration. If the costs were to be assessed by the arbitrator it would be clear no action could be brought before they were ascertained. Here the arbitrator is *functus officio*, but a part of the arbitration remains to be performed by the Master.

*W. G. Harrison, E. G. Man and T. O. Jarvis*, for the plaintiff.—It was intended by the Legislature that the whole of the Lands Clauses Consolidation Act should be read with the whole of the special Act, except where the intention to exclude it is clearly expressed, and there is no reason

why section 34 should not be read with section 14 of the special Act. There is no inconsistency. The two Acts are to be read as one, and then "such arbitration" refers to any such arbitration as may be provided by the amalgamated statute. The reason as well as the justice of the case requires this construction. As to the second point, the plaintiff's right to costs was absolute as soon as the award was made—*Holdsworth v. Wilson* (7), *Lewis v. Rossiter* (8). It makes no difference whether the costs are given by the arbitrator or by Act of Parliament, as here. The settlement of the costs is not part of the award, but a ministerial act. The dispute in this case is as to the defendants' liability. Why should the costs of a taxation be incurred before the question of liability is decided? The action is really brought to obtain a declaratory decree, and this judgment has the same effect.

*The Solicitor-General* replied.

BRETT, L.J.—I am of opinion that this judgment, with a slight variation to which I will allude hereafter, ought to be affirmed. The first question raised is whether under section 14 of the private Act the plaintiff is entitled to any costs at all. This depends on the question whether section 34 of the Lands Clauses Consolidation Act, 1845, can be applied to arbitrations under section 14 of the defendants' Extension Act.

Now under section 2 of the special Act, by which, as well as by the Lands Clauses Act itself, the Lands Clauses Act is incorporated with the private Act, every part of the Lands Clauses Act is to be read as if it was actually part of the private Act, unless it is expressly excluded. Now I agree that this phrase may mean more than exclusion by express negation; and that the meaning may be satisfied if any part of the Special Act is inconsistent with any part of the Lands Clauses Consolidation Act. Then that part of the Lands Clauses Consolidation Act is expressly excluded. We must, therefore, consider the matter as if all the clauses of the Lands Clauses Act had

(2) 1 Exch. Rep. 441; s.o. 17 Law J. Rep. Exch. 126.

(3) 32 Beav. 340; s.c. 33 Law J. Rep. Chanc. 142

(4) Law Rep. 2 Q.B. 292.

(5) 16 Law J. Rep. Q.B. 304.

(6) 2 Dowl. N.S. 876.

(7) 4 R. & S. 1; s.c. 32 Law J. Rep. Q.B. 289.

(8) 44 Law J. Rep. Exch. 136.

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been enacted in the private Act, and then see whether section 34 of the general Act is inconsistent with section 14 of the other Act. If all the clauses of the Lands Clauses Consolidation Act had been so enacted, then we should find several methods of proceeding to arbitration in the case of lands purchased elsewhere than in the particular streets referred to in section 14. And if in any other streets than those two there had been an interference with the enjoyment, then also there would have to be an arbitration governed by section 34 of the Lands Clauses Consolidation Act. Then we have the case of these two particular streets provided for by section 14. If there had been no such section, the arbitration as to the present dispute might have been carried on in the manner laid down by the 68th section of the Lands Clauses Consolidation Act, which applies to injury to lands not taken, as well as to the injury done by taking lands: or there might, as to these streets, have been an arbitration in the way provided for the purchase of lands. There would be two arbitrators appointed in the usual way to assess the compensation or value; or possibly the assessment might have been made by two justices under section 22.

But these provisions are "varied" by section 14, for an arbitration by an arbitrator appointed by the Board of Trade is inconsistent with the appointment of arbitrators in the manner laid down by the Lands Clauses Consolidation Act, and therefore the section "expressly varies" the provisions of that Act as to the kind of arbitration to which the parties are to resort. But there is to be an arbitration; and reading the Lands Clauses Act as if enacted in this special Act, we should have, as regards this company, first, arbitrations proper, for the purchasing of houses not in these particular streets; secondly, arbitrations, for the taking of or injuries to such houses under section 68, and thirdly, this particular species of arbitration as to houses in these particular streets, with respect to the damage caused by the lowering of the street, or by the taking of them in consequence of such damage, though not

otherwise wanted for the purposes of the company. Then we have section 34, and if we may read the sections of the Lands Clauses Consolidation Act in any part of the private Act I do not see why we should not read it either before or after section 14. But I should not like to decide the case on the mere question of location. The proper way to read the Act is to apply section 34 to any arbitrations in the consolidated statute made up of the general and special Act together, which would be the only statute affecting the subject. Then section 34 is in no way inconsistent with section 14. If section 34 is enacted in the local statute there is no inconsistency involved in saying that it applies to arbitrations under section 14. Such an application is not excluded by any negative words, and admitting that under the authority of *The Queen v. The Lord Mayor of London* (4) if section 14 was inconsistent with section 34 it would exclude it, it seems to me that it does not. Therefore the plaintiff is entitled to costs.

The next question is, has the plaintiff brought her action too soon? That depends on whether the settlement of the amount is a condition precedent to her right to bring the action. We must arrive at the solution of this question by steps. The doctrine of the case of *Holdsworth v. Wilson* (7) is contained in these words—speaking of an ordinary arbitration the Chief Justice says (at p. 291): "Where arbitrators award costs, it is meant to be judicially the costs of the litigation, and the amount to be ascertained ministerially by the officer whom they appoint. The party entitled to costs may make his claim, and the taxing officer of the Court, by reason of the submission being made a rule of Court, has the authority between the parties to settle the amount."

A contrast is here pointed out between the arbitrator's judicial decision and his ministerial function. The passage does not indicate that an officer of the Court as such is to perform that function, but some one of a particular class to be appointed by the arbitrator. The foundation, therefore, of that decision is this: when the award decides the matter

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in dispute and declares one of the parties to be liable to pay costs, that is a judicial decision. Having decided judicially that one party is liable to pay costs, the ascertaining of the costs is a ministerial act to be performed by the arbitrator after he has made his judicial decision; therefore this Court held, that as by the award costs had been awarded, the party entitled to costs might bring his action at once, before the costs were ascertained, on the ground that it had been declared by a competent authority that he was entitled to costs; that thus the right was determined, and the ascertaining of the amount was a merely ministerial act, and the action could, therefore, be brought at once. Applying this reasoning to section 34, by that enactment, except in a certain case, the claimant is entitled to costs, to be settled in a particular way. That is equivalent to imposing two duties on the arbitrator; first, to decide judicially the contest between the parties as to right to compensation and the amount of compensation—that is his award, and there is only one award to be made under the section. Then the statute declares as a matter of law, that on an award in favour of the claimant the claimant is entitled to his costs. That is not a judicial decision, but a statutory declaration of the right to costs. As long as the Act put upon the arbitrator the ministerial duty of certifying the amount of costs due under the statute, the arbitrator had two functions—first, to arbitrate; and, secondly, to settle the costs. Then, under the Act of 1869, part of the duties which had been laid upon the arbitrator were given to, or shared with, the Masters of the Court if the parties chose. That in itself goes strongly to shew that the interpretations I have put upon the arbitrator's duties would have been given to them by the Legislature. If the Legislature had considered that the settling of the costs was part of the arbitration, or that there were two arbitrations, I doubt if it would have created two functionaries instead of one. But if the arbitrator had two distinct functions, it was reasonable to give the second function to the Master.

On the decision of the arbitrator there

arises a statutory right to costs, and on that arises the ministerial duty of finding the amount.

Applying the doctrine of *Holdsworth v. Wilson* (7), the plaintiff's right to costs is established by the statute, which takes effect on the decision of the arbitrator; and directly the right to the costs is established, the right of action accrues; and all that has to be done is the performance of the ministerial function of settling the amount. The action, then, may be brought in the same way as in *Holdsworth v. Wilson* (7), and therefore the plaintiff has not brought it too soon. The judgment, therefore, in this case, must be substantially affirmed. But it is impossible to say that the claim is strictly accurate, for I cannot think that, if the plaintiff has two distinct heads of claim, and wholly fails on one head and proceeds on another, he is entitled to the costs of the separate claim on which he has been unsuccessful. Therefore I am of opinion that the order of Mr. Justice Manisty must be modified, so as to shew that the plaintiff is entitled to such costs as the Master may find to have been reasonably incurred by the plaintiff in respect of that branch of his claim on which he succeeded. This, however, is not a material part of the appeal, and therefore, generally, the judgment will be considered as affirmed with costs.

COTTON, L.J.—The first question in this case is whether the Act of Parliament gives the plaintiff a right to costs at all. The claim is in respect of the costs of an arbitration under section 14 of the defendants' private Act of 1875. That section makes no mention of costs, and it is clear that, the costs not being given under the ordinary jurisdiction of the Court, the claimant must shew some statutory provision entitling him to them. There is no such provision in the special Act. But the plaintiff truly says that it incorporates the Lands Clauses Consolidation Act, and that in that Act there is a section (section 34) which, if applicable, will give him the right to costs. Let us see whether that section is incorporated, and whether it gives the right. The two acts are incorporated by section 2

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of the special Act as well as by the Lands Clauses Consolidation Act itself. Under section 2 of the private Act the Lands Clauses Consolidation Act is incorporated, except where its provisions are expressly varied. How, then, are we to deal with the incorporated statutes as forming an incorporation? We cannot deal with them as two separate Acts, but must deal with them as one single enactment, the general Act having been enacted for the purpose of saving expense, and containing all such provisions as are, as a rule, necessary for the purpose of carrying the objects of special Acts into effect, all which provisions are incorporated into the special Act, so as to make one general Act of the two. But they are only incorporated "except where expressly varied." I take that to mean that where there is a provision in the special Act and in the general Act concerning the same subject matter, and the two provisions are inconsistent, then the provision in the general Act is not incorporated, for otherwise there would be an Act containing inconsistent clauses. Now, here, section 14 of the special Act is inconsistent with certain sections of the general Act. How? So far as the general Act provides several modes of constituting the tribunal to assess compensation for the taking or injuriously affecting lands. As regards the two particular streets it introduces another tribunal, and so far expressly varies the provisions of the general Act. But is section 34 expressly varied? In my opinion it is not. All that can be said is that, as regards the new tribunal, section 14 makes no provision as to costs.

But it is not inconsistent with section 34 of the Lands Clauses Consolidation Act, which, as to certain arbitrations, gives costs, and I am of opinion that the two sections may quite well stand together. But that will not decide the question, for when we find that section 34 is to be introduced into the single body of legislation made up of the special Act and the Consolidation Act, we must consider whether it is then applicable to arbitrations under section 14. Now the 34th section says that "all costs of any

such arbitration, and incident thereto," shall, except in certain cases, be borne by the promoters. What is the meaning of the words "any such arbitration?" Clearly it does not refer to one single class, for several kinds of arbitration have been mentioned in the general Act, and "any such" arbitration refers to all of them. If, then, all the clauses of the Lands Clauses Consolidation Act, including section 34, are put in one body of legislation with section 14, then the words "any such" will mean any such as are mentioned in that body of legislation, and will include arbitrations under section 14. This, I think, is the true meaning of the statute. But it is said that the words "such arbitration" are confined to any such arbitration as is before-mentioned in the Lands Clauses Consolidation Act. I think this is not so. We must deal with the matter reasonably and fairly. The statute we have to consider is not a statute specially relating to the two streets in question here, but it is to enable the company to make a new line, and to buy certain property for the purpose; and as to these particular streets giving them the further power to buy the houses, even if they do not require the sites, instead of compensating the owners for the damage done. I think we must introduce each of the clauses of the special Act into that block of sections which, in the Lands Clauses Consolidation Act, deals with the same matter. Thus we should introduce into the block of sections, from section 6 to section 68, the provision that, though the company do not require the sites of these houses, they may purchase them instead of paying compensation for the damage done; and we should have to introduce into the same block the provision as to ascertaining the purchase-money. The one provision should be introduced after the enactment, giving power generally to purchase property; the other, which provides a tribunal, may fairly be introduced after those sections, which constitute other special tribunals of arbitration. Then section 34 refers to the costs of arbitration. It is true that we are not dealing with lands taken; but by reading section 68 as incorporated with

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the private Act, we shall find a special proviso that the costs of arbitration as to the two special streets are to be settled as directed by section 34. In other words, there being no clause in the special Act inconsistent with the introduction into it of section 34, the proper construction is that section 34 gives a right to the costs of arbitrations carried out under the special tribunal constituted by section 14.

The next question is whether this action has been brought prematurely. If the sole right to a sum of money depends on what shall be awarded by a special individual, of course there is no claim until the individual has made his award. If the right depends on a declaration, aye or no, whether the plaintiff is entitled, it is evident that no action can be brought before the declaration is made. But what have we here? A statute declares that the plaintiff is entitled to her costs. What is still to be done, under the original Act, is not that the arbitrator shall determine whether the plaintiff shall have costs, but that he shall settle the amount; and now, under the Act of 1869, the settlement is to be made by the master, if required.

I will not go into the question whether in discharging this duty the master is acting as a master of the Court, so as to render his finding liable to a revision or not. Clearly he is only to settle the *quantum* of costs, and not to say whether the plaintiff has a right to costs or not. Of course he might tax off the whole amount and allow none; but that is not the same thing as declaring that the plaintiff has no right to recover. Therefore there is no technical difficulty about the form of a decree in this case, and I think the judgment was substantially right. But I think it has gone a little too far, because under it the plaintiff might be held to be entitled to all the costs, as well of the unsuccessful as the successful issues. I think, therefore, it ought to be modified, as my Lord has said, by being limited to the costs of the arbitration so far as relates to the causes of action in respect of which the sum of 30% was awarded.

THE SINGER, L.J.—On the principal matter in question I entertain no doubt; but before considering the effect of section 14 of the special Act it is not unimportant to consider the position of parties entitled to compensation under the Act generally.

By it the company are, first, entitled to take lands; and secondly, it is contemplated that in the course of their works they will injuriously affect other lands. In respect of both these classes of injury the injured party is entitled to compensation, for section 2 of the private Act incorporates the Lands Clauses Consolidation Act, 1845, under which the promoters are to make compensation for both classes of injury. The Act enables such compensation to be obtained by various modes of procedure. In the case of injuriously affecting lands under section 68, or in the case of purchase and consequent injury to lands adjoining, the modes of assessment are threefold.

If the claim is under 50% it is to be assessed by justices; if over, the claimant has a choice of two methods—he may go before a jury or submit to arbitration. That arbitration is of two kinds—either before one arbitrator by consent, or, in case of dispute, before two arbitrators and an umpire. That being the position of parties generally whose property is taken or affected by the act of companies, there is a strong *a priori* argument that such persons are generally entitled to compensation and costs; and very strong words would, in my opinion, be necessary to take away the right to costs.

What, then, is the character of the exception made to the general rule by section 14? The parties affected by it are parties having property in two specified streets and their houses have suffered deterioration from the lowering of the level of the street.

Stopping there, it is clear that, although the Legislature has specially mentioned a particular class of injury to property in the special Act, it is a class which comes under the provisions of section 68 of the Lands Clauses Consolida-

*Sharpe v. Metropolitan District Rail. Co., App.* tion Act. If I recollect rightly, the case of *Moore v. The Great Southern and Western Railway of Ireland* (9) decided that point. It certainly was so held in *McCarthy v. The Metropolitan Board of Works* (10). The principle is this—wherever an interference with a right of way for the benefit of the public affects a particular house, then, if by reason of such interference the house is lessened in value in the hands of the owner, a claim to compensation arises. That being so, the Solicitor-General bases the following argument upon it:—He says that this being one of the cases for compensation under the general Act, and being provided for separately by section 14 of the Special Act, shews that the Legislature intended to make a provision differing from that in the general Act. Now section 14 specifically indicates the matter in which it was intended that there should be a difference, and there is no reason that that alteration should extend further. The difference is this—where as a general rule the claimant may choose his own tribunal and may choose his own arbitrator, the Legislature as to these particular streets has appointed a special tribunal, one single arbitrator to be nominated by the Board of Trade, who is to deal with all questions of damages in respect of injury to houses in those streets.

But it cannot be argued that the Legislature intended as regards those streets to take away the general provision as to costs. It is said that these streets may have been considered a small class of property, and it may have been thought expedient that large costs should not be incurred. Perhaps that is true, and arbitration before one fixed tribunal may be more expedient and less expensive than the usual tribunals. But it does not follow, though the expense be less, that the claimants are not entitled to be paid their share of it. It would be a great injustice if the provision as to costs were excluded. The company not only have power to compensate the owners

for injury, but may, if they choose, insist on taking the houses; and whether the value is large or small, it is unjust that persons owning houses in these two particular streets should not be entitled to the costs of the investigation.

There is no reason, therefore, why section 34 should be excluded. Then has it actually been excluded, though not by express language, yet by some inconsistent provision? I can find nothing to lead me to that conclusion. It is contended on behalf of the defendants that the effect of the creation of this special tribunal is to do away with the effect of sections 25 to 37 of the Lands Clauses Consolidation Act, as regards these particular houses. The answer is manifest. Without many of these provisions the arbitration could not be carried on. Suppose the arbitrator dies; how can another be appointed except under section 27? The arbitrator administers an oath; where is that provided for, except under section 33? The arbitrator calls witnesses before him; what power has he to do so, unless under section 32? Finally, how is the award to be made and enforced, unless sections 35 and 36 are incorporated with the Special Act? If that be so, what ground is there for contending that section 34 shews a greater inconsistency with the Special Act than the other sections to which I have referred? It may be observed that all these sections begin with relative terms, and the matters to which they relate are to be found in the previous clauses of the Lands Clauses Consolidation Act. But there is substantially no difficulty in holding that the subject-matter of section 14 may be the correlative of the relative term used in section 34. The Legislature have thought proper to deal in a particular way with a particular injury which was dealt with in general terms in section 68 of the general Act. If we read section 68 into the Special Act, the plaintiff has a right to compensation and costs. But they have dealt also with another point, and instead of the tribunal provided in section 25, they have thought proper to appoint a single arbitrator, who is to be named by the Board of Trade, and all the machinery which

(9) Ir. Com. Law Cas. N.S. 46.

(10) 42 Law J. Rep. C.P. 81; s. c. Law Rep. 8 C.P. 191; s. c. 43 Law J. Rep. C.P. 385; s. c. Law Rep. 7 H.L. 243.

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applies to arbitrators under section 25 of the Lands Clauses Act is equally applicable to arbitrations by the arbitrator named by the Board of Trade. I am therefore of opinion that the plaintiff has a right to costs.

The question then arises, has she been premature in bringing this action? On that point I have had more doubt than on the last. If the action had been brought before the Judicature Act, I do not quite see how she could have recovered costs under the arbitration when no costs were assessed. I certainly should have had doubts, if it were not for the case of *Holdsworth v. Wilson* (7). She would not be without her remedy. If the Master refused to tax the costs, she could apply for a mandamus. If he would tax them, no difficulty would arise. On the other hand, it is manifestly reasonable that where a dispute has arisen as to the defendants' liability to pay costs at all, there should be some method of ascertaining the right before going through the form of settling the amount, which may be after all a useless proceeding; and unless it is clear that it cannot, I should be inclined to hold that it can be done by bringing an action.

On the whole, I think that the principle of *Holdsworth v. Wilson* (7) is wide enough to include this case, and that the plaintiff is entitled to obtain a declaration of her right, subject to the merely ministerial act of assessing the amount.

It appears to me, therefore, that the judgment must be affirmed in all respects, with this modification, that the costs are to be settled so far as relates to that part of the plaintiff's claim in respect of which the amount of 30*l.* has been awarded.

*Appeal dismissed.*

Solicitors—T. Noton, for plaintiff; Baxters & Co., for defendants.

[IN THE COURT OF APPEAL.]

1878. }  
Nov. 16, 17. } FOWLER v. KNOOP.\*

*Ship and Shipping—Bill of Lading—18 & 19 Vict. c. 111. s. 1—Liability of Consignee named in the Bill of Lading—Delivery to be taken within reasonable Time—Contract implied by Law in the Bill of Lading.*

Where there is no express stipulation in a bill of lading it is an implied term of the contract contained in it that the consignee named in the bill of lading, or his assigns, will take delivery of the goods within a reasonable time; and the person to whom the property in the goods has passed by reason of such consignment, is by virtue of the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), s. 1, subject to the liability so to take them.

Where the charterers and the shippers are the same persons, such contract will still be implied in the bill of lading, notwithstanding the existence of an express stipulation in the charter-party between the charterers and the shipowner in reference to the same matter.

This was an appeal from the judgment of Field, J., on further consideration, reported 47 Law J. Rep. Q.B. 473, where the facts are fully stated.

The action was brought by a shipowner against the consignee named in the bill of lading, for damages for the detention of the plaintiff's vessel at the port of discharge.

The vessel was chartered by the firm of J. Gildermeister & Co., to load a cargo of nitrate of soda at the port of Inique, and to proceed to a port for orders to discharge in a safe port in the United Kingdom.

The charter-party contained the following stipulations:—

"Bills of lading to be signed by the master, weight and quality unknown, all on board to be delivered," and that the vessel should "in such discharge port as ordered deliver the whole of her cargo

\* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

*Fowler v. Knapp (App.).*

as fast as the custom of the port will allow."

J. Gildermeister & Co. were also the shippers of the cargo, and the bill of lading was as follows:—

"Shipped in good order and condition, by J. Gildermeister & Co. on board the British barque *Olaudine*, whereof E. Jamieson is master, now lying at the port of Inique and bound for Queenstown or Falmouth for orders, 52,090 bags nitrate of soda, weighing, &c., and are to be delivered in the like good order and condition at the port of her final destination (the act of God, &c., excepted) unto Messrs. William Buckfield & Co." (the defendants' firm) "or to their assigns, he or they paying freight for the said goods as per charter-party, and average accustomed. Dated at Inique Nov. 19, 1875."

Gildermeister & Co. drew a bill of exchange for 5,000*l.* upon the defendant on account of the cargo, and forwarded the bill of lading with a copy of the charter-party to the defendant, to whom the cargo was consigned for sale, and who thereupon accepted and paid the bill of exchange.

The vessel was ordered to Plymouth to discharge. She was ready to discharge on the 8th of April, 1876. The bill of lading remained in the defendant's hands; the cargo was delivered upon orders signed by the defendant to the firm of Gibbs & Co., the ultimate purchasers; and the discharge was not completed till the 27th of April.

At the trial the jury negatived the existence of a special custom of the port of discharge, alleged by the defendant, and found that delivery of the cargo was not taken in reasonable time.

Upon these findings the learned Judge (Field, J.), on further consideration, entered judgment for the plaintiff.

From that judgment the defendant now appealed.

*Butt and J. C. Matthew*, for the defendant, cited *The St. Olud* (1); *Anderson v.*

*Morice* (2); *Smurthwaite v. Wilkins* (3); and *Ford v. Cotesworth* (4).

*Oohen and Wood Hill*, for the plaintiffs, cited *Domett v. Beckford* (5); *Hill v. Idle* (6); *Steele v. The State Line Steamship Company* (7); *Sandeman v. Scurr* (8); and *Fraser v. The Telegraph Construction and Maintenance Company* (9).

The arguments were substantially the same as those in the Court below.

BRAMWELL, L.J.—The argument for the defendant in this case was that there was a charter-party besides the bill of lading, and that this charter-party contained the terms of the contract, and that the bill of lading, or the contract contained in it, or evidenced by it, is not the governing contract in this case. It was said that the bill of lading must be read together with the charter-party, and that the contract between the defendant and the shipowner must be collected from the two documents and from the other circumstances of the case. In our opinion, and in the view which we take of the case, it is not necessary to give any decision on that point. The learned Judge who tried this case says that, even if this contention were a valid one, still that the jury have found that there was no special custom to take the contract out of the ordinary one, and he held that the contract to be gathered from the two documents was to take delivery of the cargo in a reasonable time, according to the custom of the port of discharge, and did not alter the contract, which would be found in or "collected from" the bill of lading alone. In this we agree with him. Even if there were nothing but the bill of lading then the contract would be contained in it, and would be

(2) 46 Law J. Rep. C.P. 11; s. c. 1 App. Cas. 718.

(3) 11 Com. B. Rep. N.S. 842; s. c. 31 Law J. Rep. C.P. 214.

(4) 38 Law J. Rep. Q.B. at p. 55; s. c. Law Rep. 4 Q.B. at p. 132.

(5) 5 B. & Ad. 521.

(6) 4 Campb. 327.

(7) Law Rep. 3 App. Cas. 72.

(8) 36 Law J. Rep. Q.B. 58; s. c. Law Rep. 2 Q.B. 86.

(9) 41 Law J. Rep. Q.B. 249; s. c. Law Rep. 7 Q.B. 570, 566.

(1) Br. & Lush. 4.



*Fowler v. Knoop (App.).*

one which the law would imply, that is, a contract to unload within a reasonable time, or to use due diligence in unloading, which is the same thing. Now the charter-party makes no difference in this; the material provision is that the vessel shall "deliver the whole of her cargo as fast as the custom of the port will allow."

Now there is no custom of the port unless it be that due diligence be used in unloading. Assume, then, that the contention of the defendant were correct, still there would be an obligation to unload within a reasonable time, and therefore the plaintiff is entitled to our judgment.

Another point, then, arises, for it is said that the defendant was not the consignee of the goods, and not a holder for value within the meaning of the Bills of Lading Act, because he ceased to have a beneficial interest in the property before the bill of lading was signed. I doubt whether the facts of the case support this contention, for at the date of the bill of lading he was the beneficial owner.

We think that this case comes within the intention of the statute. The defendant did retain the bill of lading as an owner in one sense, for he gave delivery orders to the vendees. We think, therefore, that the defendant is liable in this action. There must be some person who is within the statute, and it is clear that Gibbs & Company are not, and that the defendant was. In our opinion this point also fails, and the plaintiff is entitled to our judgment, and the appeal must be dismissed.

BRETT, L.J., and COTTON, L.J., concurred.

*Appeal dismissed.*

Solicitors—Stibbard, Gibson & Co., for plaintiff;  
W. A. Crump & Son, for defendant.

**NOTE.**—By 18 & 19 Vict. c. 111. s. 1, Every consignee of goods named in a bill of lading to whom the property in the goods mentioned therein shall pass upon or by reason of such consignment, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

[IN THE QUEEN'S BENCH DIVISION.]

1879.

March 17. }

GREAVES v. FLEMING.

*Practice*—Order XXX. rules 1, 2 and 4—  
*Costs*—Payment into Court before Defence—  
Acceptance by Plaintiff in Satisfaction.

*Where a defendant has, before delivering his defence, paid money into Court in satisfaction of the plaintiff's claim, under Order XXX. rule 1, the plaintiff may, on taking the money out in satisfaction, at any subsequent time apply for an order for his costs, notwithstanding his having neglected to give the notice within four days, under rule 4, which would have entitled him absolutely to tax them; and a Judge may, under Order LV., grant such application.*

In this case an action was brought to recover 50*l.* on the balance of an account. The writ was dated the 10th of July, 1878, and the defendant on the 30th of July, with his appearance, paid 30*l.* 14*s.* 8*d.* into Court, in satisfaction of the plaintiff's claim, and gave notice thereof to the plaintiff, as required by Order XXX. rule 2. The plaintiff did not give any notice under rule 4 of that Order, nor take out the money in satisfaction, until the following January, when he accepted the sum paid in, in satisfaction of the entire cause of action, and took out a summons for taxation of his costs.

Field, J., at chambers, made an order that defendant should pay to the plaintiff his costs of action, whereupon the defendant appealed to the Court.

*Edward Pollock*, for the defendant.—If the plaintiff wished for his costs he ought to have given notice that he accepted the sum paid in, then he would have got them, as of course. Now the time directed by the Act has expired the plaintiff cannot get his costs, for there is no other rule by which he can get them, and if he wished to avail himself of this rule, he should have acted strictly in accordance with its conditions. The rule is primarily in favour of a plaintiff, and it is reasonable that he should decide within four days whether he will proceed or not; if he gives no notice defendant will plead, and incur expense. Order LV. does not

*Greaves v. Fleming, Q.B.*

apply; it is subject to the provisions of the Act, and would not enable a Judge to deprive of costs a plaintiff who has acted strictly under Order XXX. rule 4. It cannot therefore authorise the giving to him costs where he has failed to comply with rule 4. See *Langridge v. Campbell* (1).

*Lumley Smith, contra.*—There is nothing in this rule to make application within four days peremptory. The plaintiff can, as of right, tax his costs if he gives the notice within the four days, and if he lets them go by, then the Master will require some further direction from a Judge before taxing. If the delay had caused expense defendant might set it off, but this would be a matter within the discretion of the Judge to whom application might be made under Order LV.

COCKBURN, L.C.J.—I think that in this case our decision must be in favour of the plaintiff. I confess that I so decide with great hesitation, as the legislation on the matter is in an ambiguous state. On the whole, I think that we may reconcile Order XXX. rule 4 with Order LV. in this way—

If the plaintiff follows the procedure pointed out in rule 4 he acquires an absolute right to his costs, and it is not, in such a case, competent to a Judge, by an exercise of the discretionary powers conferred on him by Order LV., to order that he shall be deprived of them; but if the plaintiff has not adopted the course prescribed, but has, later than the four days mentioned, taken out in satisfaction the money paid in, then, by Order LV., he may still, as I think, have his costs, and is not necessarily deprived of them.

It is clear that a plaintiff may take out money paid in in satisfaction of his claim up to the day of reply, but as Order XXX. rule 4, does not then apply, he cannot get his costs absolutely, it must be under the general power in Order LV., and subject therefore to the discretion of the Court, or a Judge. And if the defendant has been prejudiced by the delay, or has incurred expense, that will be taken

into account, and so will anything whatsoever that he may have to urge as a set-off against the plaintiff's claim for costs.

MELLOR, J.—I am of the same opinion. I confess to having felt some difficulty, but I think that this is a more reasonable conclusion to come to than that the costs are forfeited altogether if the notice under rule 4 of Order XXX. has not been given. The plaintiff loses his right to the costs, no doubt, and if he comes under Order LV. to ask for them, the Judge takes his conduct into account. It cannot be that he forfeits by his delay, not only his right to the costs, but his right to apply to a Judge for them.

*Appeal dismissed.*

Solicitors—H. A. Maude, agent for Webster & Styring, Sheffield, for plaintiff; Wright & Law, agents for J. T. & G. Wright, Leicester, for defendant.

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1878.  
Dec. 9, 10.

THE OVERSEERS OF THE POOR OF THE TOWNSHIP OF THE FOREIGN OF WALSALL, AND THE MAYOR AND CORPORATION OF THE BOROUGH OF WALSALL (*appellants*) v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY (*respondents*).

*Rate—Sanitary Purposes in a Borough—District or Borough Rate—Exemption conferred by Local Act—Public Health Act, 1872 (35 & 36 Vict. c. 79), ss. 3, 4, 7, 16—Sanitary Law Amendment Act, 1874 (37 & 38 Vict. c. 89), s. 3—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 10, 207, 211.*

[For the report of the above case, see 48 Law J. Rep. M.C. 57.]

(1) 46 Law J. Rep. Exch. 277; s.c. Law Rep. Ex. D. 280.

[IN THE QUEEN'S BENCH DIVISION.]

1879. }  
March 10. } GHEMETTI v. GROM.

*Attachment of Debt—Order XLV. rule 2—Judgment Creditor—Order dismissing Action not a Judgment—Order XLII. rule 20.*

By Order XLII. rule 20, "Every order of the Court or a Judge, whether in an action, cause or matter, may be enforced in the same manner as a judgment to the same effect." By Order XLV. rules 1 and 2, "Where a judgment is for the recovery by or payment to any person of money, the party entitled to enforce it may apply to have the judgment debtor examined as to debts due to him, and the Court or a Judge may upon the application of such judgment creditor . . . order that all debts owing from third persons, garnishees, to the debtor be attached to answer the judgment debt."—

Held, that a person who had obtained an order dismissing with costs an action against him for want of prosecution, though entitled to enforce the order as a judgment, was not a judgment creditor within rule 2 of Order XLV.

In this case the plaintiff had begun an action against the defendant which had, by the order of Master Manley Smith, been dismissed for want of prosecution, with costs against the plaintiff. The defendant afterwards applied for a garnishee order to attach certain debts due to the plaintiff to answer his order for costs of the action dismissed. Lopes, J., at chambers having refused the application, the defendant now moved the Divisional Court by way of appeal from that refusal.

*Aspland*, for the defendant.—The question is, whether or no a judgment debt was created by the Master's order. Order XLII. rule 20, providing that every order may be enforced in the same manner as a judgment, and Order XLV. rule 1, which describes a judgment creditor as the party entitled to enforce a judgment for the recovery by, or payment to, any person of money, must have the effect of making the defendant in this case a judgment

creditor, and as such, entitled to a garnishee order *nisi* under rule 2. The cases of *Sunderland Local Marine Board v. Frankland* (1) and *Best v. Pembroke* (2) are authorities against the defendant's contention on the statutes 1 & 2 Vict. c. 110 and the Common Law Procedure Act, 1854, but the reasoning in the judgments shews that they are inapplicable, now that these provisions stand side by side in the Judicature Act, and the framers of the rules must have contemplated the remedy by attachment of debts when rule 20 of Order XLII. was made.

COCKBURN, L.C.J.—I think that the foundation for this application fails. We are asked to make a garnishee order for the attachment of debts under Order XLV. rule 2. That rule applies to cases where there has been a judgment recovered and it is still unsatisfied. Here, however, there is not a judgment, only an order dismissing an action with costs. It is true that by rule 20 of Order XLII. an order may be enforced in the same manner as a judgment, but it is nowhere said that it shall constitute a judgment; and it is not because it may be enforced by the same process that an order becomes in law a judgment. This may be a *casus omissus*, and it might be convenient that an order should be a judgment for this purpose, but under Order XLV. which deals with judgments only we cannot say now that it is so.

MANISTY, J.—I am of the same opinion. One test is this: can the affidavit required by rule 2 of Order XLV. in support of the *ex parte* application be made? It is clear that it cannot; and as it is upon such affidavit that the application must be founded the defendant cannot bring himself within the rule.

*Application refused.*

Solicitors—R. H. Davies, for defendant.

(1) 42 Law J. Rep. Q.B. 13; s. c. Law Rep. 8 Q.B. 18.

(2) 42 Law J. Rep. Q.B. 212; s. c. Law Rep. 8 Q.B. 363.

## [IN THE EXCHEQUER DIVISION.]

1879. { BOUCH v. THE SEVENOAKS, MAID-  
March 16. { STONE AND TUNBRIDGE RAIL-  
WAY COMPANY.

*Attachment of Debt—Company Judgment Debtor—Money payable to Preference Shareholders.*

*Money due from the D. company working a line of railway, to the S. company which made it, but payable as dividend by the S. company (under the terms of an arrangement between the two confirmed by an Act of Parliament) to certain shareholders of the S. company who took their shares on the security of their dividends being so provided for, is attachable by a judgment creditor of the S. company in the hands of the D. company.*

CASE stated to decide the destination of a sum of 2,500*l.* held by the London, Chatham and Dover Railway Company, garnishees.

The plaintiff on the 5th of December, 1876, obtained judgment against the defendant Company for a sum of 1,556*l.* 18*s.* 3*d.*, for engineering services in the construction of the portion of the defendants' line of railway called the "Maidstone Extension."

On the 16th of July, 1878, an order was made that all debts owing or accruing due from the London, Chatham and Dover Railway Company to the defendant company should be attached to answer the judgment debt, and that the Dover Company should shew cause why they should not pay to the plaintiff the amount of the said judgment debt.

On the 19th of July, 1878, the Dover Company accordingly attended before the Master, and admitted that they held a sum of 4,750*l.*, or thereabouts, payable under the terms of arrangement hereinafter mentioned, and professed themselves to be willing to abide the order of the Court; but the defendant company and certain of their stockholders, hereinafter described, also appeared, and claimed that the amount so held by the Dover Company could not be attached to answer the judgment debt. An order was made which, as subsequently varied, on appeal, by Field, J., was to the effect that the Dover Company

should pay over to the defendant company all moneys so held by them as aforesaid beyond the sum of 2,500*l.*, and that a case should be stated between the plaintiff, defendants, and George Herbert Pember on behalf of himself and others, the stockholders in the defendant company, and that the sum of 2,500*l.* should abide the judgment of the Court.

On the 3rd of June, 1872, the defendant company entered into certain terms of arrangement, under seal with the Dover Company, for the purpose of providing for the construction of a line of railway from Oxford to Maidstone, in the county of Kent, forming a distinct and separate section of the undertaking of the defendant company, and called the Maidstone Extension, which the defendant company had been previously authorised to construct, but had not constructed.

The deed of arrangement provided that the defendant company should forthwith construct and complete the said line; that the Dover Company should work it when completed; and that the defendant company should from time to time issue such an amount, not exceeding 200,000*l.*, of a certain authorised capital of 300,000*l.* as should be requisite for the construction of the line and for other specified purposes. It further provided, by clauses 4, 5, 6, 7 and 9, as follows:—

4. The Dover Company shall provide, and, if need be, annually pay the sum of 9,000*l.* for the payment of interest on the stock issued by the Sevenoaks Company in accordance with these terms, and such sum of 9,000*l.* shall be payable and be paid from the day on which the said Maidstone line shall be completed as aforesaid.

5. The sum provided for by the last preceding clause to be from time to time provided and paid by the Dover Company (in these terms called the "contribution of the Dover Company") shall be deemed to become payable from day to day, but shall be paid at the same time as the interest on the Dover Company's arbitration debenture stock is paid.

6. The contribution of the Dover Company shall be a charge on the undertaking of the Dover Company next after the interest on their existing debenture stocks.

7. The contribution of the Dover Com-

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pany shall be repaid to them out of the net earnings of the Maidstone line, and any deficiency in that behalf of those earnings in any year shall be a charge on the net earnings of that line in every subsequent year until the same is fully paid.

9. The gross earnings of the Maidstone line shall be applicable and applied in the manner and with the priorities following, and not otherwise:—

First. In payment to or retention by the Dover Company of the actual cost of working the same, as hereinbefore provided.

Second. In repayment to or retention by the Dover Company of their contribution, and of any sum or sums which may for the time being be due to them under article 7 of these terms.

Third. In payment of the residue then remaining to the company for their own benefit.

The terms of arrangement were confirmed as fully as if the same were enacted in the body of the Act by an Act passed in the same year, called the Sevenoaks, Maidstone and Tunbridge Railway Act, 1872.

The Act contained in its 21st section provisions for the realisation and distribution of the assets of the defendant company in the event of its being wound up on the transfer (which was authorised by the said Act) of its undertaking to the Dover Company; and the said section enacted that, subject to the payment or satisfaction of all their debts and liabilities, the company should pay and distribute its assets among its registered shareholders.

The 23rd and 24th sections provided that after the debts, liabilities and engagements of the company should be paid, satisfied or discharged, and their net moneys distributed, the company should be dissolved, but that everything done before the dissolution should be as valid as if the dissolution had not happened, and should not be prejudiced or affected thereby.

The terms of arrangement were modified by the Sevenoaks, Maidstone and Tunbridge Railway Act, 1873, to the extent that the sum of 200,000*l.* was increased to 211,000*l.*, and the sum of 9,000*l.* increased to 9,500*l.*

The deed of arrangement as so modified was carried into effect, and the defendant company on the 1st of February, 1873, issued the prospectus hereinafter (so far as is material) set out, inviting subscriptions to the said stock to the amount of 200,000*l.*:—

“The capital now to be raised under the Act of last session, and the agreement with the London, Chatham and Dover Company confirmed by the Act, will be entitled in perpetuity to the payment of 4*l.* 10*s.* per cent. per annum by the London, Chatham and Dover Company from the completion of the line. This guarantee, which is absolute, and not dependent on the profits of the line itself, will rank after the arbitration and B. debenture stocks of the London, Chatham and Dover Company, not exceeding in the whole 5,999,000*l.*, and before its preference capital and ordinary stock.

“This guarantee is therefore certain, and when payable on the completion of the line the stock will yield 4*l.* 10*s.* per cent. irrespective of the contingent additional interest of 1*l.* 10*s.* per cent., for the payment of which an estimated gross receipt of 34*l.* per mile per week will suffice.

“This additional interest of 1*l.* 10*s.* per cent. has been attached to the stock by the Sevenoaks, Maidstone and Tunbridge Railway Company under the Act of last session, and will be payable out of the net earnings of the line after payment and recompment to the London, Chatham and Dover Company of working expenses and the amount of the guaranteed interest paid by them.

“The guarantee as authorised last session is limited to 9,000*l.*, or 4*l.* 10*s.* per cent. on a sum of 200,000*l.* In consequence, however, of the great increase in the price of material and cost of labour since the original estimate was made, the directors of the London, Chatham and Dover Company have by resolution agreed (subject to Parliamentary sanction and to the approval of their proprietors) to extend the guarantee for the completion of the line by an additional 500*l.* per annum, so as to cover the sum of 211,000*l.*, and a bill is now before Parliament for this purpose.

“The 200,000*l.* capital now to be raised

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will therefore be part of a sum of 211,000*l.*

"The money raised will be solely applicable to the completion of the line under the provisions of the Act of 1872."

The Dover Company caused to be published and circulated with the prospectus a letter, in which they called attention to the accompanying prospectus issued for the capital to complete the Sevenoaks, Maidstone and Tunbridge Railway Company's line to Maidstone, and recommended the proposed issue of stock to the favourable consideration of their proprietors.

The said 200,000*l.* stock, and also the additional 11,000*l.* of stock was subscribed for and allotted on the terms set forth in the prospectus, and (by consent of all parties) George Herbert Pember represented the said stockholders in the present proceedings.

The stockholders were registered members of the Sevenoaks Company, having like qualifications and rights of voting with the other members.

Since the completion of the line the Dover Company have every half-year, namely, on the 15th of January and the 15th of July, paid to the Sevenoaks Company 4,750*l.* by cheque payable to the defendant company. The defendant company upon receipt of the cheque have, after endorsing the same, paid it into an account at their bankers opened in the names of two directors of the defendant company, by whom the same has been transferred to another account, being wholly separate and distinct, at the said bankers, entitled the "Interest Warrant Account." From the said "Interest Warrant Account," the interest warrants were paid by the bankers to the stockholders in question in respect of their stock, and the "Interest Warrant Account" was employed solely for the payment of the said interest warrants.

On the 16th of July, 1878, when the garnishee order was served, one of the said half-yearly payments of 4,750*l.* was due and payable by the Dover Company to the defendant company (namely, on the 15th of July, 1878), and a cheque in the above form had on the 10th of July, 1878,

been drawn and signed ready to be paid to the defendant company, but it had not been handed to them. In consequence of these proceedings and the orders herein, this cheque was afterwards cancelled.

According to the accounts as rendered by the Dover Company, there have never been any surplus earnings payable by the Dover Company to the defendant company or to the said stockholders, over and above the said annual sum of 9,500*l.*

The earnings in respect of the said Maidstone extension, after providing for the working expenses for the half-year ending the 30th of June, 1878, according to the said accounts, amounted to 230*l.* 5*s.* 10*d.*, and the whole earnings, after providing for working expenses, since the opening of the line in June, 1874, to 2,624*l.* 10*s.* 9*d.*

The question left for the opinion of the Court was, whether the sum of 4,750*l.*, or any part thereof, was, on the 16th of July, 1878, liable to be attached by the plaintiff to answer the judgment debt.

If the Court answered the question in the affirmative, the Dover Company were to pay to the plaintiff out of the said sum of 2,500*l.* the judgment debt of 1,556*l.* 18*s.* 3*d.*, and interest and costs (if any) as should be ordered by the Court, and should, after reimbursing themselves their taxed costs in relation to these proceedings, pay the residue to the defendant company for distribution to the stockholders.

If the Court should answer the question in the negative, the Dover Company should pay the sum of 2,500*l.* to the defendant company for distribution, and the plaintiff should (if the Court should so order) pay the costs of the defendant and the Dover Company.

*R. E. Webster* (Bray with him), for the plaintiff.—This is a debt due from the Dover Company to the defendants, which the plaintiff is entitled to attach. The plaintiff can only be affected by his own agreement or by an Act of Parliament. It is not suggested that the plaintiff had contracted away his rights, and the Act of Parliament does not prejudice them. It simply enabled the Dover Company and

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the defendants to enter into this agreement. He cited *In re Stuart's Trusts* (1).

*Herschell* (*Jeune* with him), for the defendants and George Pember.—Under the Act of Parliament there is a duty on the Dover Company to pay this money to the shareholders of the defendant company whom they have guaranteed, and to them only. It would be a breach of trust for the Dover Company to pay it over to the plaintiff. The preference shareholders subscribed on the representation that the Dover Company would pay over this money to them, and for the Dover Company to pay it to someone else would be a fraud.

*Webster*, in reply.—The argument for the defendants would give the preference shareholders the position of debenture holders, which is the very thing the arrangement and Act of Parliament have avoided doing.

KELLY, C.B.—I am of opinion that the money is clearly attachable. It clearly is payable by law to the Sevenoaks Company in the first instance. That company on receiving it indorse it in favour of their preference shareholders. But in order to do this, they must have the money first, and the question is whether their paying it to a particular class of their own shareholders can affect the creditor. It is clear that the creditor cannot be affected by such an arrangement except by an Act of Parliament taking away his ordinary rights. What is there in the Act of Parliament to deprive the creditor of the power to take in execution the money of his debtor lying in the bank? I think there is nothing. If the money had been lying on the table he would have a right to take it in execution, and as it is he has a right to attach it. The argument is that this money was impressed with a trust or duty. But these shareholders were not debenture holders, and there is a clear distinction between the rights of the two. These shareholders are only in the position of ordinary shareholders, who are themselves subject to debenture holders. They have the security of this undertaking of the Dover

Company, but this is nothing more than a privilege they possess.

HUDDLESTON, B.—What we have to consider is whether there is in the possession of the Dover Company money belonging to the defendants which the plaintiff has a right to attach. We must look at the position of the parties. To whom was the Dover Company to pay the money? The Sevenoaks Company. What for? For the payment of interest on stock. What is the position of the stockholders? It is said they are *cestuis que trustent*, or persons absolutely entitled to this money. But they are not debenture holders, they are preference shareholders. What is a preference shareholder? Nothing more than a shareholder who is entitled to his money before another shareholder. Is he entitled to have it in preference to a judgment creditor? I think not. I think these persons are shareholders and nothing more, and that the plaintiff is entitled to our judgment.

*Judgment for plaintiff with costs.*

Solicitors—Hargrove & Co., for plaintiff; Newman, Stretton & Hilliard, for defendants and George Pember.

[IN THE QUEEN'S BENCH DIVISION.]

1879. }  
Feb. 24. } TURQUAND v. FEARON.

*Practice—Adding Plaintiff—Consent of Person added—Order XVI. rules 2 and 13.*

*Where a plaintiff, official liquidator of a company, suing upon a guarantee of the defendant, which had been equitably assigned to the company, sought to add the name of the assignor as plaintiff under Order XVI. rule 2, without evidence of having obtained his consent, or tendered him an indemnity, the Court refused to allow the name to be added.*

This was an appeal against an order of Pollock, B., reversing the order of Master Dodgson, and amending the writ in the action by the addition of the name of one Darling as plaintiff.

(1) 46 Law J. Rep. Chanc. 86.

*Turquand v. Fearon, Q.B.*

The action was brought on a guarantee of a certain acceptance, which, according to the affidavit filed for the plaintiff, had been given by the defendant to Darling, and by him handed over to Willis, Percival & Co., among whose papers it was found by the plaintiff Turquand, the official liquidator of that company.

The defendant opposed the addition of Darling's name as plaintiff, on the ground that Order XVI. rule 2, did not give a Judge jurisdiction to make a man a plaintiff without his consent.

*Cohen (Lamaison with him)*, for the defendant.—There is no power to make such an order as this behind the back of the person whose name is sought to be added. Either he must consent, or an indemnity must be offered to him. This is an objection that can be taken by the defendant, because he is not protected against another and a separate action by the person added—*Hubbart v. Phillips* (1). The solicitor to the writ has not been retained by Darling to bring or continue the action in his name, and it would be set aside—*Reynolds v. Howell* (2), *Robson v. Eaton* (3).

*Gore, contra.*—It is admitted that if Darling should come forward afterwards, he will be entitled to an indemnity, but it is for him to apply. The right of the assignee to use his name is absolute, subject merely to a temporary stay of proceedings until the indemnity is asked for be given—*Chit. Pr.* 1385. And see *Lawes v. Bott* (4), *Auster v. Holland* (5), *Duckett v. Gover* (6).

MELLOR, J.—I am of opinion that the order made by Pollock, B., should be set aside.

Two constructions have been contended for of the rules of Order XVI.

(1) 13 Mee. & W. 702; s.c. 14 Law J. Rep. Exch. 103.

(2) 42 Law J. Rep. Q.B. 181; s.c. Law Rep. 8 Q.B. 398.

(3) 1 Term Rep. 62.

(4) 16 Mee. & W. 300; s.c. 16 Law J. Rep. Exch. 279.

(5) 15 Law J. Rep. Q.B. 229.

(6) 46 Law J. Rep. Chanc. 407; s.c. Law Rep. 6 Ch. D. 82.

—the first a very wide one, namely, that a person may arbitrarily be added as plaintiff in an action already commenced, without obtaining his consent, or serving him with a summons, or calling him before the Judge, or in any way giving him notice of what is being done; the second that his consent is a condition precedent to his name being used.

I cannot, however, help thinking that while the effect of the rule primarily was to provide for cases of *bona fide* mistake, in which the amendment would be made as of course, where it might be necessary to add another plaintiff, yet it was not intended to confer on the Judge an absolute discretion to add a person without hearing him. If this were allowable, the person so added might not know anything about it until the action had been tried, and he possibly involved in costs. There is therefore, I think, no right in a party seeking to add another plaintiff to do so as of course, and to leave it to the latter to intervene for his own protection.

Before such an order can be made, the applicant must shew that the party either consented, or had had a reasonable opportunity of consenting, so that the Judge might, on having the person brought before him, or represented, exercise his discretion as to granting or refusing the application. It seems to me eminently desirable that the party should be brought before the Judge on such a summons.

FIELD, J.—I am of the same opinion. It may be that Darling is the only person who can sue on the document, but all I will say about the facts is, that at present no right is shewn in the plaintiff to use Darling's name, and it may be that there was no assignment of this guarantee, only a partial security given. When, therefore, the plaintiff asks to be allowed to add Darling's name, we must first be satisfied that the action was begun under a *bona fide* mistake, for then rule 2 of Order XVI. applies. But the Common Law Procedure Act is still in force, and the written consent of the person to be joined as plaintiff must be produced before the amendment can be made. And rule 2 goes on to say that the addition of



*Turquand v. Fearon, Q.B.*

a plaintiff is to be on such terms as may seem just. But how can it be just unless it is shewn, first, that the plaintiff has a right to use the name of the person, and secondly, that he has indemnified him against loss? I think it is clear that Darling ought to be protected, and so also ought the defendant to be protected, and neither of them will be so if it is open to Turquand to add Darling as a plaintiff to the action without his consent or knowledge.

Under these circumstances I think that the order should be set aside, and the amendments on the writ struck out.

*Appeal allowed.*

Solicitors—H. Kimber & Co., for plaintiff; Herbert & Kent, for defendant.

[IN THE COMMON PLEAS DIVISION.]

1879. }  
March 12. } DAUN v. SIMMINS.

*Practice—Rule for new Trial—Power to enter Judgment—Order XL. Rule 10—The Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59)—Rules of December, 1876.*

*The Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), and the Rules of December, 1876, have not altered Order XL. rule 10. Therefore the Divisional Court on a motion to set aside a verdict which has been found for the plaintiff, instead of ordering a new trial may give judgment for the defendant, where such Court is satisfied that there is really no evidence to support the verdict, and that it has before it all the materials necessary for finally determining the question in dispute.*

In this case a rule *nisi* had been obtained on behalf of the defendant to set aside the verdict which had been found for the plaintiff, and for a new trial on the ground that there was no evidence to go to the jury in support of such finding, and that the verdict was against the evidence. After hearing

*Bompas and Walpole*, for the plaintiff, against the rule; and

*W. G. Harrison and Moulton*, for the defendant, in support of the rule;

THE COURT was of opinion that the rule should be absolute, on the ground that there was no evidence to go to the jury on which they could find a verdict for the plaintiff.

*W. G. Harrison* thereupon applied under Order XL. rule 10 for the Court to give judgment for the defendant instead of directing a new trial.

*Bompas, contra.*—Since the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), and the Rules of December, 1876, made under the authority of that Act, the Divisional Court has only power to grant a new trial, and cannot give judgment.

[*LOPES, J.*—In *Milissich v. Lloyds* (1) Brett, L.J., said, "It seems that the new rules of 1876, though they altered rules 4 and 6, did not alter rule 10, under which I think we can enter judgment according to law if we think it should be entered."]

The Appellate Jurisdiction Act and rules of 1876 provide for the determination of all the proceedings subsequent to the trial, down to and including the final judgment by the Judge who tries the cause.

*DENMAN, J.*—The 17th section of the Appellate Jurisdiction Act, 1876, states that "all proceedings in an action subsequent to the hearing or trial, and down to and including the final judgment or order except as aforesaid," that is, except as thereafter provided, "shall, so far as is practicable and convenient, be had and taken before the Judge before whom the trial or hearing of the cause took place." Then there is this proviso, "that Divisional Courts of the High Court of Justice may be held for the transaction of any business which may for the time being be ordered by Rules of Court to be ordered to be heard by a Divisional Court." Now rule 10 of Order XL. still remains in force, and, therefore, where,

*Dawn v. Simmins, C.P.*

as in this case, on a motion for a new trial the Court has before it all the materials necessary for finally determining the question in dispute, it may give judgment accordingly. Judgment will therefore be entered for the defendant.

*Judgment for the defendant.*

Solicitors—Wright, Bonner & Wright, for plaintiff; S. R. Lewin & Co., for defendant.

[IN THE EXCHEQUER DIVISION.]

*Hopkinson v. 1879.* } THE SWANSEA BANK (LIMITED) v.  
*Thuring* Mar. 16. } THOMAS.  
*52 1882*  
*91*

*Landlord and Tenant—Apportionment Act, 1870 (33 & 34 Vict. c. 35)—Successive Assignees of Lease—Liability for Proportion of Rent.*

*An assignee of a lease who assigns between two quarter days is liable under the Apportionment Act for rent up to the date of such assignment.*

CASE stated by consent for the opinion of the Court.

On the 16th of April, 1875, John Williams and Samuel Miles demised a house at Swansea to John Lewis Williams for twenty-one years, at a rent payable on the ordinary quarter-days.

On the 10th of April, 1876, the defendant was appointed trustee for the liquidation of the affairs of John Lewis Williams, the lessee.

In August, 1877, the reversion expectant on the term of twenty-one years became vested in the plaintiffs.

The defendant paid, or caused to be paid, the rent up to the 29th of September, 1877, and on the 6th of December, by deed, assigned the house to Edward Thomas, for the residue of the term.

The question submitted for the opinion of the Court was, whether the plaintiffs were entitled to recover from the defendant the whole or a part apportioned up

to the 6th of December of the quarter's rent ending the 25th of December, 1877.

*C. James*, for the plaintiffs, contended that the defendant was liable to pay an apportioned part of the rent for that portion of the quarter up to the 6th of December. He relied on the Apportionment Act, 1870 (33 & 34 Vict. c. 35), s. 2, which enacts that, "from and after the passing of this Act, all rents and annuities, dividends and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."

*A. Wills* (*Paine* with him), for the defendant, argued that the Apportionment Act applied to the persons who received the payment, and not the persons who made it. It allowed an apportionment as between successive landlords and not as between successive tenants. He referred to the 3rd section and the 4th section with its proviso as shewing that the Act was not intended to apply to cases like this.

THE COURT (1) were of opinion that the Apportionment Act, 1870, applied, and that the defendant was liable for a proportion of the quarter's rent up to the 6th of December, 1877.

*Judgment for plaintiffs.*

Solicitors—Crowder, Anstie & Vizard, agents for Brown, Collins & Woods, Swansea, for plaintiffs; Hacon & Turner, agents for Charles Henry Glascodine, for defendant.

(1) Kelly C.P. and Huddleston, B.

[IN THE QUEEN'S BENCH DIVISION.]

1879. } COLLINS v. THE VESTRY OF  
April 1. } PADDINGTON.

*Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), sect. 125—Obligation of Vestry to remove Dust, &c., from Houses—Extent of Obligation—Contract of Sale of Dust and Refuse—What included under Contract.*

*By the Metropolis Management Act, 1855, s. 125, a duty is imposed on a vestry of collecting and removing all dirt, ashes, rubbish and filth, in or under houses and places within their parish.*

*The plaintiff contracted with the defendants for the purchase of the dust, filth and refuse which should be collected by their servants from the houses, &c., in the parish of P. In each house there was a receptacle called a dust-bin, the contents of which were put into baskets by the scavengers, and thence into carts sent by the vestry and so were conducted to the brickfields of the plaintiff. The dust bins contained, in addition to dust, a number of articles known as "tots," of more or less value, thrown away by the occupiers of the houses or their tenants, for the purpose of being taken away by the dust carts and got rid of:—Held, that the plaintiff was not entitled to these "tots," under the terms of his contract with the vestry, inasmuch as there was no obligation on the part of the latter under 18 & 19 Vict. c. 120. s. 125, to remove them, and the contract must be construed to include only such things as the vestry were compelled by the statute to take away.*

This was a Special Case stated by an arbitrator.

On the 15th of February, 1876, the plaintiff entered into a contract with the defendants, of which the following are the material portions:—

"Whereas the vestry have offered to sell and dispose of all the breeze, dust, cinders, ashes, dirt, offal, garbage, filth and refuse, which shall be collected and received by their contractors, agents and servants within the parish of Paddington during the period of one year, to be computed from the 25th day of March, 1876, unto Edward Collins for the sum of

sixpence for every cartload of such breeze, dust, cinders, ashes, dirt, offal, garbage and refuse, and the said Edward Collins has accepted such offer and agreed to purchase and take the said breeze, dust, cinders, ashes, dirt, offal, garbage and refuse at such price accordingly. . . Now, therefore, these presents witness that . . . the said vestry do hereby bargain and sell unto the said Edward Collins, his executors and administrators, all and every part of the said breeze, dust, cinders, ashes, dirt, offal, garbage, filth and refuse which shall, and may, during the period of twelve calendar months, to be computed from the 25th day of March, 1876, be collected, gathered and received by the said vestry or their contractors, servants and agents from all and every the houses and other premises situate and being in all and every of the roads, squares, streets, lanes, courts, mews and other places within the said parish of Paddington. And the said vestry do hereby, as far as they lawfully can or may, covenant with the said Edward Collins, his executors and administrators, that the said vestry . . . shall and will at their own expense, deliver and deposit the said breeze, dust, cinders, ashes, dirt, offal, garbage, filth and refuse into or upon the brickfield belonging to the said Edward Collins situate and being in Wood Lane, Shepherd's Bush . . . in such quantities and on such days in every week (Sundays excepted) and at such reasonable times in the day-time as the said vestry . . . may think fit."

The deed contained covenants on the part of the said Edward Collins for the payments of the amount to become due in respect of the deliveries of dust, &c., the accounts to be adjusted on the footing of a payment by him of sixpence a load.

The manner in which the dust, &c., the subject of the contract, was collected by the vestry was as follows:—

In each house or other premises to which this contract refers there was a receptacle, called a dust-bin, into which were put all the ordinary refuse of the house or premises. The vestry sent carts

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under the charge of their servants to collect the contents of these dust-bins. It was the duty of such servants of the defendants to take the contents of the dust-bins in baskets or otherwise out of the bins and put them into the carts sent by the vestry for the purpose of collection, and as soon as the cart was full, to conduct it to the brickfields of the plaintiff in Wood Lane aforesaid.

The contents of the dust-bins consisted chiefly of cinders, ashes and the sweepings of the houses, but they also contained a number of articles of more or less value thrown away by the occupiers of the houses or their servants or other member of the household and put into the dust-bins for the purpose of being taken away from the premises by the dust carts as refuse, and got rid of. The dust heap accumulated in the brickfield would be some time or other sifted, in order to separate the cinders, breeze and ashes which are used in brick-making. In the course of this process the articles in question, which in the business are known as "tots," are separated, and those of the same kind, being collected together are saleable, and upon a large contract like the present, the tots are of considerable value. The articles are of a very miscellaneous kind, but amongst the most valuable are broken white glass, bones, articles of iron, lead and other metals, and knife handles.

Throughout the period covered by the contract the servants of the vestry employed in collecting the contents of the bins were more or less in the habit of picking over the contents of the bins, of abstracting portions of the more valuable articles, of putting them into sacks of their own and of selling the articles so abstracted for their own benefit. This process of selection was generally (though not exclusively) carried on upon the premises upon which they entered for the purpose of collecting the contents of the dust-bins, and in these instances the men so acting either took the articles in question from the dust-bin itself or from the baskets used for carrying the refuse from the bins to the carts, or as the refuse was in the act of being transferred from the bin to the baskets.

They also took such articles from the carts themselves when opportunity offered and dealt with them in the same manner.

The question for the opinion of the Court was whether the plaintiff was entitled to damages for the abstraction under the circumstances mentioned of "tots" by the servants of the vestry.

*J. Croome (Digby Seymour with him)*, for the plaintiff.—The question turns partly on the meaning of the Metropolis Management Act, 1855, section 125 (1), and partly on the construction to be put on that part of the contract set out in the Special Case. It is contended that the words, "dirt, ashes, filth and refuse," include all the contents of the dust-bins, and that what are termed "tots" come within the provisions of the Metropolis Management Act, 1855.

[COCKBURN, L.C.J.—Suppose a mistress lost a jewel which found its way into a dust-bin, would the plaintiff under his contract with the defendants be entitled to it?]

No; because the jewel would get there only by accident; but the term "rubbish" as used in the statute includes everything which has been abandoned as useless by an occupier of premises, such as an old coal-scuttle, &c.

*W. G. Harrison (Julian Robins with him)*, for the defendants.—The contract must be read with reference to the obligation imposed by the statute on the defendants. "Rubbish" must mean something *eiusdem generis* with dirt and dust, the object being merely to compel a vestry to see to the removal of such things as might seriously prejudice the health of occupiers if allowed to remain.

*Croome* replied.

(1) By 18 & 19 Vict. c. 120. s. 125, a vestry are required to appoint persons to collect and remove "all dirt, ashes, rubbish, ice, snow and filth in or under houses and places within their parish." By section 126 a penalty is imposed on occupiers of premises and other persons who refuse to allow "the soil, dirt, ashes or filth to be taken away by the scavengers." By section 127 "all dirt, dust, nightsoil, ashes and rubbish collected as aforesaid, shall be the property of the vestry," &c.

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COCKBURN, L.C.J. — I think that in this case our judgment must be for the defendants. We have to consider what is the obligation which is imposed on the vestry under the Metropolis Management Act (18 & 19 Vict. c. 120), ss. 125 to 128. Now it seems to be clear that the duty which was intended to be imposed on the vestry under these sections related to something which has reference not to the convenience of householders, so as to enable them to get rid of what might be in their way, but to sanitary considerations only. Whatever is injurious to themselves and their neighbours from a sanitary point of view, such as filth, &c., an obligation is imposed on the vestry to remove; but it by no means follows that because a vestry is bound to remove what is injurious to health and was properly consigned to the dust-bin, that therefore it is bound to remove what was not properly thrown in the dust-bin; in other words, such things as were not within the scope of what the Legislature intended in framing the Act. Curiously enough, in each of the sections to which I have referred, different words are employed. In the 125th section the words are "dirt, ashes, rubbish, ice, snow and filth," which gives a clue as to the sort of things the Legislature intended to be included, that is to say, dirt, ashes and other things *ejusdem generis*, the presence of which would prejudice the health of the occupier or his neighbours. In the 126th section the words are, "soil, dirt, dust, ashes or filth;" the term "rubbish" does not occur; while in the 127th section the terms employed are "dirt, dust, nightsoil, ashes and rubbish," the maintenance of which is inconsistent with the sanitary provisions of the Act. The scope, therefore, of the statute having been ascertained, the next question is, what was the nature of the contract entered into by the vestry with the plaintiff? The duty is cast on the vestry to remove dirt, dust and other similar refuse, and one would naturally suppose that the contract entered into with the plaintiff would be to purchase such things as the vestry were liable to remove under the provisions of the statute. Nor do I find anything in

the contract inconsistent with the view that the contract should be construed as co-extensive with the duty cast upon the vestry by the Act. When you look at the words as given *in extenso*, in none do you find the term "tots" used, and I do not think they are included under the word "refuse," which, in my judgment, means such things only as are injurious to the health of the inhabitants, and which, therefore, the vestry are compelled to remove. Mr. Croome has argued that anything thrown into the dust-bin must be taken as being included under the terms of the contract; but I cannot accede to that view. It is not everything which gets into a dust-bin that is to be regarded as "refuse." Even supposing those things had no commercial value, would it be obligatory on the part of the vestry to carry away such things as old bottles, or cast-off boots and shoes? I think not, though, no doubt, if the scavenger is of opinion that he can get money for these lots of things, he will be glad enough to take away what it is inconvenient for a householder to retain. But a householder cannot compel a vestry to take away such things as broken glass, old bottles or disused garments; and if the scavengers do take them, it is for their own use and profit, and not for the vestry. That is the only sensible construction which, as it seems to me, can be put on the contract, and accordingly I think we must give judgment for the defendants.

MELLOR, J.—I am of the same opinion, though I must confess I have felt considerable difficulty in coming to a conclusion as to the construction to be placed on this contract. I think the views expressed by my Lord as to the duty intended to be cast on a vestry by the Metropolis Management Act with reference to the removal of dust and dirt are correct. If the contrary view was upheld, there would be nothing to prevent a householder from filling his bin with old broken glass, shoes and other things which it might not be convenient otherwise to get rid of. I do not think that the Legislature ever intended to impose such an obligation as that. Happily

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no real difficulty arises, because the collectors are willing enough as a rule to take these sort of things away. The usual course of business is for the scavengers to separate such things, and to collect them in a sack for their own benefit, not as "refuse," but as articles abandoned by the owners. I therefore concur with my Lord in thinking that this action cannot be maintained.

*Judgment for defendants.*

Solicitors—R. H. B. Macmullen, for plaintiff;  
J. H. Hortin, for defendants.

[IN THE HOUSE OF LORDS.]

1878. { THE OVERSEERS OF THE FOREIGN  
Nov. 26. { OF WALSALL AND THE MAYOR,  
ALDERMEN AND BURGESSES  
OF WALSALL v. THE LONDON  
AND NORTH WESTERN RAIL-  
WAY COMPANY.

*Court of Appeal—Jurisdiction—Case stated by Quarter Sessions for the Opinion of the Queen's Bench Division—Poor Rate—Judicature Act, 1873, ss. 19, 45.*

[For the report of the above case, see 48 Law J. Rep. M.C. 65.]

[IN THE QUEEN'S BENCH DIVISION.]

1879. }  
Feb. 10. } STACHLSCHMIDT v. WILFORD.

*Practice—Right to discontinue Action—Findings by Arbitrator equivalent to General Verdict—Rules of Court, 1875, Order XXIII. rule 1.*

*Where an action has been referred to an arbitrator, and the findings of the arbitrator are in favour of the defendant on all the material points, so as to be analogous to*

*a general verdict, a Judge ought not, in the exercise of his discretion, to give leave to the plaintiff to discontinue his action under Order XXIII. rule 1.*

This was an appeal from an order of Field, J., made at chambers, granting leave to the plaintiff to discontinue his action, under Order XXIII. rule 1.

The action was brought by the landlord of the house against the defendant for preventing the seizure of twenty-one heriots, claimed to be seized by virtue of an alleged custom, or to be due by reason of the defendant's tenements being held by heriot service. The action was subsequently referred, by consent of the parties, to an arbitrator, for the purpose of stating a Special Case, power being given to the arbitrator to find, as a fact, whether there was such a custom as was alleged. The arbitrator found that no such custom existed, and that, save as to one of the tenements, none of such tenements were held of the manor of Bromley by any custom or service whatever. With regard to the before-mentioned part of a tenement, the arbitrator found that if a certain entry was admissible in evidence, then that such tenement was held of the manor by heriot service, but otherwise not so.

Upon these findings the plaintiff applied for leave to discontinue the action, under Order XXIII. rule 1, and the summons came on for hearing before Field, J. (on February 22nd, 1877), when the following order was made:—"Order.—That action be discontinued, no other action to be brought in respect of the same causes of action, or against the defendant, or any person claiming under or through him, in respect of heriot custom within the manor of Bromley, or heriot service in respect of any of the tenements mentioned in the plaintiff's particulars in this action. Plaintiff to pay to defendant the costs of action, including the costs of and incidental to the settling of the Special Case by the arbitrator, and of this application."

The defendant appealed.

*Wills and Moorsom*, for defendant.—The result of the arbitrator's findings has

*Stachelschmidt v. Wilford, Q.B.*

been that the defendant has succeeded in getting a clear verdict on heriot custom as to twenty out of the twenty-one tenements. The defendant wants a judgment, because it would bind privies in estate, whereas an order of discontinuance is merely a personal order, and not of record. Upon the next death of a tenant the lord of the manor might seize beasts, and it would be necessary to bring a fresh action, whereas judgment would operate as a complete estoppel. Discontinuance of an action is, since the passing of the Judicature Act, obtained under Order XXIII. rule 1, which, no doubt, gives a Judge the power to allow an action to be discontinued at this stage, "upon such terms as to costs, and as to any other action" as he thinks fit; but the question is whether the discretionary power so given ought to be exercised in favour of the plaintiff after what has happened. The practice prior to the passing of the Judicature Acts was to allow discontinuance before trial, but after a general verdict it was never allowed, unless after a rule for a new trial was obtained (2 *Chit. Arch.* 11th edit. 1471). The findings of the arbitrator in the Special Case are equivalent to a general verdict, and if judgment is obtained they would remain part of defendant's muniments of title.

*E. Webster and Curteis Bennett*, for the plaintiff.—The order gives the defendant all he is entitled to under any circumstances. At certain stages the plaintiff might discontinue upon payment of costs, but where there has been any finding he could not bring an action against the same party. According to the terms of the action neither the defendant or his heirs or assigns could be again made liable to have an action brought against them in respect of this claim.

[COCKBURN, L.C.J.—The parties are exactly in the same position as if they had gone to trial; suppose, therefore, instead of going to arbitration, you had had a general verdict against you, could the plaintiff have leave to discontinue?]

It is contended that he could; at all events, the matter was entirely one for the discretion of the learned Judge sitting at chambers, and he has exercised it in

favour of the plaintiff. They referred to *Young v. Hichens* (1), and *Price v. Parker* (2).

COCKBURN, L.C.J.—I am of opinion that the order of my brother Field was wrong, and should be rescinded. The questions in dispute in this action were submitted to an arbitrator, and they turned out to be questions as to the customs that applied to those tenements. They were to be determined by the arbitrator, and he has determined them in favour of the defendant, with one very trifling exception; and upon these findings the defendant wishes to have judgment. It seems to me that the case is exactly equivalent to a case going to trial at Nisi Prius, and a verdict being found by the jury for the defendant. If that had been the case, it can hardly be contended that it would have been of any avail to have asked the Judge or a Court to interfere between the finding and the technical judgment. In place of the findings of a jury, here we have the findings of a referee; it appears to me, then, only common justice that the party entitled should have the benefit of these findings. It is idle to say he gets the same thing by the conditions imposed in the order for discontinuance. The object of the defendant is not only to obtain perpetual immunity from certain claims, but to secure his property for himself and those taking after him. To interfere between the decision of the referee and the judgment to which the defendant is entitled cannot, I think, in the exercise of a sound discretion, be allowed. It is a matter of discretion clearly; but I think the right to judgment vested in the defendant as soon as the issues were ascertained, and that it is too late then for the person against whom judgment is bound to be given to abandon the action, merely on condition that another action shall not be brought against the parties. When once the issues involved have been determined, I am satisfied that an order for discontinuance ought not to be allowed. Accordingly, the order of Field, J., must be rescinded.

(1) 6 Q.B. Rep. 606; s. c. 1 D. & M. 599.

(2) 1 Salk. 178.

*Stachelschmidt v. Wilford, Q.B.*

MELLOR, J.—I am of the same opinion. I think that it was intended by Order XXIII. rule 1, to put some limitation on the powers of withdrawal of a case by the parties; and the rule would appear to be rather a restriction than an enlargement of the former powers possessed in that respect. I think the discretion exercised by my brother Field is not in accordance with the spirit of the rule. The most important issues have been found in favour of the defendant, and that being so, this order ought never, in my judgment, to have been made.

*Order rescinded with costs.*

Solicitors—Stoneham & Legge, agents for Latter and Willett, Bromley, for plaintiff; Taylor & Hales, for defendant.

[IN THE EXCHEQUER DIVISION.]

1878. }  
May 10. } *In re* DUTTON; *ex parte* PEAKE  
Dec. 4. } AND BEECH.

*Will—Perpetuity—Gift to a Mechanics' Institution—Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), ss. 30 and 33.*

*A gift to a building fund of a mechanics' institution established and maintained by subscriptions of its members to provide them with a library, reading-room, lectures and the like, and capable of dissolution only by nine-tenths of the members present at a general meeting, is a gift tending to perpetuity and void.*

Appeal from the decision of the Judge of the County Court of Staffordshire, holden at Hanley, Burslem, and Tunstall, on the petition of J. N. Peake and J. Beech, trustees of the Tunstall Athenæum Mechanics' Institution.

Thomas Dutton, by his will, dated the 10th of August, 1874, bequeathed the residue of his personal estate to his wife and A. B. Lownds, their heirs, executors, administrators and assigns, upon trust to convert the same into money and invest the proceeds and pay the income to the

wife for her separate use during her life; and he bequeathed the capital after her death to the trustees for the time being of the Tunstall Athenæum and Mechanics' Institution, to be applied by them towards the building fund in connection therewith.

The testator died on the 13th of August, 1874. His wife died on the 26th of March, 1877. The residuary personal estate of the testator amounted to 431*l.* 2*s.* 2*d.*

Disputes having arisen whether the bequest to the trustees of the Tunstall Athenæum and Mechanics' Institution was valid, A. B. Lownds, as surviving trustee of the will, paid the 431*l.* 2*s.* 2*d.* into the Post Office Savings Bank, under the County Courts Act, 1867. The trustees of the institution presented this petition, praying that the 431*l.* 2*s.* 2*d.* might be paid to them to be applied as directed by the will. The petition was opposed by next of kin of the testator.

Upon the hearing of the petition, it appeared that the Tunstall Athenæum and Mechanics' Institution was established to provide its members with a library, consisting of a library of reference and a circulating library, a reading-room, lectures and classes for mutual improvement. It was managed by a committee appointed under rules in accordance with the Literary and Scientific Institutions Act, 1854. Its premises were bought ready built. It had no building fund, but there was a sinking fund formed for the purpose of paying off a mortgage on the premises.

The following were among the rules of the institution:—

1. The members of the institution shall consist of (a) donors of 10*l.* or upwards in money or books at one time, who shall be invested with all the privileges of class b for life; (b) honorary subscribers of 1*l.* and upwards annually, who shall be eligible to any office and entitled to all the privileges of the institution; (c) subscribers of 10*s.* per annum, with 1*s.* entrance fee, who shall be entitled to all privileges as above; (d) subscribers of 5*s.* per annum and 6*d.* entrance fee, entitling them to the use of the reading-room or library separately, as may be determined upon at the time of entering.



*In re Dutton; ex parte Peake, Exch.*

4. The institution shall not be dissolved without the consent of nine-tenths in number of the members present at a general meeting to be specially called for that purpose, such consent to be confirmed by the like majority at a further special general meeting to be called within not less than one or more than three calendar months from the passing of such first resolution.

5. The property and effects of the institution shall from time to time be vested in the trustees for the time being, in trust for the general benefit of the members.

The County Court Judge held that the gift to the trustees of the institution was void under 9 Geo. 2. c. 36, and dismissed the petition.

A rule having been obtained to reverse the decision of the County Court Judge,

*A. Charles* shewed cause for some of the next of kin.—First, this is a gift by will to a charity, to be laid out in land, and is therefore void under 9 Geo. 2. c. 36. Secondly, the gift tends to a perpetuity, as the institution can only be dissolved by consent of nine-tenths of its members. *Carne v. Long* (1) is conclusive on this point. He was then stopped.

*E. Harrison*, for other next of kin, also shewed cause.

*Tyssen and Woolf*, for the petitioners, supported the rule, and they cited on both points *Oocks v. Mannors* (2). There is no perpetuity, for the members might dissolve and divide the property between them. This was not so in *Carne v. Long* (1).

*J. Robins*, for the trustee of the will.

*A. Charles*, in reply, cited the Literary and Scientific Institutions Act, 1854, 17 & 18 Vict. c. 112. ss. 30 and 33, providing that the members of such an institution should receive no profit on dissolution, but the property should go to another institution.

The following judgments were delivered on December 4:—

*KELLY, C.B.*—The first question which was argued in this case was whether the bequest was void under the Mortmain

(1) 2 De Gex, F. & J. 75; s. c. 29 Law J. Rep. Chanc. 503.

(2) 40 Law J. Rep. Chanc. 640; s. c. Law Rep. 12 Eq. 574.

Act, 9 Geo. 2. c. 36. And, independently of that, another question was argued, namely, whether the bequest was void as tending to a perpetuity. Upon the former question, having regard to the terms of the bequest—a bequest “to the trustees for the time being of the Tunstall Athenæum and Mechanics’ Institution, to be applied by them towards the building fund in connection therewith”—I think that, if this institution were a charitable institution, the bequest would probably be void under the Mortmain Act; but when we look to the rules we find the institution really is a species of club, and not a charity—see the decision of Hall, V.C., in *Re Clark's Trusts* (3). The principal question, however, was whether the bequest was void as tending to a perpetuity; and I am of opinion that the bequest does tend to a perpetuity, and is void on that ground. In *Carne v. Long* (1), where a gift had been made to an institution called the Penzance Public Library, the Lord-Chancellor said: “My objection to this devise is that it tends to a perpetuity, an objection with which the Vice-Chancellor does not appear to have dealt, but which appears to me wholly fatal to the devise. The clear intention of the testator, as expressed by the will, is that this should be a gift in perpetuity to this institution at Penzance. The gift is to the trustees for the time being of the Society and their successors for ever, they holding it for the use, benefit, maintenance and support of the library.” Those, no doubt, were stronger words than the words of the bequest in the present case; but still it is clear that the society with which we are dealing might last for ever; there is no event upon which it must cease to exist. The judgment from which I am quoting went on to say:—“If the devise had been in favour of the existing members of the society, and they had been at liberty to dispose of the property as they might think fit, then it might, I think, have been a lawful disposition, and not tending to a perpetuity. But, looking to the language of the rules of this society, it is clear that the library was intended

(3) 45 Law J. Rep. Chanc. 194; s. c. Law Rep. 1 Ch. D. 197.

*In re Dutton; ex parte Peake, Exch.*

to be a perpetual institution, and the testator must be presumed to have known what the regulations were. By one of these it is provided that the society is not to be broken up so long as ten members remain. The devise, therefore, is for the benefit of a subsisting society, and one which is intended to subsist so long as ten members remain, and the property comprised in the devise is therefore to be taken out of commerce and to become inalienable, not for a life or lives in being and twenty-one years afterwards, but for so long as ten members of the society shall remain." The decision of the Vice-Chancellor was accordingly reversed.

There are also several cases, *Thomson v. Shakespeare* (4), among others, which bear still more directly upon the present case and shew that where a club or other institution not a charity may last indefinitely, where no event is provided upon which the club or other institution is to come to an end, a gift which by its terms is to be treated as capital or permanent property of the club or other institution not a charity is void on the ground of perpetuity. I am of opinion, therefore, that the appeal must be dismissed.

HUDDESTON, B.—I am of the same opinion. It was almost conceded upon the argument that this institution was not a charity, and that the case therefore did not fall within the Mortmain Act, 9 Geo. 2. c. 36. But it was argued that the judgment of the County Court Judge might be supported on the ground that the bequest was void as tending to a perpetuity; and I agree with my Lord that the bequest is void on that ground.

On behalf of the appellants, *Cocks v. Manners* (2) was cited, as shewing the true effect of *Carne v. Long* (1); and it was contended that this case resembled in principle *Cocks v. Manners* (2), inasmuch as there is a provision by the rules for the dissolution of the institution by vote of a certain proportion of the members present at a general meeting called for the purpose, confirmed by a subse-

quent meeting, and the rules contain no provision as to the mode of disposing of the property of the institution upon its dissolution. But this argument was answered, on the part of the respondents, by pointing out that the Literary and Scientific Institutions Act, 1854, which by section 33 applies to all such institutions as the present, provides by section 30 that upon dissolution the property of an institution under the Act shall not be paid to or distributed among the members of the institution or any of them, but shall be given to some other institution to be determined by the members, or in default by the Judge of the County Court. The judgment appealed from must be affirmed.

*Judgment affirmed, and leave to appeal refused.*

Solicitors—Llewellyn, Ackrill & Hammack, agents for Llewellyn & Ackrill, Tunstall, for petitioners; H. Tyrrell, agent for E. Tennant & Co., Hanley, and J. Burton, agent for Tomkinson & Furnival, Burslem, for next of kin; Norris, Allens & Carter, agents for G. Smith, Tunstall, for trustees.

[IN THE DIVISIONAL COURT FOR THE Q.B., C.P., AND EXCH. DIVISIONS.]

1879. }  
Jan. 17. } THE QUEEN v. NEWTON.

*Penalty—Company—Delivery of List of Members to Registrar within fourteen Days after General Meeting—Necessity to prove holding of General Meeting—Companies Act, 1862, ss. 26, 27—Companies Act, 1867, s. 39.*

[For the report of the above case, see 48 Law J. Rep. M.C. 77.]

(4) 1 De Gex, F. & J. 399; s. c. 29 Law J. Rep. Chanc. 276.

[IN THE EXCHEQUER DIVISION AND IN  
THE COURT OF APPEAL.]

1879. }  
March 1, } POSTLETHWAITE v. FREELAND  
2, 22. } AND ANOTHER.\*

*Shipping—Charter-party—Demurrage*  
—“Cargo to be discharged with all Despatch, according to the Custom of the Port.”

*Under a charter-party, which provides that the cargo is to be discharged with all despatch, according to the custom of the port, but which does not otherwise specify the time to be occupied in the discharge, the duty of the charterer is to use reasonable diligence in performing that part of the delivery which falls upon him according to the custom of the port, but he is not bound to take measures to obviate delays which may arise, owing to the custom of unloading at the port, without his act or default.—So held by BRETT, L.J., and THESIGER, L.J. (dissentiente COTTON, L.J.).*

Claim for demurrage of the plaintiff's ship, the *Cumberland Lassie*, and in the alternative, for damages for the detention of the ship by the defendants, contrary to the provisions of a charter-party made between the plaintiff and the defendants.

Defence—denial of the allegations in the claim.

Issue.

At the trial before Lord Coleridge, C.J., it appeared that the plaintiff, the owner of the *Cumberland Lassie*, and the defendants, entered into a charter-party on the 28th of April, 1875, of which the following are the material parts:—

“The ship *Cumberland Lassie* . . . shall proceed . . . to Barrow-in-Furness, . . . and there load from the factors of the affreighters a cargo of steel rails and fastenings, . . . and being so loaded shall therewith proceed to East London, Cape of Good Hope, to discharge at any safe wharf where ships can always lay safely afloat as ordered on arrival, or so near thereunto as she can safely get, and there deliver the same on being paid

freight. . . . The captain to sign bills of lading as presented, . . . and to have an absolute lien on the cargo for all dead freight <sup>and</sup> demurrage due to the ship under this charter-party. . . . The cargo to be brought to and taken from alongside at merchants' risk and expense. . . . Twelve running days, Sundays and holidays excepted, are to be allowed the said merchants (if ship not sooner despatched) for loading the cargo. Any days on demurrage over and above the said lying days, at 5*l.* per day. The cargo is to be discharged with all despatch, according to the custom of the port.”

It appeared at the trial before Lord Coleridge, C.J., that the *Cumberland Lassie* left Barrow on the 8th of June, loaded with a cargo of steel rails, and arrived at East London on the 31st of August. She was reported at the Port Office on the following day, the first lighter came to her on the 6th of October, she crossed the harbour bar and entered the river on the 14th of November.

The evidence taken on a commission shewed that there is at the port of East London a dangerous sand-bar; in fine weather only can ships which draw from five feet to seven feet of water cross this bar at high water. Vessels generally lie at anchor in the roadstead, about one mile from the shore, and their cargoes are discharged into surf-boats or lighters. There were in 1875 nine lighters in the port, but of these only four were adapted for unloading steel rails. There were twenty-four working days in September, but owing to the number of vessels at the port and the scarcity of lighters, the *Cumberland Lassie* did not come on turn for a lighter until the 6th of October.

The lighters were worked by a warp, as described in the judgments of the Court; they were sent to ships in turn, according to the date on which the arrival of each ship was reported, and, by the custom of the port, mail steamers had the preference.

Lord Coleridge, in summing up the evidence, directed the jury that custom meant a settled and established practice of the port, and that the defendants would be liable to the plaintiff if they

\* *Coram* Brett, L.J.; Cotton, L.J.; and Thesiger, L.J.

*Postlethwaite v. Freeland, App.*

wilfully neglected to use the accommodation afforded by the port, and asked them, first, whether there was any settled practice or custom in the port of East London between the months of April and November, 1875, as to the unloading of sailing vessels, laden as the *Cumberland Lassie* was laden? Secondly, if there was, was the *Cumberland Lassie* unloaded with all despatch, according to such custom, using the word in the sense in which he had explained it? Thirdly, if there was no actual settled practice, was the *Cumberland Lassie* unloaded with all reasonable despatch under the circumstances?

The jury answered the first and second questions in the affirmative, and the verdict and judgment were accordingly entered for the defendants.

A rule was afterwards obtained in the Exchequer Division calling on the defendants to shew cause why the verdict should not be set aside and a new trial had on the ground of misdirection, because, under the circumstances, the risk of not being able to discharge with despatch or in the usual time fell on the charterers, and the consignees were bound to provide the means of discharging the cargo, and also because the defendants did not shew that they had used all reasonable or possible means for discharging the cargo, and because there was no evidence that the usual number of lighters fit to discharge railway iron were in port, and because there could be no binding custom as to the number of lighters fit to discharge railway iron on account of the recency of the importation of such iron, and also on the ground that the verdict was against the evidence.

This rule was afterwards discharged, the following judgments being delivered:—

KELLY, C.B.—Where a shipowner requires that his ship should be discharged at any particular port, not precisely according to the custom of the port, not with reasonable despatch, nor with any high degree of despatch, but within a certain number of days, it is always open to him to take care that in the charter-party the contract should be especially

expressed that the discharge should take place within a certain specified number of days. That has not been done in this instance. The shipowner, instead of using language which could admit of no dispute, leaves it in general terms in the contract that the ship shall be discharged with all despatch. It is entirely, and must always be entirely, a question for the jury whether those general terms—the terms of a general contract of that nature—are duly observed and complied with. These questions were accordingly left to the jury:—First. What was really the custom of the port? And when, that being, no doubt, taken into consideration by the jury, the question simply arose whether the charterers had really discharged the ship with reasonable despatch, it was found that they had. I see no reason whatsoever to disturb that verdict; and I think it would be to substitute one contract for another, and a contract of a very different nature from that which the parties actually entered into, were we to hold that this verdict could not be allowed to stand.

HAWKINS, J.—I am of the same opinion. I cannot help thinking that, looking at the terms of the charter-party, both parties had in their contemplation and in their minds what difficulties there were to encounter at East London in discharging the *Cumberland Lassie*. The words are, "shall be discharged with all despatch, according to the custom of the port." It was contended on behalf of the plaintiff that the words, "shall be discharged with all despatch," must be read altogether independently of the words that follow, "according to the custom of the port." It is said that the meaning of the provision is, that the ship is to be discharged according to the usual mode of discharging at the port; but with all reasonable despatch, and that, therefore, the charterer is responsible for delay. I cannot come to that conclusion myself. I think these words, "to be discharged with all despatch," must be read with the words "according to the custom of the port."

If that be so, it becomes necessary to see what is the custom of the port as to

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the discharge of a vessel of this description. Now, Lord Coleridge asked the jury distinctly this question: was there any settled practice or custom from April to November, or rather during August, September, October and November, 1875—because those are the months during which the vessel was at the port of East London—as to the unloading of sailing vessels laden as the *Cumberland Lassie* was laden? The jury answered that there was a settled practice as to the discharge of such vessels.

The next question seems to me to dispose of the whole matter. If there was such a custom, was the *Cumberland Lassie* unloaded with all despatch, according to it? The jury answered that she was. With those findings Lord Coleridge expresses his satisfaction. I think they entirely dispose of the case. We have had cited to us the case of *Randall v. Lynch* (1). That seems to me to be no authority for the proposition for which it was cited. That was a case where, by the terms of the charter-party, forty days were fixed as the time to be allowed for unloading the ship, and the action was brought upon that charter-party. There the parties entered into a stipulation as to the time to be allowed for the discharge, and it was in reference to that particular stipulation in the charter-party that Lord Ellenborough used the following words:—"I am of opinion that the person who hires a vessel detains her if, at the end of the stipulated time, he does not restore her to the owner. He is responsible for all the various vicissitudes which may prevent him from doing so." I think we are now deciding this case entirely in accordance with the view of Lord Ellenborough. He was then speaking of the duty of charterers under the charter-party, which limited the time for discharging, and not of the duty of a charterer under such a charter-party as that now before us.

Therefore I think the verdict was right, and, according to the findings of the jury, the judgment was right; and in regard to the findings of the jury, Lord

Coleridge expresses himself satisfied with them; consequently I think the rule should be discharged.

The plaintiff appealed.

*Cohen and Bigham* (on March 1), for the plaintiff.—The findings of the jury are doubtless adverse to the plaintiff; but those findings were based on a misdirection. The learned Judge failed to direct the jury aright, for he should have directed the jury that the charterers were bound to provide means for discharging the cargo on the arrival of the ship, or at all events within a reasonable time after that arrival. The contention on behalf of the plaintiff is, that the charterers were bound to use even more than reasonable diligence in discharging this vessel under their charter-party, that they were bound to do it with all despatch; the custom of the port may regulate the mode of discharge, but cannot be held to limit the words, "with all despatch." The discharge of the cargo was a matter entirely in the hands of the defendants, they knew the nature of the cargo, the difficulties of the harbour and the accommodation there provided. The plaintiff had not to co-operate with the defendants in anything, and therefore the decision in *Ford v. Cotesworth* (2) does not apply to this case, although the reasoning in the judgment in the Queen's Bench does, and that reasoning shews that the charterers were bound here to use all despatch, and that it was not sufficient for them to rely on the use of such materials as might chance to be ready to hand at the port of discharge. The cargo was to be taken alongside at merchant's expense and risk, so that the charterers alone had the control of the unloading of this vessel. Where no time is mentioned in the charter-party the ordinary rule must prevail, and any loss arising from the state of the harbour must fall on the charterers, and not on the shipowner, and if the delay arises from accumulation of business the reason ap-

(1) 2 Campb. 352.

(2) 33 Law J. Rep. Q.B. 52; s. c. 39 Law J. Rep. Q.B. 188 (Exch. Ch.); s. c. Law Rep. 4 Q.B. 127; s. c. Law Rep. 5 Q.B. 544.

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plies with still greater force—*Tapscott v. Balfour* (3), *Ashcroft v. The Crow Orchard Colliery Company* (4). The case of *Wright v. The New Zealand Shipping Company* (not reported) in this Court, decided that in circumstances such as these, the shipowner ought not to be the loser when the charterers could have themselves taken steps which would have prevented the delay. It is also submitted that no custom, such as is here alleged as to the number of lighters at this port, can exist, the number must vary, and the evidence shows that more lighters did arrive while this vessel was being unloaded. Moreover, the importation of rails to South Africa being a recent development of trade, there can be no custom as yet binding in that branch of trade, and in the present case such a custom would contradict the express terms of the contract, and cannot therefore be binding on the plaintiff.

*W. Williams and Macleod*, for the defendants.—The verdict and judgment were right, and ought not to be disturbed. All the peculiarities of the port of discharge must be considered to have been in the knowledge of both parties when the charter-party was signed, and the custom of the port, which by the terms of the contract governs the time of discharge, includes the use of the limited apparatus at the port, due regard being paid to the rules as to turns of vessels, and the preference to be given to Government steamers. The clause in question must be construed as a whole, and not divided into two separate provisos, as contended by the plaintiff, and then the custom of the port must be held to govern the whole proviso. In *Ashcroft v. The Crow Orchard Colliery Company* (4) the defendants were disabled from performing their contract by a number of engagements, which they themselves had created, so that the delay there was caused by their own act, and not, as here, by circumstances over which they had and could have no control.

(3) 42 Law J. Rep. C.P. 16; s. c. Law Rep. 8 C.P. 46.

(4) 43 Law J. Rep. Q.B. 194; s. c. Law Rep. 9 Q.B. 540.

*Bigham*, in reply, referred to *Randall v. Lynch* (1).

*Our. adv. vult.*

The following judgments were given on March 22:—

**THE SIGER, L.J.**—The plaintiff in this action was the owner of a vessel called the *Cumberland Lassie*, and on the 28th of April, 1875, he chartered her to the defendants to carry a cargo of about 370 tons of steel rails and fastenings from Barrow-in-Furness to East London, in South Africa, and there discharge. The charter-party provided that the cargo should be brought to and taken from alongside at merchant's risk and expense, and contained the following stipulation, "The cargo is to be discharged with all despatch, according to the custom of the port." The action is brought to recover damages for the alleged breach of such stipulation. The port of East London is situate upon a river having a bar at its mouth, and into which, in consequence, vessels of the burden of the *Cumberland Lassie* are unable to enter until the greater part of their cargo is discharged. The discharge is performed by lighters, which are worked to and from the ship in a somewhat unusual manner. There is one large warp or cable from the inside to the outside of the bar, from that warp there branch out minor warps, and to those minor warps vessels loading or unloading their cargoes attach their own cables. The lighters have neither sails nor oars, and are worked by being pulled along the warps and cables which I have described. In 1875 the business of loading and unloading was mainly conducted by a company, called the East London Landing and Shipping Company, to which the warps belonged, and which owned nine or ten lighters for working in conjunction with the warps. Four only of these lighters were suitable to the discharge of the cargo of the *Cumberland Lassie*. The custom or practice of the port, as regards the discharge of vessels, was as follows:—Vessels upon arrival reported themselves at the Port-office, and in the order in which they reported themselves, their turn, as it was called, for unloading came

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in rotation. As soon as a vessel came on turn one lighter was sent to her every working day, until such time as she was finally discharged, with the exception that when the mail steamers came in, a preference was given to them. The *Cumberland Lassie* arrived at East London on the 31st of August, 1875, and was ready to commence discharging her cargo on the following day. It happened, however, that at the end of 1874, or the beginning of 1875, the supply of iron rails to the Government at East London had commenced, and in consequence the number of vessels arriving at the port in the autumn of 1875 was increased, and when the *Cumberland Lassie* arrived, there were already, lying in the roadstead, seven vessels laden with cargoes similar to her own. The Government obtained from Algoa Bay, situate at least 150 miles south of East London, three or four surf boats, two of which appear to have been brought to East London after the *Cumberland Lassie* arrived there, and all of which, with the exception of one under repair, were employed in discharging the vessels which arrived before the *Cumberland Lassie*. In the result, the turn for the discharge of that vessel did not come until the 6th of October, when a lighter of the East London Landing and Shipping Company commenced to discharge the cargo. From that time it is not contended on the part of the plaintiff that there was any undue delay, but inasmuch as twenty-four working days intervened between the date of the ship's being ready to discharge and the 6th of October, the plaintiff seeks to recover damages in respect of the non-discharge of cargo during those twenty-four days. The evidence establishes that the time occupied in discharging the vessel was not greater than the average time occupied in discharging vessels of like tonnage during the autumn of 1875. At the trial Lord Coleridge left it to the jury to say, first, whether there was any settled practice or custom between the months of April and November, 1875, as to the unloading of sailing vessels laden as the *Cumberland Lassie* was laden, in the port of East London? Secondly, if there was, whether the *Cumberland Lassie* was un-

loaded with all despatch according to the custom? The jury answered both questions in the affirmative, and the learned Judge directed the verdict and judgment to be entered for the defendants. The plaintiff moved the Exchequer Division for a new trial, on the ground of misdirection, and that the verdict was against evidence, and the conditional order for a new trial having been discharged, he appealed to this Court. The argument before us has really resolved itself into a question as to the construction which the clause in the charter-party, "the cargo is to be discharged with all despatch according to the custom of the port," when read in conjunction with the facts, ought to bear. The plaintiff contends, in substance, that Lord Coleridge ought to have told the jury that as soon as the *Cumberland Lassie* was ready to discharge, the defendants ought to have provided her with one lighter for every working day, except perhaps the days on which the lighters were engaged in discharging mail steamers. If the plaintiff is right in his contention, I think it clear that the learned Judge did misdirect the jury, for he certainly indicated to them that there was no such obligation upon the defendants to provide lighters; but I am of opinion that the plaintiff is not right in his contention. In order to support it, his counsel treat the clause of the charter-party in question as if the words "with all despatch" were unconnected with the words "according to the custom of the port," and they endeavour by that means to read the clause as running in this way, "the cargo is to be discharged according to the custom of the port, and with all despatch." Reading the clause in this way, they argue, not without force, that the custom of the port was to regulate the mode of discharge by a single lighter, worked by the warps and cables; but was not to regulate the time of commencing the discharge or the rate of despatch, which it was contended was to be as fast as one lighter, commencing as soon as the vessel was ready to discharge, could on working days discharge the cargo.

In my opinion, however, the words "according to the custom of the port," placed as they are in immediate juxta-

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position with the words "with all despatch," were intended to be read and must be read so as to qualify these latter words; and if that be so, it appears to me to follow that the practice or custom as to vessels coming on turn was one which regulated the despatch of the *Cumberland Lassie* just as much as the practice or custom of unloading vessels by lighters worked along the warps or cables. Indeed, lighters, warps and cables may, in this case, be looked on as forming one apparatus for unloading, and the plaintiff had no right to complain of the defendants because this apparatus was, until the 6th of October, occupied by vessels which arrived before the *Cumberland Lassie*, and over which the defendants had no control. The decision of this Court in *Wright v. The New Zealand Shipping Company* (not reported), to which we have been referred, is in no way inconsistent with this view. There the charter-party did not contain any express provision in reference to the discharge of the cargo, and the obligation of the charterer was, therefore, that implied by law, that is, to discharge within a reasonable time. The ordinary time for the discharge of vessels of similar burden with and loaded as the chartered vessel in that case was loaded, was proved to be thirty-five days; but owing to a concourse of vessels annually at the particular time of the year at which the plaintiff's vessel happened to arrive, and due in great measure to arrivals of the defendant's own vessels, the lighters were inadequate in point of number, and the plaintiffs' vessel was delayed for a much longer period than thirty-five days. Upon that state of facts it was held that the ship-owner ought not to be the sufferer from a delay against which the defendants might themselves have provided, in respect to which the charter-party contained no express stipulation, and the cause of which, although recurring at fixed intervals of time, was exceptional when compared with the general state of the port of discharge. The cases of *Tapscott v. Balfour* (3) and *Ashcroft v. The Crow Orchard Colliery Company* (4), are also distinguishable from the present. In the former the loading of a cargo of

coals was to be in the usual and customary manner, nothing being said as to time, and it was held that the words applied to the mode of loading only, and that the charterer was responsible for delay which arose from his vessel's inability to get under the tips, that inability again being due to the number of vessels waiting in turn to go under the tips before her, of which number, moreover, several were loaded by the agent employed by the charterer. It is also to be observed that in that case it was proved that, although loading from the tips was the most usual method of loading in the particular dock, yet it could be and not unfrequently was done from lighters, and Denman, J., in his judgment relies upon the fact as giving additional support to the view that the charterer, who might have obtained lighters, was responsible for the delay.

In *Ashcroft v. The Crow Orchard Colliery Company* (4), a cargo of coal was to be loaded with the usual despatch of the port, or if longer detained the ship was to be paid forty shillings demurrage. It was there held that the charterers were liable for a detention outside the docks for an unusual time, that detention being due to the fact that the charterers themselves had, when the charter-party was entered into, three ships loading in the docks, and ten other charters on their books, having priority over the plaintiffs.

None of the decisions to which I have referred in any way impugned the authority of cases of the class of *Leidemann v. Schultz* (5) and *Lawson v. Burness* (6), which were decided in favour of the charterer, upon words in the charter-party importing that he was only to be bound to take cargo in regular turns of loading. They are merely illustrations of the principle enunciated in *Ford v. Cotesworth* (7), to which my judgment in this case is in no way opposed. That principle is, that under a charter-party which provides for the delivery of the cargo in the usual and customary manner,

(5) 14 Com. B. Rep. 38; s. c. 23 Law J. Rep. C.P. 17.

(6) 1 Hurl. & C. 396.

(7) 38 Law J. Rep. Q.B. 52; s. c. Law Rep. 4 Q.B. 127.



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but which is silent as to the time to be occupied in the discharge; the law implies a contract that each party will use reasonable diligence in performing that part of the delivery which, by the custom of the port, falls upon him. Here the use of the warps and lighters in regular turn was part of the custom of the port, by which the discharge with all despatch was to be qualified and limited, and by that custom the control of the lighters, as well as of the warps, was no more in the hands of the charterers than it was in the hands of the shipowners. For these reasons, I am of opinion that the ruling of the learned Judge at the trial was correct, that the findings were warranted by the evidence, and that this appeal should fail.

COTTON, L.J.—This was an action by the owner of a sailing vessel called the *Cumberland Lassie*, against the charterers for the detention of his ship. The action was tried before Lord Coleridge, and resulted in a verdict and judgment for the defendants, and this was an application by way of appeal from the Exchequer Division for a new trial on the ground of misdirection.

By the charter-party, which was dated the 28th of April, 1875, it was agreed that the *Cumberland Lassie* should take a cargo of rails from Barrow-in-Furness to East London in South Africa, and it was stipulated that the cargo should be brought to and taken from alongside at merchants' risk and expense. And further (which is the provision on which the question turns), that the cargo was to be discharged with all despatch, according to the custom of the port. It was for delay in accepting delivery of the cargo at the port of discharge that the action was brought.

The ship arrived at East London on the 31st of August, 1875. The harbour there is a bar harbour, and vessels of the size of the *Cumberland Lassie* are obliged to unload a considerable portion of their cargo before they can cross the bar. The discharge of cargoes outside the bar is effected by means of lighters or other small vessels. The usual way by which, in September, 1875, lighters were brought alongside the vessel to be unloaded was

by means of a warp, consisting of a rope carried across the bar and fastened to buoys, and on the outside connected with the ropes branching from it; from the end of these branch warps the lighters were warped to the vessel to be unloaded by a rope provided by that vessel. The complaint of the plaintiff is that for twenty-four working days after the *Cumberland Lassie* arrived at the port no lighters or other vessels were provided by the defendants, the charterers, to accept delivery of the cargo. The defendants admit the fact; but they say, that having regard to the terms of the charter-party and the facts proved, they are not liable for the delay. It was proved at the trial, that at the time when the *Cumberland Lassie* arrived at East London, and was in course of unloading, the only lighters for unloading vessels outside the bar, with the exception of three boats belonging to the Government, belonged to a company which had purchased these lighters and the warp from the Government; that there was a practice or custom at the port that every sailing vessel should be taken in turn for unloading, according to the time of her arrival in port, and that when the turn of a vessel arrived it should have the services of one lighter only, and once only in the day; that the company had four lighters only capable of carrying iron rails; that mail steamers were, as against sailing vessels, entitled to preference in the use of the lighters, and that, in regular turn, the *Cumberland Lassie* was not entitled to the use of a lighter for discharge of her cargo before the twenty-four working days had expired. There was evidence that having regard to the number of vessels in the port at the time when the *Cumberland Lassie* arrived, and to the number of lighters then at the port available for unloading rails, the turn of the plaintiff's vessel to have a lighter for unloading the cargo did not arrive before the twenty-four days had expired. The defendants contend that the reference to the custom of the port, contained in the provisions of the contract to which I have referred, absolves the defendants from liability, and so Lord Coleridge directed the jury. For he, in his summing-up, in effect directed

*Postlethwaite v. Freeland, App.*

that if they found that at the date of the charter-party, and from that time till the time of the unloading, there was a practice at the port as to the unloading, and if so, that the defendants used the existing appliances with due despatch, in accordance with the practice, that then they should find for the defendants. If the delay of which the plaintiff complains was not attributable to what can be called the custom or practice of the port, this was a misdirection. For, in the absence of any reference to the custom of the port, and if there was no express stipulation in the contract to regulate, in this respect, the rights and liabilities of the plaintiff and defendants, it would be the duty of the charterers to provide, when or shortly after the vessel was ready to discharge its cargo, appliances of the kind ordinarily in use in the port for the purpose of taking delivery, that is, in the present case, lighters or other small vessels capable of crossing the bar. Did, then, the reference to the custom of the port vary the defendants' liability in this respect? It was argued that it does so, because the custom or practice of the port was that vessels should be entitled to lighters in turn, according to the times of their respective arrivals, and by treating the warp and lighters as one entire instrument for unloading vessels outside the bar. But there was no evidence that a larger number of lighters than were in use at the time in question in the port could not have crossed the bar daily by means of the warp, and, on the contrary, there was evidence that shortly afterwards a larger number of lighters were employed in unloading vessels, and crossed the bar by means of the warp. The delay, therefore, was attributable to the number of lighters at the port being insufficient for the number of vessels. The number of lighters cannot, in my opinion, be considered as a matter regulated by or dependent on the custom or practice of the port. It would not, I should think, be contended that, however the business of the port might increase, it could be said to be the custom or practice of the port that the only lighters for hire there should be such as the company were for the time being possessed of. In my

opinion the defendants are not, by the qualifying reference in the charter-party to the custom of the port, protected from liability for delay caused by the number of lighters at the port being insufficient for the vessels for the time being in the port. It is said that this will make the words "according to the custom of the port" inoperative, and strike them out of the contract. But, in my opinion, this is not the case. These words will qualify the words "with all despatch" by excusing any delay caused, for example, by the preference given by the practice of the port to mail steamers, or by no work being done on those days which it is the practice of the port to observe as holidays. It was much pressed, in the course of the argument, that it was impossible for the charterers to provide more lighters. If, however, the construction which I have put upon the contract is correct, the defendants cannot protect themselves from liability to pay damages to the plaintiff for the delay, by alleging that this is attributable to their inability to discharge an obligation which the defendants, as between themselves and the plaintiff, had undertaken.

It was said that the number of the lighters was insufficient in consequence of there being at the time an unusually large number of vessels which were waiting to discharge their cargo. In my opinion if such was the case, it cannot excuse the defendants from liability. For if such was the case, the delay would be caused by an accident of which, as between themselves and the plaintiff, the defendants must bear the loss.

BRETT, L.J.—The question in this case is, whether there ought to be a new trial on the ground of misdirection. The action is for demurrage, and the answer is that under the charter-party the discharge of the cargo was to be according to the custom of the port, and that it was properly discharged in accordance with the charter-party. Lord Coleridge asked the jury whether there was an established custom of the port, and whether, if so, the cargo was discharged in accordance with that custom, and the jury answered both questions in the affirmative.

*Postlethwaite v. Friesland (App.), Exon.*

So far there is no symptom of a misdirection. But it is said that the Judge misdirected the jury as to what might and what might not be a part of the custom of the port. The objection in reality is that the learned Judge admitted evidence to shew that certain things were part of the custom of the port which in their nature could not be so.

It was shewn by the evidence that part of the custom was that vessels should be unloaded by certain lighters, that is to say by those belonging to a certain company and those belonging to the Government, and that such lighters were only supplied to the ships in turn and in a particular way. It was shewn that this was the practice of the port, not only at the time when the ship arrived, but had been so for so long a time that it had become a recognised custom. But it was urged on behalf of the plaintiff that this evidence was immaterial, and that the learned Judge was wrong to admit it—that this evidence was in fact shut out by the terms of the charter-party. Now the charter-party provides that the cargo is to be brought to and taken from alongside at merchants' risk and expense, and that the cargo is to be discharged with all despatch according to the custom of the port.

In other words the cargo is to be discharged with all despatch consistent with its being discharged in the way in which every ship is invariably discharged at that port. What then is the manner in which the vessel is to be discharged?

The ship cannot cross the bar and must lie outside. The discharge must therefore take place by lighters which are warped along a fixed cable across the bar, and when they have crossed the bar they are warped along smaller ropes to the ship's side, and in the same manner are warped in again. The port is 150 miles at least from any place whence any additional lighters can be procured, and to say that any one could get more lighters for the purpose of unloading a particular ship is to say that which, from a business point of view, is impossible. Therefore, *a priori*, one would suppose that the unloading must be done by lighters belonging to that port only.

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Evidence was given which accords with that which one would naturally expect, that the unloading had to be done by lighters only, and not by such lighters as the owners of the cargo could procure at their own will and pleasure, but by the lighters belonging to the company and the government. Now the company and government would only supply those lighters in one particular way; namely, at the rate of one lighter per day to the ships in turn, according as each arrived and was reported.

Therefore, the process by which a ship had to be discharged was by placing itself on the turn and waiting till it received from the Government a permission to have one lighter per day to discharge the cargo. So far from thinking that this cannot be a custom, I am of opinion that it is the only substantial custom of the port. If there was no custom whatever, and the charterer could have supplied himself with a hundred lighters at once, he must still use them by going along the fixed warp. That is a matter of necessity, and therefore the use of the fixed warp cannot be called an essential part of the custom, but an essential part of the custom was to wait till the vessel could get a lighter in her turn. Therefore, unless we hold that the defendants were bound to go to any distance to fetch lighters, they used all diligence and every despatch. I am, however, of opinion that it was an essential part of the custom that the charterers were not bound to get lighters from any other place, in any other way or at any other time, but only from the company and Government at such times as they would allow, and I am of opinion that that was a valid custom, that the learned Judge was right to admit the evidence, that the verdict was right, that upon the findings no other judgment could be entered, and that consequently this judgment ought to be affirmed.

*Judgment affirmed.*

Solicitors—Chester, Urquhart & Co., agents for Bradshaw, Barrow-in-Furness, for plaintiff; Allin & Greenop, for defendants.

[IN THE COURT OF APPEAL.]

(Appeal from the Exchequer Division.)

1879. }  
 March 3, 4. } BRITAIN v. ROSSITER.\*

*Statute of Frauds* (29 Car. 2. c. 3. s. 4)  
 —Contract not to be performed within a  
 Year—Part Performance—Contract of Ser-  
 vice—Judicature Act, 1873 (36 & 37 Vict.  
 c. 66), sec. 25, sub-sec. 7.

Under section 4 of the *Statute of Frauds*  
 a parol contract not to be performed within  
 a year is not void, though no action can  
 be brought upon it; and no fresh contract  
 can be implied from acts done in pursu-  
 ance of and during the existence of such  
 contract.

The equitable doctrine of part perform-  
 ance taking contracts out of the operation of  
 section 4 of the *Statute of Frauds* cannot  
 be extended by the High Court of Justice,  
 under section 24, sub-section 7 of the *Judi-  
 cature Act*, 1873, beyond the limits to  
 which it was confined by the Courts of  
 Equity. It is, therefore, applicable only to  
 contracts for the sale and purchase of  
 lands, and not to a contract of service.

The plaintiff in this case was engaged  
 by the defendant in the capacity of clerk.  
 The terms of the agreement of service  
 were fixed on Saturday, April 21, 1877,  
 and were reduced into writing on that  
 day, but the writing was not signed by  
 the parties. Under the agreement the  
 plaintiff was to serve the defendant for a  
 year from Monday, the 23rd of April, at  
 a monthly salary.

The defendant accordingly entered into  
 the service on Monday, the 23rd of  
 April, and continued to serve the de-  
 fendant, as clerk, upon the terms con-  
 tained in the agreement, for seven months,  
 at the end of which time he was dismissed  
 by the defendant (who had given him a  
 month's notice of dismissal); all the  
 wages due to him in respect of the time  
 during which he had served being duly  
 paid.

Thereupon, the plaintiff brought this  
 action for wrongful dismissal. By way

of defence, the defendant justified the  
 dismissal on various grounds, and also  
 pleaded that the contract was not to be  
 performed within a year within the 4th  
 section of the *Statute of Frauds*, and  
 that therefore the action would not lie.

At the trial, after hearing the evidence  
 of the plaintiff as to the making of the  
 contract, Hawkins, J., directed a verdict  
 for the defendant on the ground that the  
 contract was within the 4th section of the  
*Statute of Frauds*, and gave judgment  
 accordingly.

On the 22nd of May, 1878, the Ex-  
 chequer Division was moved for, and re-  
 fused, an order *nisi* for a new trial on the  
 ground of misdirection.

On appeal,

*Fifth*, for the plaintiff, contended that  
 there was evidence of a new contract to  
 be implied from the acts of the parties,  
 and, secondly, that the part performance  
 of the contract by the plaintiff by en-  
 tering upon the employment was suf-  
 ficient to take the case out of the statute.  
 An order *nisi* having been granted,

*Lawrance* and *P. B. Hutchins* now  
 shewed cause.—The contract was com-  
 plete on Saturday, the 21st of April. It  
 is a subsisting contract, though it cannot  
 be sued upon—*Snelling v. Lord Hunting-  
 field* (1). But no other contract can be  
 implied as long as the express contract  
 subsists. The service of the plaintiff was  
 admittedly under the contract of the 21st  
 of April. Therefore the service is not one  
 from which any other contract of service  
 can be implied—*Giraud v. Richmond* (2),  
*Leroux v. Brown* (3), *Banks v. Cross-  
 land* (4), *Johnson v. Appleby* (5). The  
 cases which decide that the contract is  
 not void but only unenforceable have  
 been acted upon too long to be now over-  
 ruled. As to the question of part per-

(1) 1 Cr. M. & R. 20; s. c. 4 Law J. Rep. Exch.  
 232.

(2) 2 Com. B. Rep. 335; s. c. 15 Law J. Rep.  
 C.P. 180.

(3) 12 Com. B. Rep. 801; s. c. 22 Law J. Rep.  
 C.P. 1.

(4) 44 Law J. Rep. M.C. 8; s. c. Law Rep. 10  
 Q.B. 97.

(5) 43 Law J. Rep. C.P. 146; s. c. Law Rep. 9  
 C.P. 158.

\* *Coram Brett, L.J.; Cotton, L.J.; and  
 Theiger, L.J.*

*Britain v. Rossiter (App.), Exch.*

formance, that is an equitable doctrine applied by the Equity Courts to cases involving the purchase and sale of lands. But the doctrine has never been applied either at law or in equity to any other kind of contract.

*Fifth*, in support of the rule.—A contract which comes within the mischief of section 4 of the Statute of Frauds is not merely unenforceable, but void for all legal purposes—*Carrington v. Roots* (6). In that case, speaking of the effect of the 4th section of the Statute of Frauds, Lord Abinger says, "I think that the meaning of the statute is not that the contract shall stand for all purposes except that of being enforced by action, but it means that the contract shall be altogether void." And Parke, B., says, "An agreement which cannot be enforced on either side is a contract void altogether." The same doctrine is laid down in *Reed v. Lamb* (7), where Alderson, B., says that there is no difference between sec. 4 and sec. 17. See also Lord Ellenborough's judgment in *Inman v. Stamp* (8). The judgments in *Leroux v. Brown* (3) are, no doubt, to a certain extent inconsistent with the above dicta. There is a conflict of opinion on the subject; but the construction which makes the contract void is the one which is more consistent with common sense. Otherwise the contract is preserved as a sort of entity which cannot be grasped, existent only for the purpose of doing evil. Being void in part the contract should be held void altogether—*Thomas v. Williams* (9). If the contract is void, it may be treated as no contract, and a new contract must be implied for a yearly service, to terminate which at the least a reasonable notice must be given. As to the doctrine of part performance it is true that Courts of Equity only applied it to contracts within the 4th section of the Statute of Frauds, where the contract related to the sale of land. The principle upon which the Courts of Equity

gave relief is shewn by *Johnson v. The Shrewsbury and Birmingham Railway Company* (10), and *Pickering v. The Bishop of Ely* (11). They would not interfere in any case where they were not assured that the plaintiff had not an adequate remedy in damages. The reason of this rule as to part performance is that the Court will not allow the statute to be used against good conscience—*Bond v. Hopkins* (12), and *Morphett v. Jones* (13). The present case is as much against conscience as any case can be. And now by the Judicature Act, 1873 (36 & 37 Vict. c. 66), sec. 24, sub-sec. 7, the doctrine of equity may be applied to cases dealt with by the common law divisions. We have now a union of equity principles with common law jurisdiction; and the Court may give the plaintiff his remedy in damages for the defendant's breach of good faith. The plaintiff has been put in such a position that it is a breach of good faith for the defendant to avail himself of the statute.

BRETT, L.J.—I am of opinion that this rule should be discharged. I think that Mr. Justice Hawkins was right, and I think that the Exchequer Division was also right. It seems to me to have been proved beyond contradiction that on Saturday, the 21st of April, an express contract of service was made for a year, to commence on the Monday following. It is clear that such an express contract is within the 4th section of the Statute of Frauds; that is to say, it is a contract, but being only verbal neither party can bring an action upon it so as to charge the other. But then it is suggested that as the plaintiff did on Monday enter into the service and continued in it for some time, we may from his so doing imply another contract to serve for a year, bringing with it the same consequences as the original contract, but outside the operation of the Statute of Frauds. It is said that we can make this implication because the

(6) 2 Mee. & W. 248; s. c. 6 Law J. Rep. Exch. 96.

(7) 6 Exch. Rep. 130; s. c. 20 Law J. Rep. Exch. 161.

(8) 1 Stark. 12.

(9) 10 B. & C. 664.

(10) 3 De Gex, M. & G. 914; s. c. 22 Law J. Rep. Chanc. 921.

(11) 2 You. & C. 249; s. c. 12 Law J. Rep. Chanc. 271.

(12) 1 Sch. & Lef. 413.

(13) 1 Swanst. 172.

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first contract is void. But in the first place, according to the true view of the statute, it is not right to say that the contract is void, in my opinion, either under the 17th or 4th sections of the statute; at all events it is not so under the 4th section. The contract exists, though no one can be charged on it. But if the original contract still exists, it seems to me that we cannot, from acts done in the performance of that contract, imply a new and distinct one. The acts are done with the intention of acting under the original contract, and therefore we should be drawing an inference contrary to the truth if we should infer that there was another contract. I think that it is a proposition which cannot be controverted, that no new contract can be implied from acts done under an express contract, which is still in existence. All that can be said is that no one can be charged upon that contract, because it is not in writing. Cases were cited in support of the contrary view, especially *Carrington v. Roots* (6) and *Reed v. Lamb* (7), and it was said that those cases contained a judicial declaration that contracts within the 4th section of the Statute of Frauds, though admitted to have been made, were to all intents and purposes void if not in writing. With regard to the *dicta* referred to, it is enough to say that the proposition so stated was not necessary in those terms for the decision of those cases. It being admitted that no action could be brought on the contract itself, because it was not in writing, it is also clear that neither party could be made liable upon it indirectly by any action which necessitated the admission of the existence of the contract. No doubt phrases were used in the cases referred to implying that the contract was void; but the question was elaborately commented on in the case of *Leroux v. Brown* (3) by Maule, J., and Jervis, C.J., who took the same view as to those expressions as myself, and gave clearly the interpretation necessary for that case, namely, that the contract is not void, but only incapable of being enforced, and that any right which depends upon the contract as such cannot be maintained. If it had been otherwise, the Court would have decided

in that case that the law had merely a territorial application, whereas if the rule merely applies to the enforcement of the contract, then it is a law with respect to the procedure of the Court, and therefore applicable to contracts made abroad as well as in this country. Besides this, the case of *Snelling v. Lord Huntingfield* (1), so far from having been overruled, has been strongly supported in the case of *Leroux v. Brown* (3), and ought not, in my opinion, to be overruled now. In my opinion, therefore, the contract in the present case was not void, but was an existing contract, and from acts done merely in part performance of it, we cannot imply another independent contract. It is the plaintiff's misfortune that he can only insist on a hiring for a year by relying on the original contract, but it is a contract on which he cannot rely, and therefore he cannot maintain the action.

Then it has been said that as there has been part performance, the Court may look at the contract notwithstanding the Statute of Frauds, because of the equitable principle which existed before the Judicature Acts. Now we know that in such a case the Courts of Equity did look to see what the contract was, with regard to sales or leases of lands; but the application of the principle was confined exclusively to land, and was never extended to contracts such as the one before us, because there were no means of bringing such contracts before the Court. They would not entertain a suit for specific performance of a contract of service, and so such a case could not come before them. As to the application of the doctrine to questions affecting land, I shall say no more but that they were bold decisions on the statute. The principle was never applied to any other form of contract before the Judicature Acts. Can we so apply it now? I think that the true principle of the Judicature Act is, that it confers no right which no one possessed before, either in the Courts of Law or of Equity. If it did, it would alter the rights of parties, whereas in truth it only transfers the procedure. No one could be charged on this contract before the Judicature Acts, either at law or in equity, and if the plaintiff were

*Britain v. Rossiter (App.), Exch.*

enabled to enforce this claim, either at law or in equity, it would be an alteration of the law. I am of opinion that the law remains as it was, and that the plaintiff's claim cannot be enforced.

COTTON, L.J.—In this case we refused to grant a rule on the question whether a new contract was expressly entered into on the Monday. On the other points we granted a rule, because we thought them worthy of argument, and having heard every argument which can be advanced on behalf of the plaintiff, we think the rule must be discharged.

It is said that though this contract cannot be enforced, yet there is another contract which can be enforced, to be implied from the actions of the parties; and it has been attempted to take the case out of the operation of the rule that no contract can be implied in the face of an express contract, by shewing that the express contract was void to all intents and purposes under section 4 of the Statute of Frauds. But I do not think that is the true construction of the section, the language of which is that no person shall be charged on such a contract.

Before I go into the cases, I may observe that to hold that this section makes those contracts which come under its operation void, would be inconsistent with the action of the Courts of Equity with regard to part performance in questions affecting lands. If such contracts were void, the Courts of Equity would not have restored them. But the ground of their action was this, that the statute does not render the contract void, but requires certain evidence to be given in certain cases; and the Courts of Equity have been accustomed to dispense with that evidence in certain cases. Then let us look at the cases. In *Carrington v. Roots* (6) and *Reed v. Lamb* (7) there are expressions from which it may be gathered that section 4 of the statute renders the contract void. But as to the *dicta* of Lord Abinger, there is a passage in his judgment which I think explains his meaning. The action related to a sale of growing crops, and was in the form of trespass, for removing the plain-

tiff's cart, which he sent to carry the roots away. Lord Abinger in that case said, "Wherever an action has been brought on the assumption that the contract is good at law, that seems to me to be in effect an action on the contract." He points out that the action was brought on the assumption that there was a contract, good at law, between the parties, and was brought in effect to enforce that contract, and came therefore within the express prohibition of the Statute of Frauds.

Then Parke, B., says, "Does he mean an agreement in fact, operating as a license only, or a binding contract for the sale of the crop, and for him, the plaintiff, to have a right of entry on the land to gather it? I think the latter is the true construction, and that it means a contract which the one party could enforce against the other as a matter of right."

That passage explains the meaning of the previous *dicta*. We need not go into the judgment in *Reed v. Lamb* (7). In that case the contract was said to be for a special purpose void, and we must treat such contracts generally as not void, but incapable of being enforced.

Then as to the second point, that the contract may be enforced, because it has been in part performed. Let us see what is the nature of the doctrine of part performance. It is said that the principle is that the Court will not allow one party to a contract to take advantage of part performance of the contract, and to permit the other party to change his position or incur expense or risk under the contract, and then to deny that the contract exists, for this would be contrary to conscience. I admit some *dicta* of learned Judges point this way; but it is not the right explanation of the doctrine, for if it were, part payment of the purchase-money would come within the rule, and would take the contract out of the statute. But it is quite clear and well established that the receipt of any sum, however large, by one party under the contract, will not entitle the other to enforce a contract which comes within the section. But what can be more contrary to conscience than that, after a man

*Britain v. Rossiter (App.), Exch.*

has received a large sum of money in pursuance of a contract, he should deny that the contract exists? The real principle is this. If the Court found a man in occupation of land, or doing acts with regard to it under circumstances which would, *prima facie*, render him a trespasser, the Court would say that there was strong evidence from the user of the land of the existence of a contract, and would therefore allow parol evidence to be brought to shew the real circumstances under which possession was taken. That being so, does the doctrine apply to the present case? The plaintiff has actually entered the service of the defendant. Does this overt act in part performance of the contract enable us to look at the contract, though it is not in writing? Does the Judicature Act enable us to do so? Sub-section 4 of section 24 of the Judicature Act, 1873, enacts that the Courts "shall recognise and take notice of all equitable estates, titles and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, in the same manner in which the Court of Chancery would have recognised and taken notice of the same." The effect of that section clearly is this: it enables the Common Law Courts to enforce rights formerly enforceable in equity only, without remitting the matter to a Court of Equity. Then, by sub-section 7, "the High Court of Justice and the Court of Appeal respectively . . . shall have power to grant and shall grant, either absolutely or on such terms and conditions as shall seem to them just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter." This is clearly a legal claim. There would be no difficulty in enforcing it in a Court of law, if it were enforceable. The end of the section gives the object, "so that, as far as possible, all matters in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided."

I agree with my Lord, that it was not intended to give any new rights to the parties by that section, but merely to enable the High Court of Justice, as one Court, to deal with all matters within the jurisdiction of Chancery and Common Law.

But even if this were not so, we could not make this order absolute. The doctrine of part performance has always been confined to questions relating to land, and has never been extended to contracts of service, and I do not think we ought, from any vague notion of applying equitable principles, to extend the rule to cases in which the Courts of Equity never interfered.

THE SINGER, L.J.—There are two questions in this case—first, whether the plaintiff can maintain an action upon this contract at all; and secondly, if he cannot at law, whether he can in equity.

I am reluctantly forced to subscribe to the opinion that he cannot. I say reluctantly because it is manifestly unjust that where there has been a contract of hiring which has been acted upon, one party who has had the advantage of the contract should be able to put an end to it; and I should have been glad to have decided that the plaintiff was entitled at least to reasonable notice of dismissal.

First, then, has the plaintiff a right of action at all? Now it is beyond a doubt that this contract was formally made upon the 21st of April, and it is not in dispute that if so, it comes within the operation of section 4 of the Statute of Frauds. The question then arises, what is the effect of the statute on such a contract? Is it that the contract is entirely swept away so that it does not stand in the way of the proof of any other contract, or is it that the contract still exists but cannot be enforced? No doubt there are certain *dicta* from which it might appear that certain Judges have considered the contract as absolutely void. But if those *dicta* are looked at by themselves we shall find that they were not necessary for the decision of the cases in which they appear, and if we look to subsequent cases we find that it has



*Britain v. Rosset (App.), Exm.*

been distinctly decided, when the decision was necessary for the case, that the contract is not actually void.

If we look at the words of the statute, we shall find that it is impossible to hold that they make the contract void. That it is not so is shewn by the fact that where one party has signed the contract and the other has not, the party who has signed may be charged upon it, but the party who has not signed cannot. Another reasonable argument is this—the cases of *Carrington v. Roots* (6) and *Reed v. Lamb* (7) point to the theory that though there is a difference in language between the two sections they are really in substance identical. But it by no means follows that contracts under the 17th section are absolutely void for all purposes, for the statute itself provides that part performance enables the Court to look at the contract though not in writing; but this could not be if the contract were absolutely void. But we need not pursue the question of principle further, for the case of *Snelling v. Lord Huntingfield* (1) has never been overruled, it is a distinct authority which has been repeatedly followed. It decides that a contract not enforceable under the 4th section of the Statute of Frauds still exists as a contract, and no implied contract can be set up when an express contract is in existence. Therefore, though it may be hard upon the plaintiff, if we are to follow *Snelling v. Lord Huntingfield* (1), the law is clearly laid down for us, and we are bound by its authority.

There is, therefore, still in existence an express contract made on Saturday, the 24th of April, and the plaintiff cannot maintain an action upon it: on the other hand he cannot bring an action on an implied contract, for there is an express one in existence. As to the other matter, it has been held that though the plaintiff has no right to recover on the executory contract, yet if it has been executed to the extent of the plaintiff entering upon the service, that is enough to entitle him to be paid for his services, and it would be difficult to see, if we were not bound by authority, why, if the plaintiff can sue upon a *quantum meruit*, he should not equally be entitled to claim that he shall

not be dismissed without reasonable notice, or without such notice as was stipulated for in the contract. But the point has been expressly decided in *Snelling v. Lord Huntingfield* (1), in which Lord Lyndhurst seems to treat it as a matter of law, that the plaintiff can recover in respect of services actually rendered, but not with respect to notice of dismissal. This seems to be the doctrine of the Common Law. Then if we turn to Equity, we find that it has been held as regards a sale of land that when there has been an entry by one party to the contract, that is an overt act, apparently done under a contract, which enables the Court to look at the contract to see to what actual contract the overt act is referable. I do not see why the same doctrine should not be applied to the case of a contract of service, and as the principles of equity are founded on this, that the Court will not allow a fraud on the part of one party to a contract on the faith of which the other party has altered his position, I do not see why that principle does not embrace a contract of service. At the same time I feel that doctrines of this nature are not to be arbitrarily extended, and that we cannot go beyond what the Courts of Equity have decided as to the principle of relief and the class of cases to which it is to be applied. Therefore, unless we distinctly see that the principles applicable to land ought to be extended to contract of service, though I do not think we are prevented by section 25 of the Judicature Act, 1873, from doing so, I do not think we ought to extend the doctrine of part performance beyond its application by the Courts of Equity.

*Order discharged.*

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Solicitors—W. Tanner, for plaintiff; Pike & Son, for defendant.

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QUEEN'S BENCH, COMMON PLEAS AND EXCHEQUER.

[N. S.]

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[IN THE COURT OF APPEAL.]

(Appeal from the Common Pleas Division.)

1878. }  
Dec. 14. }  
1879. }  
March 22. } BUTTON v. O'NEILL.\*

*Bill of Sale*—17 & 18 Vict. c. 36—*Affidavit*—*Description of Residence and Occupation of Maker.*

The "description of the residence and occupation of the person making or giving" a bill of sale required by 17 & 18 Vict. c. 36 (the *Bills of Sale Act, 1854*), s. 1, to be filed with the bill of sale, is the description of such residence and occupation at the date of the affidavit, and not at the time of the making or giving of the bill of sale.

This was an appeal by the plaintiff from a judgment of the Common Pleas Division, discharging an order *nisi* for a new trial.

The action was an interpleader issue, in which the plaintiff claimed against the defendant, an execution creditor, under a bill of sale given by the debtor, John Pace, who at the date of the giving of the bill of sale was residing at Cranbrook House, Kennington Road, Lower Clapton. After the giving of the bill of sale, but before it was registered, the maker of it changed his residence to "St. Anne's Villa, Wood Green." In the affidavit filed with the bill of sale the maker was described as "now residing at St. Anne's Villa, Wood Green."

At the trial a verdict was directed for the defendant on the ground that the bill of sale was void under section 1 of the *Bills of Sale Act, 1854*, for not stating the place of residence of the maker at the time when the bill of sale was made.

The plaintiff obtained an order *nisi* for a new trial on the ground of misdirection, which order was afterwards discharged by the Common Pleas Division.

On appeal,

*Finlay*, for the plaintiff.—It is more in accordance with the words of the Act,

\* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

and more to the interest of creditors, that the residence of the maker of the bill of sale at the time of the registration should appear in the affidavit than the description of his residence when he gave the bill, the object being to trace the debtor—*Hatton v. English* (1). The *London and Westminster Loan Discount Company v. Chace* (2), is against the plaintiff's contention, but if reason is the other way it may be overruled. See also *Brodrick v. Scalè* (3), *Pickard v. Brets* (4), *Routh v. Roublot* (5), *Jones v. Harris* (6).

The defendant in person.—The cases which are in my favour are rightly decided. Great confusion would result from a change in the law. The object is to identify the giver of the bill of sale; and this is best attained by ascertaining where he was and what he was doing when the bill of sale was given. There is no real hardship on the plaintiff in this case, neither can the argument of hardship prevail. See the observations of Williams, J., in *The London and Westminster Loan Discount Company v. Chace* (2).

*Our. adv. vult.*

The following judgments were delivered on the 22nd of March, 1879:—

BRAMWELL, L.J. — This case is very embarrassing. The question is, whether an affidavit stating truly the residence of the maker of the bill of sale at the time of the making of the affidavit, which was not the residence at the time of the giving of the bill of sale, nor that in the bill of sale, is sufficient under the *Bills of Sale Act, 17 & 18 Vict. c. 36* (7). Sixteen

(1) 7 E. & B. 94; s. c. 26 Law J. Rep. Q.B. 161.

(2) 12 Com. B. Rep. N.S. 730; s. c. 31 Law J. Rep. C.P. 314.

(3) 40 Law J. Rep. C.P. 130; s. c. Law Rep. 6 C.P. 98.

(4) 6 Hurl. & N. 9; s. c. 29 Law J. Rep. Exch. 18.

(5) 1 E. & E. 850; s. c. 28 Law J. Rep. Q.B. 240.

(6) 41 Law J. Rep. Q.B. 6; s. c. Law Rep. 7 Q.B. 167.

(7) By 17 & 18 Vict. c. 36. s. 1, "every bill of sale of personal chattels made after the passing

*Button v. O'Neill (App.), C.P.*

years ago it was held in *The London and Westminster Discount Company v. Chace* (2) that it was right to state the residence in the bill of sale, if it was truly stated then, though changed at the time of the affidavit, and it was said it would not be sufficient to state it as in the case before us. If this authority had been acted on most certainly we ought to follow it. For it is obvious that it is of very little consequence which way the law is, and it would be very mischievous to overrule a case so acted on, and thereby invalidate the registration in many cases. But upon enquiry we have found that the authority has not governed the practice; on the contrary, the invariable form of the affidavit is to state that the residence of the grantor "is" so and so.

Now if that case was rightly decided all these affidavits are wrong. For they all speak of the time present; that is, of the swearing of the affidavit and not of the execution of the bill of sale. The time of each may be the same but it is not sworn to. The matter will appear plain thus—Suppose the affidavit says the residence is A., and suppose that is the residence stated in the bill of sale. Suppose the affidavit was wilfully false, and B. was the residence. Suppose an indictment for perjury,—there could be no conviction. The defendant would not have sworn what was the residence when the bill of sale was given, he would have sworn what it was at the time of the affidavit; but that, according to the above case, is immaterial. That case, however, also decided that the affidavit was sufficient, though it said "*is* a gentleman," and though at the time of the affidavit (which was made some weeks after) the grantor of the bill of sale was in a trade. The difficulty was got over by holding that "*is*" was bad grammar and meant "*was*." But, with all respect, the

grammar was good enough. It is not a reason for saying that grammar is bad, that on the facts appearing, the truth would not be expressed by the language used. It is impossible for us to agree with that part of that decision; and we must, therefore, examine the statute and judge for ourselves. The words are "together with an affidavit of the time of the bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same." As was observed in the case cited, the framer of the statute was loose in his language. It is manifest that the "time of such bill of sale being made or given" means the time when such bill of sale was made or given. The language would have been right if it had been "at the time of the making or giving of such bill of sale." So of the next words. They should in strictness have been, "a description of the residence and occupation of the person who has made or given the same," for it is a past act. But if there had been those words, it is manifest that this affidavit would be right. A description of the residence and occupation of a person who has done a thing means of his residence and occupation at the time of the description. If I were to say to anyone, "Give me a description of the name and occupation of the author of the *Correlation of Forces*," I should not ask where Mr. Justice Grove lived at the time when he wrote and published it, nor what he then was, but where he resides now and what he now is. This is confirmed by the enactment as to bills of sale under executions. For surely, if the execution has been out for a year, as may be the case, it would be the residence when the bill of sale was executed rather than that when the execution issued that should be given. We have said that it matters not which way the law is; but if there is a choice, surely, whatever the object of the statute, it is better that as late a description of the maker of the bill of sale as possible should be given, and the affidavit may be later, cannot be earlier, than the bill of sale. What people want to know is, whether A. B., now being so and so, and residing at —, has given a bill of sale, and surely the later they can hear of

of this Act . . . shall, together with an affidavit of the time of such bill of sale being given and made, and a description of the residence and occupation of the person making and giving the same . . . be filed with the officer acting as clerk of the dockets and judgments in the Court of Queen's Bench within twenty-one days after the making or giving of such bill of sale."

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him the better. If Mary Smith, of A. Street, spinster, marries John Brown, of B. Street, the day after she has given a bill of sale, it would be more easy to trace and identify her if described as Mary Brown, wife of John Brown, of B. Street, than if described, as in the bill of sale, as Mary Smith, of A. Street. We cannot agree with the reasoning of the Court in the case cited. It is to be remembered that the construction there given to the statute and affidavit was admitted to be strained and forced, and was to support the bill of sale, which there has always been a strong tendency to do. It is further to be observed that that decision is in opposition to the opinion of Mr. Justice Wightman. It is true that two Acts of Parliament as to bills of sale have passed since the cases cited, and have not altered the law laid down. It is true also that there is language in all the statutes indicating that the framers of them may have thought that residence and occupation in the bills of sale would be given. If that appeared in the first Act, it would be a legislative interpretation of its meaning, but it does not, and it is not enough that it appears that the framers of the other Acts thought that it would be so, especially when it is borne in mind that in the immense majority of cases the bill of sale and affidavit are contemporaneous. In the result, we would abide by that case so far as it construes the Act, but for the practice not being in conformity with it. So that we can only uphold a large number of bills of sale by holding, as was done in that case, that the language in the affidavit is ungrammatical. This we cannot do. We must, therefore, dissent from that case and reverse the judgment.

*Judgment reversed.*

Solicitors—Carr, Banister, Davidson & Morris, for plaintiff; Defendant in person.

[IN THE COMMON PLEAS DIVISION.]

1878.	}	PELLAS AND COMPANY v. THE NEPTUNE MARINE INSURANCE COMPANY.
Dec. 4.		
1879.		
March 18.		

*Marine Insurance—Assignee of Policy—Action by Assignee—Defence—Set-off—Counterclaim—31 & 32 Vict. c. 86.*

*To an action on a policy of insurance on a ship's cargo brought by the assignee of such policy in his own name by virtue of the 31 & 32 Vict. c. 86, the defendant may set off any debt which he might have set off if the action had been brought in the name of the person who had effected the policy; "any defence" in the 1st section of that Act not being confined to a defence arising on the policy itself.*

*Semble, a counter-claim is within the meaning of the words "any defence" in that section.*

Action by the assignees of a marine policy who sued therein in their own names by virtue of the "Policies of Marine Insurance Act, 1868" (31 & 32 Vict. c. 86). At the trial, before Lord Coleridge, C.J., in London during the Trinity Sittings of 1878 a verdict was entered for the defendants.

A rule *nisi* was afterwards obtained for a new trial, against which

*Herschell* and *A. L. Smith* shewed cause.

*Murphy* and *Webster* argued in support of the rule.

The facts and arguments are fully stated in the judgment.

*Our. adv. vult.*

LOPES, J. (on March 18), delivered the following judgment of the Court (1).

The plaintiffs are merchants; the defendants underwriters. The action is brought on a policy of insurance for the sum of 800*l.* effected in January, 1876, by Harris & Co., a firm at Newcastle, on a cargo of coals, and cash advances, shipped on board the *Toivatar* for a voyage from the Tyne to Genoa. The defendants in consideration of the premium underwrote the said policy and became insurers to Harris & Co. On the 22nd

(1) Denman, J., & Lopes, J.

*Pellas & Co. v. Neptune Marine Ins. Co., C.P.*

of May, 1876, the policy was assigned by Harris & Co. to one Questa, of Genoa, and on the 30th of May, 1876, the said policy was further assigned by Questa to Pastorino & Co., of Genoa, who on the 10th of May, 1877, assigned to the plaintiffs. The *Toivatar*, with the said coals and cash advances, was by the perils insured against lost. The defendants admitted that the plaintiffs were entitled to recover and paid the 300*l.* into Court, except the sum of 40*l.*, which the defendants contended they were entitled to set off (the said 40*l.* being a debt due to the defendants from Harris & Co. incurred in January, 1876).

The case was tried in London, before the Lord Chief Justice of the Common Pleas Division, who directed a verdict for the defendants. A rule was subsequently obtained for a new trial for misdirection, the ground being that the learned Judge ought to have told the jury that the defendants could not set off this 40*l.* against the present plaintiffs.

The question we have to consider on the argument of this rule is whether having regard to the provisions of the Act 31 & 32 Vict. c. 86, this set-off can be pleaded as a defence against the plaintiffs, who are assignees of the policy. The Act is entitled "An Act to enable assignees of marine policies to sue thereon in their own names." Section 1 is as follows:—"Whenever a policy of insurance on any ship, or on any goods in a ship, or on any freight, has been assigned so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured, the assignee of such policy shall be entitled to sue thereon in his own name, and the defendant in any action shall be entitled to make *any* defence which he would have been entitled to make if the said action had been brought in the name of the person by whom, or for whose account, the policy sued upon was effected."

It is contended on the part of the plaintiffs that "any defence" is confined to a defence arising on the policy itself, and cannot cover or include a defence like a set-off, or in fact any defence which does not arise upon the policy. We are unable to place this limited meaning on this word

defence, as it is used in this Act of Parliament. It would be doing violence to the plain language used. Previously to the passing of this Act an assignee of a marine policy could not sue in his own name, he must have sued in the name of his assignor. The Act was passed to remedy this evil, and according to our view the Legislature intended to leave the law in all other respects as it was. It was intended to enable the assignee to sue in his own name, but the defendant was to be entitled to make any defence to the action of this assignee which he might have made to the action of the assignor.

Before this Act, if the action had been brought, as it must have been, in the name of Harris & Co., the defendants could have set off the 40*l.* If the debt set off had accrued since the assignment, and the defendants had notice of the assignment, it might have been replied as an equitable replication, but the 40*l.* beyond all question could have been set off. We think the defendants here are entitled to set off the 40*l.*

A point was taken by the plaintiffs in the argument, which was not raised at the trial. It was that the plaintiffs' claim was for unliquidated damages; and that the 40*l.* could not be set off against such a claim.

We do not think it necessary to consider this point. The point ought to have been taken at the trial. If it had been, the learned Judge would probably have amended the statement of defence by permitting the defendants to add a counterclaim for the 40*l.* If it had been pleaded as a counterclaim we think it would have come within the words "any defence" in the Act. Had the Act not been passed, plaintiffs could only have sued in Harris & Co.'s name. If Harris & Co. had been plaintiffs, defendants could under the Judicature Acts have made this 40*l.* the subject of a counterclaim and defence, and we think this would have been within the meaning of the Act of Parliament.

*Rule discharged.*

Solicitors—Lowless & Co., for plaintiffs; Shum, Crossman & Co., for defendants.

[IN THE COURT OF APPEAL]

1878.  
Dec. 18, 19. } HAYN, ROMAN & COMPANY v.  
1879. } CULLIFORD & CLARKE.\*  
March 22. }

*Ship and Shipping—Bill of Lading—  
Excepted Perils—Negligent Stowage—Li-  
ability of Master.*

The plaintiffs shipped a quantity of sugar in bags, to be carried by the defendants' steam-ship from Hamburgh to London, at an agreed freight. The vessel was chartered by Messrs. P. & K., the plaintiffs having no knowledge of the charter; and the bill of lading which was received by the plaintiffs was signed "P. & K., agents." The bill of lading provided that the sugar should be delivered in good order, "the act of God, the Queen's enemies, pirates, robbers, jettison, barratry and collision, fire on board or on shore, and all accidents, loss and damage of whatsoever nature or kind, and however occasioned, from machinery, boilers, steam and steam navigation, or from perils of the sea or rivers, or from any act, neglect or default whatsoever of the pilot, master or mariners in navigating the ship; the owners of the ship being in no way liable for any of the consequences of the causes above excepted; and it being agreed that the officers and crew of the vessel in the transmission of the goods as between the shippers, owners and consignee thereof be considered the servants of such shipper, owner or consignee."

In an action for damage caused by negligent stowage, — Held, that the damage done to the sugar was a tortious act, in respect of which the plaintiffs could recover from the defendants, whether the latter were bound by the bill of lading or not.

This was an appeal from a judgment of Denman, J., on further consideration, reported 47 Law J. Rep. C.P. 755, where the ascertained facts are fully stated.

The case was argued on appeal by—  
Watkin Williams and Charles Bowen,  
for the defendants.

J. C. Mathew (Butt with him), for the plaintiffs.

*Our. adv. vult.*

\* Coram Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

The judgment of the Court was (on the 22nd of March) delivered by

BRAMWELL, L.J.—This case comes before us in a very unsatisfactory way, so far as relates to one of the questions principally argued before us. We are not told how the goods came to be shipped, and are left to guess with whom the plaintiffs made their contract of carriage. We are, however, satisfied that the plaintiffs are entitled to recover. The case is in a dilemma. Either there was a contract between the plaintiffs and defendants or there was not. If there was a contract between them it is the one contained in or evidenced by the bill of lading. Now it is clear that if that is the contract the defendants are liable—liable on the ordinary contract of a carrier, unless there is (and there is not) some clause in the contract to relieve them. Whether the words in other respects would extend to this case we need not say, as there is one respect in which they do not. They extend to the acts of captain, officers and crew; they do not extend to the acts of the defendants and their other agents and servants, therefore, not to the acts and defaults of the stevedore. But it is by those acts and defaults that the goods were damaged. If, then, there is a contract between the plaintiffs and defendants the defendants are liable. So, also, if there is not. For if there is not, the case is this: The goods were lawfully with the defendants' license on their ship, and they tortiously so dealt with them that they were injured. It was found as a fact that the loading of the oxide was negligent; it was therefore wrongful, not as a breach of contract, but as a wrongful act in itself. If the defendants had done what was done wilfully, that is to say, knowing that it would injure the plaintiffs' goods, it is clear they would be liable. But what difference does it make that they did it ignorantly? It may be asked, where is the duty of care? I answer, that duty that exists in all men not to injure the property of others. This is not a mere nonfeasance which is complained of. It is a misfeasance, an act and wrongful. Suppose A. lets B. a horse, B., with C.'s license, puts it up at C.'s stables for reward to C. from B. C. turns into the

*Hayn, Roman & Co. v. Culliford, App.*

stables loose a vicious horse, known to be so, not intending to injure A.'s horse, but not thinking of the matter. There cannot be a doubt that C. would be liable to A. if the horse was injured. So if he gave the horse bad oats which injured it he would be liable, though he would not be (to A.) if he omitted to feed him. So here justice is done, though indirectly. It is certain that if the charterers sued on the charter in respect of the complaint in this action there would be no defence. And it is certain that they ought so to sue if necessary for the benefit of the plaintiffs.

The judgment must, therefore, be affirmed.

[In concurring with the above judgment, BRETT, L.J., further observed that he considered that the inferences of fact drawn by Denman, J., in the Court below were right.]

*Judgment affirmed.*

Solicitors—W. A. Crump & Son, for plaintiffs;  
Hollams, Son & Coward, for defendants.

*Madeworth, Pilly & Co. v. L. & C. 55-  
Bradlaugh & Wadgate 52-28  
[IN THE COURT OF APPEAL.] 62-455*

(Appeal from the Exchequer Division.)

1879.	}	GIRDLESTONE v. THE BRIGHTON AQUARIUM COMPANY.
Feb. 28.		
Mar. 22.		

*Action for Penalties under 21 Geo. 3. c. 49. ss. 1, 4—Judgment obtained by Covin and Collusion no Bar to subsequent bona fide Action—Evidence of Covin and Collusion.*

*The defendants kept the Brighton Aquarium open to the public on Sunday, the 15th of August, 1875, thereby incurring a penalty under 21 Geo. 3. c. 49. The plaintiff issued his writ in an action to recover the penalty on the 17th of April, omitting to specify in the writ the Sunday in respect of which the action was brought. The defendants continued to keep the Aquarium open every Sunday up to and including Sunday, the 17th of October. On the 20th of October a writ was issued in the name*

*of one R., claiming penalties in respect of all the Sundays from the 15th of August to the 17th of October, both inclusive, and judgment was signed by default in R.'s action on the 28th of October.*

*The defendants pleaded this judgment in bar of the plaintiff's action. Reply, that the judgment was obtained by covin and collusion.*

*It was proved that R.'s action was brought at the request of the defendants; that the defendants' solicitor instructed another solicitor to carry it on in the name of R. That it was intended to protect the defendants from any other actions for penalties in respect of those Sundays, and also to ascertain whether the Home Secretary would remit the penalties under 38 & 39 Vict. c. 80, and that there was an understanding between R. and the defendants that he should not enforce the judgment:—Held, that the judgment obtained in R.'s action was no bar to the plaintiff's action, R.'s action being a nullity, having been, in fact, brought by the defendants against themselves.*

*Held also, by COTTON, L.J., and THESIGER, L.J., that there was ample evidence of covin and collusion on the part of R. and the defendants.*

This action was brought to recover a penalty of 200l. under 21 Geo. 3. c. 49 (1), from the defendants, for having, on Sunday, the 15th of August, 1875, kept open the Brighton Aquarium as a place of entertainment and amusement for the public, who were admitted by the payment of money.

The statement of defence alleged that

(1) By 21 Geo. 3. c. 49. s. 1,—“Any house, room or other place which shall be opened or used for public entertainment or amusement, or for publicly debating on any subject whatsoever upon any part of the Lord's Day called Sunday, and to which persons shall be admitted by the payment of money, or by tickets sold for money, shall be deemed a disorderly house or place, and the keeper of such house, room or place shall forfeit the sum of 200l. for every day that such house shall be open or used as aforesaid on the Lord's Day to such person as will sue for the same.” . . . .

By section 4, “Any person entitled to either of the aforesaid forfeitures may sue for the same by action for debt in any of His Majesty's Courts of Record at Westminster.”

*Girdlestone v. Brighton Aquarium Co. (App.), Exch.*

the defendants were theretofore sued in the Court of Common Pleas in an action at the suit of one Rolfe, for the same causes of action and in respect of the Sunday named in the statement of claim, and for the same penalty, and that judgment was signed in Rolfe's action against the defendants on the 28th of October, 1875, and still remained in force.

In reply, the plaintiff took issue on the statement of defence, and denied that in Rolfe's action judgment was recovered for the same cause of action in respect of the same Sunday in respect of which the present plaintiff was suing; and alleged that Rolfe's action was prosecuted and judgment recovered by covin and collusion between the plaintiff and Rolfe.

The action was tried in April, 1877, in Middlesex, before Cleasby, B., and a special jury, when the following facts were proved:—

The defendants opened the aquarium on Sunday, the 15th of August, 1875, and on every succeeding Sunday up to the 17th of October inclusive.

The writ in this action was issued on the 17th of October, 1875, but did not shew in respect of which Sunday the penalty was claimed.

In the month of October the defendants' solicitor communicated with Mr. Rolfe, and obtained his permission to bring an action in his name against the defendants, upon the understanding that the defendants might make any use they pleased of the action, and that Rolfe would not issue execution or claim any penalties. The defendants' solicitor thereupon employed another solicitor to issue a writ in Rolfe's name against the defendants. That writ was issued on the 20th of October, claiming penalties in respect of all the Sundays from the 15th of August to the 17th of October inclusive, and judgment was signed by default on the 28th of October.

On the 24th of November the statement of claim in the present action was issued, claiming the penalty in respect of the 15th of August.

It was admitted, on the part of the defendants, that the object of Rolfe's action was to protect the defendants against any other actions which might be brought

in respect of any of the Sundays covered by it; and also to ascertain whether the Home Secretary would remit the penalties under the power given him by 38 & 39 Vict. c. 80 (2).

On this evidence the learned Judge directed the jury that there was ample evidence of covin and collusion, and the jury found for the plaintiffs.

A rule nisi was afterwards obtained by the defendants to set aside the verdict and judgment, if any, and enter a verdict for the defendants, on the ground that on the facts proved there was no evidence of covin and collusion; or for a new trial, on the ground that the Judge misdirected the jury in not telling them that there was no evidence of covin and collusion, and in telling them that the judgment in Rolfe's action was a form and of no effect, and that judgment in any action not brought for the purpose of enforcing judgment was covinous and collusive; and in not telling them that in order to be covinous and collusive the judgment in Rolfe's action must have been fraudulently or deceitfully procured, and that to constitute covin and collusion there must be a secret agreement or assent between two or more persons, with a view to the defrauding or prejudicing of another; and on the ground that the verdict was against the weight of evidence. The rule was argued before the Divisional Court of Exchequer on the 6th and 7th of February, 1878, and on the 4th of March, that Court (3) gave judgment discharging the rule.

Against this decision the defendants now appealed.

*Charles Russell and Macdonell (McMillan with them)*, for the defendants.—The Judge was wrong in allowing the jury to find that the agreement was covinous and collusive without finding actual fraud. See *Co. Lit.* book 3, tit. "Remitter," 678,

(2) By 38 & 39 Vict. c. 80. s. 1,—"It shall be lawful for Her Majesty to remit, in whole or in part, any penalty, fine or forfeiture imposed or recovered for any offence under the said Act, whether on indictment, information or summary conviction, or by action or any other process."

(3) Kelly, C.B.; Cleasby, B.; and Pollock, B.



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p. 357*b*, where the definition of covin is thus given: "*Covina, covina*, cometh of the French word *covine*, and is a secret assent determined in the hearts of two or more to the defrauding and prejudice of another." "*Collusion*" also implies fraud—*Garth v. Cotton* (4). *Covin* and *collusion* are a criminal offence under several old statutes, but a man could not be found guilty without actual fraud. See *Viner's Abridgment*, "*Covin*" A. 473; *Winbush v. Talboys* (5) and *Meriel Tresham's Case* (6). Also 4 Rep. 82*b*, *Perry v. Meadowcroft* (7), *Meadowcroft v. Hugenin* (8). The fraud must be of two parties. *Covin* and *collusion* being a criminal matter must be proved strictly. Here there is an absence of direct fraud, and no one is prejudiced, for the plaintiff in the present case had no vested right to the verdict. The object of obtaining the Home Secretary's opinion is a lawful one, and even if the defendants had an improper motive, the act, lawful in itself, is not thereby invalidated—*Shaw v. Gould* (9), *Donegal v. Donegal* (10). There is no *collusion* if the matter was fairly brought before the Court. It was further contended for the plaintiff that his right to the penalties attached as soon as he issued his writ, and that, therefore, Rolfe's action was no bar. But this is not so. Suppose two creditors bring actions against a debtor, the one who issues the first writ does not obtain priority. *Jackson v. Gisleng* (11), *Hutchinson v. Thomas* (12), *Coombe v. Pitt* (13), were penal actions under an obsolete system. The bill or information or original writ in each case shewed accurately the offence charged—See 18 Eliz. c. 5, and *Sperry's Case* (14). But in the present case the writ does not. Be-

sides, the statutes giving penalties to informers do not usually give the penalties to the person who shall first issue process, but the first who can prove his case. 7 Ed. 4. c. 23 gives it "to him that espyeth or maketh proof;" 14 & 15 Hen. 8. c. 2 to "the first finder" of deceitful wares; 4 Hen. 7. c. 2 "the first finder that can prove it," &c.

*The Solicitor-General*, for the plaintiff.—"Covin" does not necessarily imply either conspiracy or fraud. It means a trick or contrivance generally, though usually it is used as equivalent to *collusion*.—Chaucer's Prologue to the *Canterbury Tales*, "But that he knew his sleight and his covine." See also the *Records of the Tower of London*, Cotton's abridged edition, 1651. "The prince being informed of such covin." "So as none do keep himself in sanctuary by such covin." See 4 Hen. 7. c. 20. All the allegations in the preamble to that statute fit the circumstances of the present case. The defendants admit that Rolfe's action was "protective," viz. to prevent the recovery of the penalty imposed by the law, i.e. to defeat an Act of Parliament. This is in itself fraudulent, the fraud being that there is a *bona fide* action brought by a *bona fide* plaintiff, whereas, in truth, it is a sham action brought by a sham plaintiff. An imposition has thus been practised on the Court. If the company had brought the action themselves, the Court would not have entertained it. This is in reality the same thing, and both the company and Rolfe are implicated in the fraud, for Rolfe knew that his name was to be used for a fraudulent (in the sense of covinous) purpose. As to the other point, *Coombe v. Pitt* (13) is a direct authority that priority of writ gives a vested interest in the penalty. It does not appear that the particular offence was described in the writ in that case, any more than in this. The intention to find out the views of the Home Secretary is too remote to affect the question, and was not the principal object of Rolfe's action. That action was a sham, and cannot be made valid by anything which was done with respect to the judgment afterwards.

(4) 3 Atk. at p. 756.

(5) Plowden, 54*b*.

(6) 9 Rep. 109*b*.

(7) 10 Beav. 122.

(8) 4 Moore P.O. 386.

(9) 37 Law J. Rep. Chanc. 433; a. c. Law Rep. 3 H.L. 55.

(10) 3 Philli. Eccl. Cas. at p. 601.

(11) 2 Str. 1169.

(12) 2 Lev. 141.

(13) 3 Burr. 1423.

(14) 5 Rep. 61.

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BRETT, L.J.—In this case the action is brought by the plaintiff against the defendant to recover a penalty, and the answer in point of fact is that another person has recovered judgment for a penalty for the same offence before. To that it is answered first of all, that no such person has recovered such a judgment; and secondly, that if such judgment was recovered, it was recovered by covin and collusion. The case being tried before Mr. Baron Cleasby, it seems to me that his direction to the jury really amounted to this, that they might find that the suggested previous judgment had no effect, although there was no fraud whatever on the part of either party concerned in obtaining that judgment. The jury thereupon finding for the plaintiff, the Exchequer Division have affirmed that judgment. Now if it were necessary, in my opinion, in order to support this decision, to come to the conclusion that there was anything which could in any way be called fraud, I could not agree to it, because it seems to me that there is not a symptom from beginning to end of any fraud in anybody.

In my opinion the transaction was an honest transaction, honest in every part of it, and I see no harm in what was endeavoured to be done. There was a division of opinion as to the propriety of anyone suing for these penalties; and thereupon the solicitor for the defendant company requested a person in whose mind such penalties ought not to be sued for, to bring an action for the penalty of 200*l.* He did that no doubt with two intentions; one intention was that, if other persons should afterwards sue for penalties, the judgment obtained in this suit should be an answer to them. He also did it because it was supposed that if the penalties were recovered, the Home Secretary, exercising his discretion, might (for nobody of course could say whether he would) relieve the defendant company from the payment of the penalty. Neither object seems to me to be illegal or immoral in any sense. The defendants' solicitor requested a person to bring such action, and if you please, for the purpose of protecting the company. It is not shewn that that per-

son knew that at that time another action had been commenced, but to my mind the fact of his not knowing it is not material, for even if he had known it, I should have been of the same opinion as I am now. But the defect in the judgment which was obtained seems to me to have arisen from the over-caution of the defendants' solicitor. If he had asked Rolfe to bring the action, and if Rolfe had instructed a solicitor to bring the action, and he had brought it, although he had bound himself, as it is said, in honour not to insist on execution for the penalty, in the absence of a finding of any fraud by the jury, I should have thought that that was a valid judgment, and that it could not have been set aside under a plea of covin and collusion, because, as it seems to me, the plea of covin and collusion is not proved in its legal effect, unless the jury find there was something wrong in the mind of the parties who had agreed to the judgment. I should think the jury would have to find that there was something wrong in the minds of both parties. But here the defendants' solicitor not only did no more than to request Rolfe to bring an action, but it seems to me that he did not even request him to bring an action. What he did comes to this. He asked Rolfe to allow him, the defendants' solicitor, to bring an action against the defendants, using his name, and the supposed plaintiff did not exercise his judgment upon the action. He exercised no control. He did not instruct anybody; he did not become liable to anybody for what was done; he did not know of the course of the action; he did not in fact, so far as I see, know whether the action was brought or not. The only thing which happened was that he was asked whether he would lend the defendants' solicitor his name in order that the defendants' solicitor might bring an action against the defendants, and that is what the defendants' solicitor did. It shews, to my mind, that the suggested plaintiff never was a plaintiff at all, and that the only plaintiff in that suit was the defendant company. Therefore the defendant company were the plaintiffs in that suit, and were the defendants in that suit. Although, therefore, in form it was

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a judgment, to my mind it was no judgment at all, no judgment which can be said to have been recovered by anybody. If that be so, the plaintiff's judgment is the first judgment that has been recovered, and if the matter had been pleaded, not in the form of covin and collusion, but stating the facts, it seems to me that the facts stated in the replication would have shewn that the judgment asserted in the plea was no judgment at all. Upon that ground, I say deliberately, it being my opinion that there is no evidence of fraud, or of anything which can be deemed fraud, or of anything which anyone ought to call fraud, in my opinion there was no judgment at all, and therefore the plaintiff's is the first judgment, and naturally, therefore, he is entitled to succeed. It is upon that ground, and upon that ground alone, I can say that I shall be a party to affirming the judgment.

COTTON, L.J.—This was a motion by the defendant company by way of appeal from the decision of the Exchequer Division, for a new trial on the ground of a misdirection on the part of Baron Cleasby, before whom the case was tried.

The action was to recover a penalty under the Act 21 Geo. 3. c. 49. This Act makes the penalty a debt due to the person who sues for it. The defendants pleaded a judgment in respect of the same offence, that is, keeping the Aquarium open on Sunday the 15th of August, obtained at the suit of Rolfe. The plaintiff replied that the judgment was obtained by covin and collusion, and the jury found for the plaintiff on the issues; and there was a verdict and judgment for the plaintiff. There was an application to the Exchequer Division for a new trial, but that Court refused to interfere. Hence the appeal to us.

This action was commenced on the 17th of August, 1875. There was evidence at the trial that in October the solicitor of the defendants saw Rolfe, and at his request, Rolfe authorised him to commence in the name of Rolfe an action against the company for penalties incurred for keeping open the Aquarium on the 15th of August, and on the Sundays which intervened between that day and the

20th of October; that the solicitor of the company accordingly instructed the solicitor who appeared on the record for Rolfe; that this solicitor received no instructions in the matter from Rolfe; that on the 21st of October the company suffered judgment by default; that this judgment had never been enforced, and that though there was no positive agreement that this judgment should not be enforced against the company, there was an honourable understanding between Rolfe and the company that the action brought in his name was to be a protective action, and that Rolfe should not issue execution. One of the objects of allowing Rolfe to obtain judgment was to ascertain, in an action in which the plaintiff was not hostile, whether the Home Secretary would exercise the power given him by a recent Act, of preventing penalties being enforced, and it was proved that till the judgment pleaded was confessed, neither Rolfe nor the solicitor who appeared as his solicitor on the record knew of the present action. On this evidence the defendants contended that Rolfe had no intention of defeating the claim of the plaintiff in the present action, and that his intention to protect the company was not sufficient to support the plea of covin and collusion. The learned Judge, in summing up, in effect told the jury that it was not necessary for the support of this plea of covin and collusion to shew that Rolfe knew of the plaintiff's action, that even though the object of the company in procuring the action to be brought was to obtain the decision of the Home Secretary, the judgment would be one obtained by covin and collusion, if in fact there was no intention to take out execution or otherwise enforce the judgment, and if the intention was to protect the company. The jury on this direction found for the plaintiff, and I am of opinion that there was no misdirection, and that there was ample evidence to support the verdict. There was much argument before us as to the meaning of the word covin. It may be assumed that the meaning of the plea is that the judgment was obtained by an agreement between Rolfe and the defendant company. For even if

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the word "covein" does not of itself import an agreement between two, "covein" and collusion do. I am also of opinion that to make an agreement coveinous, there must be something which in the eye of the law is deceit. Now, in an action for penalties, the plaintiff is ordinarily and in the absence of an agreement between him and the defendant, a person independent of and adverse to the defendant seeking to obtain a judgment as a means of enforcing for his own benefit payment of the amount of the penalty. If in such an action, though the plaintiff is apparently independent of the defendant, he has, by an agreement with the defendant, allowed his name to be used as plaintiff, and authorised the defendant or his solicitor to instruct a solicitor to act for him, the nominal plaintiff, and there is an agreement or understanding that judgment in the action shall not be enforced, but shall be used as a protection to the defendant against other actions either already brought or which may be brought to recover a penalty given by statute, then the action is one in which the company are in substance both plaintiff and defendant, and this agreement, or arrangement is an agreement, or arrangement, that the position of the parties to the action, apparently hostile, shall be friendly; that the action and judgment which purport to be an attack on, shall in fact be a protection to the defendant—an agreement that the reality shall be different from what is represented. This, in my opinion, is (even in the absence of any intent to defraud) deceit; and in my opinion though the agreement or arrangement be not legally binding, the judgment obtained or confessed under it will have been obtained by covein and collusion, and cannot be relied on by the defendant in answer to an action in respect of the same matter brought by any other person, and the learned Judge so directed the jury. It was urged upon us that to support the plea of covein and collusion it was necessary that the agreement should be intended to deprive or defraud the plaintiff in the present action of his claim, that Rolfe had no such intention, and that neither he nor his solicitor knew of the present action till after judgment was

confessed in Rolfe's action. But it was stated by the solicitor of the defendants that the object of the action commenced in Rolfe's name was to "protect" the defendants, that is, to defeat the claim of any person who might endeavour to obtain judgment for penalties for keeping open the Aquarium on any Sunday covered by Rolfe's action, and if so, in law the parties must be considered to have intended to defeat the claim of the plaintiff as one of the general body against whose claims Rolfe's action was intended to protect the defendants. It was strongly pressed in support of the appeal that the object of Rolfe's action was to obtain a judgment on which the decision of the Home Secretary could be taken as to the course which he would adopt, and that this was disregarded by Baron Cleasby. In my opinion he was right in so doing. It is unnecessary to consider whether the intention to apply to the Home Secretary (as if Rolfe were an independent plaintiff seeking to enforce the payment of the penalties, while in fact he was as plaintiff in the action a mere name used by the company, by means of which name the company had obtained a judgment for their own protection), was not of itself an argument against the validity of the judgment.

But the circumstance that one of the objects was to apply to and obtain the decision of the Home Secretary does not in my opinion make the judgment less coveinous and collusive, if it was obtained in an action in which there was not any real plaintiff, and under an arrangement that it should be used not to recover penalties from the defendants, but to protect the defendants from the claims of others who might probably sue. I may add that the decision might, independently of the grounds which I have already given, be supported on the ground that in substance there is no judgment; the plaintiff on the record being under the circumstances the defendant under another name. In my opinion the appeal fails, and must be dismissed with costs.

THE SINGER, L.J.—I also am of opinion that the decision of the Court below should be affirmed. The defendants plead

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in bar to an action to recover a penalty, a judgment in favour of a third party for the same penalty. That judgment was obtained in an action which was commenced at the request of the defendants' solicitor, while the plaintiff's action was pending, and was carried through to judgment by the intervention of a solicitor employed by the defendants, and without the interference in any way of the nominal plaintiff. It was an action not brought for the purpose of giving the person named as plaintiff the fruits of it, or indeed any benefit whatever from it, but immediately for the protection of the defendants from any action brought or to be brought against them in respect of the penalties which were claimed in it, and mediately for the purpose of taking the Home Secretary's opinion upon the point whether he would remit such penalties. Apart from any question on the pleadings, is it possible that a judgment so obtained and in such a suit can bar the plaintiff's action? Was the action in which it was obtained in substance anything more than one in which the defendants were the real plaintiffs as well as the nominal and real defendants? I think not, and if it was not, then the mere statement of the character of the action is a sufficient argument against the judgment obtained in it operating as a bar to the present action. But the plaintiff has, in his reply to the statement of defence, impeached the judgment upon the special ground of "covin and collusion." The argument, therefore, before us has been addressed to the question whether the facts of the case establish that the judgment is so impeachable. In dealing with this question I assume that Rolfe when he assented to an action being brought in his name was unaware of the fact of the present action having been commenced. I assume too that the jury have negatived fraud in the sense of there having been a wicked mind and intent on the part of Rolfe and the defendants or either of them in instituting or assenting to the institution of the proceedings which led to this judgment. I think, however, that they are legally guilty both of covin and collusion. Although the word covin is sometimes used, especially by old writers,

in the sense of a trick or contrivance devised by one person alone, I think that in a case like the present, and where it is used in conjunction with the word "collusion," it imports a trick or contrivance planned by both parties to the transaction which is said to be tainted with it. I go further and take it to be a trick or contrivance, which must be proved to be, to use the language in *Co. Litt.* 357, "to the defrauding or prejudicing of another." Assume all that, and still the contention of the defendants appears to me to be inadmissible. If Rolfe had known of and intended to defeat the plaintiff's *bona fide* action by permitting a sham action to be brought in his own name, it is clear that he would have been a party to a trick or contrivance for defrauding the plaintiff. Prejudicing a *bona fide* action for a statutory penalty by the secret contrivance of a sham one, can be nothing less than defrauding. Indeed it is hardly disputed on the part of the defendants that under such circumstances the allegation of covin and collusion would be established. But if so, surely the intention to prejudice or defraud a class of persons including the plaintiff must equally establish the allegation, although the plaintiff was not known to be one of the class intended to be prejudiced or defrauded. There is legislative authority for this view—the statute 4 Hen. 7. c. 20, which was framed for the purpose of preventing proceedings taken in good faith to recover penalties being defeated by sham protective actions, made punishable under the name of covin and collusion, such actions not only when brought for the purpose of defeating *bona fide* proceedings already taken, in other words prejudicing a particular individual, but also of defeating such proceedings although not yet commenced, in other words prejudicing an individual not yet identified and known. The statute also provided that such covin and collusion might be averred in answer to any plea setting up a recovery in a covinous and collusive action in bar to *bona fide* proceedings. I will only add that although, as has been suggested, the motives of the defendants and Rolfe in endeavouring to obtain the decision of the Home Secretary as to the remission

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of penalties may have been good, and the end, the keeping of the Aquarium open on Sundays, may have been a desirable one, it appears to me impossible to hold with reason that the co-existence of such motives or such an end with motives, ends and acts which, standing by themselves, constitute covin and collusion, can make the case any the less one of covin and collusion, or in any way remove or lessen the legal consequences which covin and collusion entail.

*Judgment affirmed.*

Soliditors—Bridges, Sawtell, Hayward & Co., for plaintiff; Benham & Tindell, for defendants.

*Commissioner of the Court of Appeal 17th Dec 1896.*

[IN THE COURT OF APPEAL.]

1878.	}	BRYANT v. LEFEVER AND OTHERS.*
Dec. 12.		
1879.		
March 22.		

*Easement—Prescription—Access of Air—Obstruction—Nuisance.*

*The defendants raised the wall of their house so as to overtop the chimneys of the adjoining house of the plaintiff, and piled timber upon their roof, causing the plaintiff's chimneys to smoke:—Held, that the plaintiff had no cause of action, on the grounds, first, that the free access of air to the plaintiff's premises was not an easement for which he could prescribe either by statute or at Common Law; and secondly, that no nuisance had been caused by the defendants, since the smoke which caused the annoyance to the plaintiff was produced by the plaintiff on his own premises.*

This was an appeal from a judgment of Lord Coleridge, C.J., at the trial.

The statement of claim alleged that the plaintiff resided at 353, Hackney Road, Middlesex, and that the defendants were timber merchants, occupying premises adjoining the plaintiff's house.

\* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

That the plaintiff was the lessee of the house aforesaid, in which he resided, for a term of years ending on the 9th of September, 1884, and that the premises occupied by the defendants were, till a very recent date, used as a dwelling-house similar to that occupied by the plaintiff. That before the circumstances thereafter set forth, the plaintiff had always, and for much more than twenty years, a free access of air to his chimneys which were on the side of his house next to the house of the defendant, and that about the month of June, 1876, and after the plaintiff was in occupation of the said house, the defendants raised the walls of their house so high, and put stacks of timber on the roof of the said house, so as to interfere with and prevent the free access of air to the plaintiff's chimneys and prevented a proper draught in the same, and that the plaintiff was totally unable to use his said chimneys, and the enjoyment by the plaintiff of his house was much diminished and injured.

The statement was amended at the trial by the addition of a paragraph to the effect that by reason of the before-mentioned facts the defendants created a nuisance, to the injury and prejudice of the plaintiff in respect of his enjoyment of his said house and premises. The plaintiff claimed damages and an injunction.

The defence consisted of a denial of all the material allegations in the statement of claim, and a denial that the plaintiff had any claim at law to a free access of air to his chimneys at all.

At the trial evidence was given of the facts alleged in the statement of claim, and in summing up his Lordship asked the jury first whether there had been for more than twenty years free access of air to the chimneys of the plaintiff's house; and secondly, whether the erection of the defendants' wall materially interfered with the comfort of human existence on the plaintiff's premises. The jury answered both questions in the affirmative, and his Lordship gave judgment for the plaintiff.

Against this judgment the defendants appealed on the ground that in spite of

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the findings the judgment ought to have been entered for the defendants.

*Gates and Edward Clarke*, for the defendants.—There can be no prescriptive right to a free access of air from the plaintiff's land—*Webb v. Bird* (1). It was alleged there that the plaintiff had enjoyed for twenty years the free access of wind to his windmill, and that the defendant had disturbed the enjoyment. But it was held that the action would not lie, the free access of air being like the case of subterraneous water, flowing in no defined channel—*Chasemore v. Richards* (2), and not like lateral support of land by land—see *Angus v. Dalton* (3). As to the question of nuisance, the defendant has not in any way invaded the plaintiff's property. If he had poured a current of foul air upon the plaintiff's premises it would have been another matter. But the annoyance here is caused by the plaintiff's own smoke.

*Cock* (with whom was *Staveley Hill*), for the plaintiff.—An action may lie as well for the stopping of wholesome air as of light (per Wray, J., *Aldred's Case* (4)), and there may be a prescriptive right to a supply of air, though the right may not be of the same nature as that to light. It is to be observed, however, that the words "light and air" are always used in decrees as if the two things went *pari passu*—see *Dent v. The Auction Mart Company* (5), where it is shewn that the true ground of action with respect to air is generally nuisance—see *Waller v. Selfe* (6). The plaintiff claims, however, under the presumption of a lost grant. That presumption now arises as a matter of law from twenty years' enjoyment, and the findings of the jury in this case are con-

clusive in favour of the presumption. The jury need not find that in fact there had been a grant—*Deeble v. Lineham* (7). *Webb v. Bird* (1) is distinguishable. The right claimed in that case was too vague. It was held there that the presumption did not arise as no intervention to prevent the enjoyment had been possible. But that is not the case here.

*Gates* replied.

*Our. adv. vult.*

The following judgments were delivered on March 22 :—

BRAMWELL, L.J.—The plaintiff says that he is possessed of a house, that for more than twenty years this house and its occupants have had the wind blow to, over and from it, and that he has, as so possessed, the right that it should continue to do so. That the defendants have interfered with this right and prevented the free access and departure of the wind. He adds that they have committed a nuisance to him as so possessed. He has proved that he is possessed of a house more than twenty years old, that the wind had access to it and passage over it for twenty years without the hindrance recently caused by the defendants; that the defendants have caused a hindrance by putting on the roof of their house (which is as old as the plaintiff's), timber to a considerable height, thereby preventing the wind blowing to and over the plaintiff's house when in some directions, and passing away from it when in others; that this causes his chimneys to smoke as they did not before, to the extent of being a nuisance. The question is if this shews a cause of action. First, what is the right of the occupier of a house in relation to air, independently of length of enjoyment? It is the same as that which land and its owner or occupier have, it is not greater because a house has been built. That puts no greater burthen or disability on adjoining owners. What then is the right of land and its owner or occupier? It is to have all natural incidents and advantages as nature would produce them. There is a right to all the light and heat that would come, to

(1) 10 Com. B. Rep. N.S. 268; s. c. 13 Com. B. Rep. N.S. 841; s. c. 30 Law J. Rep. C.P. 384; s. c. 31 Law J. Rep. C.P. 335.

(2) 7 H.L. Cas. 249; s. c. 29 Law J. Rep. Exch. 81.

(3) 47 Law J. Rep. Q.B. 163; s. c. 48 Law J. Rep. Q.B. 225; s. c. Law Rep. 3 Q.B. D. 85; s. c. Law Rep. 4 Q.B. D. 162.

(4) 9 Rep. 58 b.

(5) 35 Law J. Rep. Chanc. at p. 565; s. c. Law Rep. 2 Eq. at p. 252.

(6) 4 De Gex & S. 315; s. c. 20 Law J. Rep. Chanc. 433.

(7) 12 Ir. C.L.R. 1.

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all the rain that would fall, to all the wind that would blow; a right that the rain which would pass over the land should not be stopped and made to fall on it, a right that the heat from the sun should not be stopped and reflected on it, a right that the wind should not be checked, but should be able to escape freely; and if it were possible that these rights were interfered with by one having no right, no doubt an action would lie. But these natural rights are subject to the right of adjoining owners, who for the benefit of the community have and must have rights in relation to the use and enjoyment of their property that qualify and interfere with those of their neighbours; right to use their property in the various ways in which property is commonly and lawfully used. A hedge, a wall, a fruit tree, would each affect the land next to which it was planted or built. They would keep off some light, some air, some heat, some rain when coming from one direction, and prevent the escape of air, of heat, of wind, of rain when coming from the other. But nobody could doubt that in such case no action would lie. Nor will it in the case of a house being built and having such consequences. That is an ordinary and lawful use of property as much so as the building of a wall or planting of a fence, or an orchard. Of course the same reasoning applies to the putting of timber on the top of a house which, if not a common, is a perfectly lawful act, and it would be absurd to suppose that the defendants could lawfully put another storey to their house with the consequences to the plaintiff of which he complains, but cannot put an equal height of timber. These are elementary and obvious considerations, but if borne in mind will assist very materially in the decision of this case.

The plaintiff, then, merely as possessed of land or house has not the right claimed. But he goes further, and says that the house and its owner and occupiers have had the enjoyment of this benefit for twenty years. He, therefore, relies on that as shewing a prescriptive title or title by lost grant. Whether he has so stated his claim as to raise such a case,

it is not necessary to say, for we are of opinion that even if he has, he has not established it; that no such right as he claims can be established by mere enjoyment, without interruption for however long a period. It certainly cannot be claimed under the Prescription Act; nor can it by lost grant, unless of such a character that it could be claimed by the common law prescription. For the expedient of a lost grant is only applicable to cases where something prevents the application of the common law prescription. We do not say there might not be an express grant or covenant not to interfere with the passage of air over neighbouring property, which could be enforced against the grantor or covenantor, and even against his assigns with notice. Whether it could be enforced against his assigns without notice, it is not necessary to say. But the "lost grant" doctrine is ancillary to the "common law prescription" doctrine. Can this right, then, be claimed under that? Now, certainly, the land as such has enjoyed this as of right for all time, since the sun first shone and the wind first blew; and it is not a case of twenty or any finite number of years. But that enjoyment is the result of the natural right of which we have spoken, and not of an acquired right. Then, does the existence of a house on the land for twenty years make any difference? None. The owner of the land enjoyed the free passage of the air over his land when it was a field subject to the right of his neighbours to build on their own land, to do on their own land any lawful act. He now enjoys it over his own land, with a house on it, subject to the same rights.

If the house on his land is less commodious by reason of any lawful act of his neighbour done on the adjoining land, then, to use the expression of the Judges in *Bury v. Pope* (8), "it was his folly to build so near to the other's land." It may be said that if this reasoning be correct, it is applicable to lights. So it is to a great extent, and anyone who reads the cases relating to the acquisition



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of a right to light will see that there has been a great difficulty in establishing it on principle. In *Webb v. Bird* (1) Mr. Justice Willes says it is anomalous, and see per Blackburn, J., in that case in the Exchequer Chamber. In the case referred to of *Bury v. Pope* (8), it was held that where there are owners of adjoining pieces of land, and one builds a house, and for thirty or forty years has access of light to it, yet the other may build a house adjoining, and shut out the light. This shews the general principle, though the law as to light is now different, as a right to it is now gained by enjoyment. But there is this difference between this claim and the claim to light. The right in that case is always limited to the particular window or aperture through which the light and air had access. It is one, therefore, against which an adjoining owner can defend himself by blocking it up within the period necessary for the gaining of a right. Lord Wensleydale thought this a very strong thing, and a great burthen on the adjoining landowner—*Chasemore v. Richards* (2). But here the claim is of such a character that its enjoyment could only be prevented by surrounding the land with erections as high as it might at any time be wanted to build on the land. The principle of *Chasemore v. Richards* (2) is applicable, namely, that the right claimed is not one the law allows, being too vague and uncertain; one the acquisition of which the adjoining owner could not defend himself against; and that the remedy of the plaintiff in such a case as this is to build higher, as in such a case as that it was to dig deeper. We are of opinion that on principle the plaintiff fails to make out his right as claimed. The authorities are to that effect. *Webb v. Bird* (1) is really in point. It is true that in that case the mill appeared to have been built in 1829. I believe the date of the building of the plaintiff's house in this case did not appear; it will hardly be supposed to be 100 years old, but the reasoning in that case would be equally applicable to a claim by prescription from time whereof the memory of man runneth not to the contrary. The date of the building of the

plaintiff's house could not be shewn. It is really hardly necessary to notice the other cases, which are sufficiently dealt with by the Judges in *Webb v. Bird* (1). We may, however, mention *Roberts v. Macord* (9), where Patteson, J., was of opinion that a claim like the present could not be supported; all the reasoning and all the considerations that prevailed in *Chasemore v. Richards* (2) are opposed to it. Where it has been said that there is a right to air, there has been good ground for supposing that the wholesomeness of the air has been interfered with, or that there was some peculiarity in the land or building which made the air necessary in a definite place. We are of opinion, then, that the action cannot be maintained on this ground.

But it is said, and the jury have found, that the defendants have done that which has caused a nuisance to the plaintiff's house. We think there is no evidence of this. No doubt there is a nuisance, but it is not of the defendants' causing. They have done nothing in causing the nuisance. Their house and their timber are harmless enough. It is the plaintiff who causes the nuisance by lighting a coal fire in a place the chimney of which is placed so near the defendants' wall that the smoke does not escape, but comes into the house. Let the plaintiff cease to light his fire; let him move his chimney; let him carry it higher, and there would be no nuisance. Who, then, causes it? It would be very clear that the plaintiff did, if he had built the house or chimney after the defendants had put the timber on their roof; and it is really the same though he did so before the timber was there. But (what is in truth the same answer) if the defendants cause the nuisance, they have a right to do so. If the plaintiff has not the right to the passage of air, except subject to the defendants' right to build or put timber on their house, then his right is subject to their right, and though a nuisance follows from the exercise of their right, they are not liable. *Sic utere tuo ut alienum non ledas* is a good maxim. But, in our

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opinion, the defendants do not infringe it. The plaintiff would, if he succeeded. We are of opinion that judgment should be for the defendants on the cause of action the subject of this appeal.

COTTON, L.J.—This is an appeal of the defendants from so much of a judgment of Lord Coleridge in favour of the plaintiff, as was given in respect of the interruption of air to the plaintiff's chimney, caused by the defendants.

The jury have found—first, that there had been for more than twenty years free access of air to the chimneys of the plaintiff's house; second, that the defendants interfered with it; third, that the erection of the defendants' wall sensibly and materially interfered with the comfort of human existence in the plaintiff's premises; fourth, that the plaintiff sustained damage, 40*l.* by the building of the defendants' wall, and 20*l.* by falling of timber and other matters from the defendants' stacks on the plaintiff's premises. The first question is whether the plaintiff has, either as a natural right of property, or as an easement, a right as against the defendants to have the access of air to his chimney without any interruption by the defendants. In my opinion he has no such right.

In my opinion, it would be a contradiction in terms to say that a man has a natural right against his neighbour in respect of a house, which is an artificial addition to, and not a user of the land; that the owner of the house has, as against his neighbour, no natural rights in respect of his house is shewn by the cases as to subjacent and lateral support. These shew, that while every owner of property has, independently of user, a natural right to support for his land, if he adds buildings to his land, and thereby requires an increased support, he, in the absence of express grant, can only acquire a right to such support by user; that is, by way of easement.

The right, if any, of the plaintiff to the uninterrupted flow of air to his chimney must therefore be by way of easement. Cases to prevent, or to claim damages for interference with ancient lights, are frequently spoken of as cases of light and

air, and the right relied on as a right to the access of light and air. But this is inaccurate. The cases, as a rule, relate solely to the interference with the access of light, and in no case has any injunction been granted to restrain interference with the access of air. It is unnecessary to say whether, if the uninterrupted flow of air through a definite aperture or channel over a neighbour's property has been enjoyed as of right for a sufficient period, a right by way of easement could be acquired. No such point is raised in this case, and I am of opinion that a right by way of easement to the access of air over the general surface of a neighbour's land cannot be acquired by such enjoyment. For this *Webb v. Bird* (1) is an authority, and as the last decision in that case was in the Exchequer Chamber, it would be sufficient to rely upon the authority of that case. But I think it better to say that I entirely agree with that decision, and with the reasons given in this case by Lord Justice Bramwell. In my opinion, therefore, the plaintiff has no right in respect of the flow of air to and from his chimney.

Everyone, however, has a natural right to enjoy the air pure and free from any noxious smells or vapours, and anyone who sends to his neighbour's land that which makes the air there impure is guilty of a nuisance.

Here it is found that the erection of the defendants' wall has sensibly and materially interfered with the comfort of human existence in the plaintiff's house; and it is said that this is a nuisance for which the defendants are liable. Ordinarily that is so; but the defendants have done it, not by sending on to the plaintiff's property any smoke or noxious vapour, but by interrupting the egress of smoke from the plaintiff's house, in a way to which the plaintiff has no legal right.

The plaintiff creates the smoke which interferes with his comfort. Unless he has, as against the defendants, a right to get rid of this in the particular way which has been interfered with by the defendants, he cannot sue the defendants, because the smoke made by himself, for which he has not provided any effectual

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means of escape, causes him annoyance. It is as if a man tried to get rid of liquid filth arising on his own land, by a drain into his neighbour's land. Until a right had been acquired by user the neighbour might stop the drain without incurring liability for so doing. No doubt, great inconvenience would be caused to the owner of the property in which the liquid filth arises. But the act of his neighbour would be a lawful act, and he would not be liable for the consequences attributable to the fact that the man had accumulated filth without providing any effectual means of getting rid of it.

I am of opinion, therefore, that so much of the judgment as is appealed from must be reversed.

*Judgment reversed.*

Solicitors—Sorrrell & Son, for plaintiff; Wilkins, Blyth & Fanshawe, for defendants.

*Hallington v. Mutual Life Assurance Co.*

[IN THE COURT OF APPEAL.]

(Appeal from the Exchequer Division.)

1879. }  
Feb. 25. } BUNTZ v. SHEFFIELD.\*  
March 22. }

*Appeal from Judge at Chambers—Time for Appealing—Long Vacation—Rules of the Supreme Court, Order LIV. rule 6.*

*Under Order LIV. rule 6, an appeal from an order of a Judge in chambers after the expiration of eight days is too late, although such order was made in the long vacation, and no Divisional Court has sat during the eight days succeeding the date of the order.*

*Crom v. Samuel* (46 Law J. Rep. C.P. 1; s. c. Law Rep. 2 C.P. D. 21) approved.

This was an appeal from a judgment of the Exchequer Division, affirming a decision of Manisty, J., at chambers.

The action was brought upon a promissory note. On the 29th of August,

\* *Coram* Brett, L.J.; Cotton, L.J.; and Thesiger, L.J.

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Manisty, J., at chambers made an order that the plaintiff should be at liberty to sign judgment. Next day the defendant gave notice of appeal, and took out a summons to extend the time for appealing. This summons was heard on the 2nd of September, when Field, J., made an order extending the time for appealing, conditionally on the payment into Court by the defendant of the amount claimed. The defendant did not pay the money into Court, and on the first day of Michaelmas sittings (no Divisional Court having sat in the interim) appealed in the Exchequer Division against the original order of Manisty, J. The Divisional Court were divided in opinion, but held, on the authority of *Crom v. Samuel* (1), that the appeal was out of time; and the defendant now appealed to the Court of Appeal.

*Saxton*, for the defendant, cited *Forrest v. Davies* (2) and *Hallams v. Hills* (3).

*Douglas Kingsford*, for the plaintiff, relied upon *Crom v. Samuel* (1) and *Deykin v. Coleman* (4).

*Our. adv. vult.*

On the 22nd of March the following judgment was delivered by

THESIGER, L.J.—This is an appeal from the affirmance by the Exchequer Division of an order by Manisty, J., made at chambers, under which the plaintiff was empowered, pursuant to the provisions of Order XIV. rule 1, to sign judgment for the amount of a promissory note sued upon. The learned Judge's order was made in the vacation, that is to say, upon the 29th of August of last year. On the 30th of the same month notice of appeal to the Divisional Court was given, and on the same day a summons to extend the time for appealing was taken out. That summons was heard on the 2nd of September by Field, J., who made an order extending the time to the first sitting of the Divisional Court, conditionally upon payment into Court within fourteen days

(1) 46 Law J. Rep. C.P. 1; s. c. Law Rep. 2 C.P. D. 21.

(2) Weekly Notes, 1878, p. 88.

(3) 24 W.R. 956.

(4) 25 W.R. 294.

*Runts v. Sheffield (App.), Exch.*

of 433*l.* 10*s.* 8*d.*, being the amount of the note and interest. The money was not paid into Court within the fourteen days or at any other time, and no sitting of the Divisional Court having taken place in the interim, the defendant at the first sitting of the Divisional Court in Michaelmas sittings appealed against the order of Manisty, J. The Divisional Court held that the appeal was out of time, and the order appealed against stood affirmed. Upon appeal to this Court the question of time is again raised, and has to be decided. The rule upon which the question turns is rule 6 of Order LIV., which is in these terms:—"In the Queen's Bench, Common Pleas and Exchequer Divisions, every appeal to the Court from any decision at chambers shall be by motion, and shall be made within eight days after the decision appealed against" (5).

The Court below has construed the rule as meaning that the defendant was bound to bring on his appeal within eight days after the decision appealed from unless the time was extended; and I am of opinion that this construction is correct. In the first place, the language of the rule is unambiguous. It directs that the appeal shall be by motion, and shall be made within eight days after the decision appealed against. Now, if it is not to be read in its plain and literal meaning, how is it to be read? Are the words "if practicable," to be taken as understood? If so, are we to read it, "and if not practicable within eight days then upon the first practicable day afterwards?" or are we to read it, "within eight practicable days, i.e., eight days on each of which the Divisional Court is sitting?"

If *Hollams v. Hills* (3) is to be treated as it has been argued it should be, as an authority upon the construction of this rule, the latter alternative would seem to be the proper one, in which case a very indefinite and at times unreasonably ex-

tended period within which to appeal from orders at chambers would be given.

But whichever alternative be adopted, does it not entail the making instead of the interpreting of a rule? And is there any such manifest inconsistency with other rules, or any such necessary hardship consequent upon the interpretation of this particular rule according to its literal meaning, as to induce us to depart from that meaning? I think not. The rules have provided against hardship, and have at the same time, by their provisions for the exclusion altogether of certain days and the inclusion of other days on certain occasions in the computation of time, indicated, according to the maxim, *Expressum facit cessare tacitum*, that they intended no implication to arise as regards other days or in reference to other occasions than those provided for.

Suppose the eighth day in this case had expired on a Sunday, then the motion might have been made on the day following, pursuant to Order LVII. rule 3, which provides as follows:—"Where the time for doing any act or taking any proceeding expires upon a Sunday or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open."

By the same rule, if the doing of an act on the last day upon which it is to be done is only possible if the offices are open, then if the offices are not open on the particular day, the act may be done on the day on which the offices shall next be open.

Where the rules wish to exclude for a particular purpose the long vacation from the computation of time, we find express provision, as in the case of filing, amending or delivering any pleading, by rule 5 of Order LVIII. This is a reason for not excluding the long vacation from the computation of time for the purpose of appeal from chambers to the Divisional Court; because the rules contemplate that such a Court will sit during vacation; see section 28 of the Act of 1873, and

(5) This rule has since been amended by the Rules of the Supreme Court, March, 1879, by the addition of the words, "or if no Court to which such appeal can be made shall sit within eight days, then on the first day on which any such Court may be sitting after the expiration of such eight days."

*Runtz v. Sheffield (App.), Exch.*

Order LXI. rules 5 and 6. And lastly, any hardship or injustice which might otherwise be worked by the strict interpretation of such rules as that which is in question in this case, can be remedied by rule 6 of Order LVIII., which gives the widest power of enlarging the time appointed for the performance of an act either before or after the expiration of such time.

Apart, then, from authority, I am of opinion that the terms of the rules upon which the present question arises are absolute and universal in their application, except so far as in other rules no qualification, limitation or exception is to be found; and consequently that the order of the Court below was right. As regards authority, there is in favour of the view I have expressed a distinct decision turning upon the construction of this particular rule in *Orom v. Samuel* (1); while *Hollams v. Hills* (3), which is cited in that case in support of the appellant's contention, is a case upon another rule, couched in different language, and a case the decision in which may well stand with that in *Orom v. Samuel* (1) and the present case. I am of opinion therefore that this appeal should be dismissed.

BRETT, L.J., and COTTON, L.J., in concurring with the above judgment, expressed great reluctance in doing so.

*Appeal dismissed.*

Solicitors—J. P. Poncione, for plaintiff; Champion, Robinson & Poole, for defendant.

[IN THE EXCHEQUER DIVISION.]

1879. } GREGSON (*appellant*) v. POTTER  
March 21. } AND OTHERS (*respondents*).

*Toll—Pier Act—Exhibition of Tolls on a Board—10 Geo. 4. c. xliia.*

[For the report of the above case, see 48 Law J. Rep. M.C. 86.]

[IN THE QUEEN'S BENCH DIVISION.]

1879. } THE COUNCIL OF THE PHAR-  
March 15. } MACUTICAL SOCIETY v. THE  
April 5, 23. } LONDON AND PROVINCIAL  
SUPPLY ASSOCIATION (LIM.).

*The Pharmacy Act, 1868* (31 & 32 Vict. c. 121), ss. 1, 15—*Offence—Sale of Poisons by Unqualified Persons—Stores with Drug Department—Application of Statute to Corporations—Action for Penalties—Statute 15 & 16 Vict. c. 56. s. 14.*

By 31 & 32 Vict. c. 121. s. 1, it is enacted that "it shall be unlawful for any person to sell or keep open shop for retailing, dispensing or compounding of poisons, unless such person shall be a pharmaceutical chemist or a chemist or druggist within the meaning of this Act." By section 15 a penalty is imposed on "any person" for selling poisons or keeping open shop for the sale of poisons in contravention of the Act.

The defendants were a limited company registered in 1878 under the Companies Acts, and formed for the purpose of purchasing and acquiring the trade of a wholesale and retail grocer and general warehouseman then carried on by M. The business of the company included, amongst other departments for the sale of various goods, a drug department, which was an open shop for the retailing, dispensing and compounding poisons within the meaning of 31 & 32 Vict. c. 121. The business of this particular department was conducted by L., with the aid of two qualified assistants. L. was a pharmaceutical chemist or a chemist and druggist, and was also a shareholder, but he acted as a servant of the company and was paid a salary or wages. Neither the managing director or any other shareholder were qualified to sell poisons:—

Held, that the defendant company was included under the term "person," and was liable accordingly to a penalty under 31 & 32 Vict. c. 121, for having sold poisons and kept open shop for the sale of poisons in contravention of that Act.

This was an appeal from the decision of the Judge of the Bloomsbury County Court in favour of the defendants in an action brought in the County Court by the plaintiffs against the defendants, to

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recover a penalty from the defendants under the 31 & 32 Vict. c. 121, for having sold poisons and kept open shop for the sale of poisons in contravention of that Act.

By the first section of the statute it is enacted that "it shall be unlawful for any person to sell, or keep open shop for retailing, dispensing or compounding poisons, or to assume or use the title 'chemist and druggist' or chemist or druggist, or pharmacist or dispensing chemist or druggist in any part of Great Britain, unless such person shall be a pharmaceutical chemist or a chemist and druggist, within the meaning of this Act, and be registered under this Act."

And by the 15th section "any person who shall sell or keep an open shop for the retailing, dispensing or compounding poisons, or who shall take, use or exhibit the name or title of chemist and druggist, or chemist or druggist, not being a duly registered pharmaceutical chemist, or chemist or druggist, or who shall take, use or exhibit the name or title of pharmaceutical chemist, pharmacist or pharmacist, not being a pharmaceutical chemist, shall, for every such offence, be liable to pay a penalty or sum of five pounds, and the same may be sued for, recovered and dealt with in the manner provided by the Pharmacy Act for the recovery of penalties under that Act."

By the Pharmacy Act (15 & 16 Vict. c. 56), s. 12, the penalty recoverable under that Act is to be recovered "in England or Wales by plaint under the provisions of any Act in force for the more easy recovery of small debts and demands."

The defendants are a company registered under the Companies Acts, 1862 and 1867, as a limited company, with a nominal capital of 10,000*l.* divided into 1,000 shares of 10*l.* each. Of these one William Mackness holds 564 shares fully paid up; six persons (one of whom was Henry Edward Longmore) hold five shares with 2*l.* 10*s.* paid on each share; three persons hold one share each with 2*l.* 10*s.* paid on each share; the remaining shares are unallotted.

The defendants' company was registered on the 29th of January, 1878, and was formed to purchase or acquire the trade

or business of a wholesale and retail grocer and general warehouseman, then carried on by William Mackness, at 113, Tottenham Court Road. Mackness is the managing director of the company. He is not a duly registered pharmaceutical chemist, or chemist and druggist within the meaning of the Pharmacy Act, 1868. Henry Edward Longmore is a pharmaceutical chemist or chemist and druggist within the meaning of the Act, but no other shareholder is so. The business of the company is carried on as that of Mackness was before the company was formed, at 113, Tottenham Court Road, and includes, amongst other departments for the sale of various goods, a chemist's and druggist's shop or drug department which is an open shop for the retailing, dispensing and compounding poisons within the meaning of the Pharmacy Act, 1868. Longmore, as has been stated, is, and at the time of the sale of the poisons in question was, a duly registered chemist and druggist within the Pharmacy Act, 1868, and the business of the drug departments was conducted by him with the aid of two qualified assistants. He with the two assistants attended regularly to the drug department, and to nothing else. He and his assistants were the servants of the company and were paid by salary or wages.

Upon this state of facts the question raised was whether the defendants' company, as such, was amenable to the penal enactments of the statute.

[The above facts are taken from the judgment of Cockburn, L.C.J.]

*The Attorney General (Sir John Holker), and Lumley Smith, for the appellants.*—It can hardly be contended that if the respondents were held not to be liable, the very object which the Legislature had in view in passing the Pharmacy Act, 1868 (31 & 32 Vict. c. 121), and regulating the sale of poisons, might be easily defeated. It will no doubt be contended that the word "person" in section 15 does not include a corporation, and that accordingly this action cannot be maintained. But if this be so, anybody who wished to set the statute at defiance has nothing to do but to form an incorporated

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company, who can then lawfully carry on business as chemists and druggists, and sell poisons wholesale and retail without possessing any qualifications at all. The object of the statute unquestionably was to prevent the sale of poisons except by properly qualified persons, and though it may well be that a mixed business such as is carried on by the defendants may not have been present to the framers of the statute, the intention of the Legislature was to place companies on the same footing as partnerships or individuals. The term "person" is, therefore, intended to apply to corporations as well as individuals, the prohibition as to the sale of poisons except by persons qualified being general. See also 7 & 8 Geo. 4. c. 28. s. 14, under which persons include a body corporate (1).

[COCKBURN, L.C.J.—That statute has no application, being limited to proceedings on indictment and summary conviction.]

The County Court Judge seems to have decided in favour of the respondents on the ground that the management of the drug department was entrusted to the care of a qualified person. But if this were held to be a sufficient answer to these proceedings, the security intended to be provided by the statute would be seriously diminished, because, in the absence of the person qualified, drugs would have to be dispensed by persons engaged in other departments who were not so qualified. Moreover it is to be observed that even though the drugs are dispensed by a properly qualified person who happens also to hold some shares in the respondent company, yet he acts as the paid servant of the respondents, so that the latter are nevertheless liable to the penalties imposed by the provisions of the Pharmacy Act, 1868, s. 15, unless properly qualified.

(1) By 7 & 8 Geo. 4. c. 28. s. 14, intituled "an Act for further improving the administration of criminal justice in England," it is provided that in the case of statutes relating to offences punishable upon indictment or summary conviction, words used importing the singular number shall be understood to include "several persons as well as one person, and females as well as males, and bodies corporate as well as individuals."

Lastly, assuming the respondents are liable, the penalty imposed by the statute can be recovered in an action at the suit of the plaintiffs. In *The Queen v. The Birmingham and Gloucester Railway Company* (2), it was decided that a corporation might be indicted for a non-feasance; and in *The Queen v. The Great North of England Railway Company* (3), a corporation were also held liable to be proceeded against by indictment for misfeasance. If, therefore, an indictment will lie for misfeasance against a corporation, there is no reason why an action for penalties should not also be maintained. They also referred to *Yarborough v. The Bank of England* (4), *Green v. The London Omnibus Company* (5), and *Maxwell on Statutes*, 292.

A. Wills and Finlay, for the respondents.—The word "person" as used in 31 & 32 Vict. c. 121, does not include a corporation. There may have been a *casus omisus* on the part of the Legislature, but that is no reason for putting a strained legal construction on a penal statute. The authorities cited on the other side shew that there is a rooted distinction between corporations and individuals. It is also clear that the term "person" in other sections of the statute does not include a corporate body—see sections 4, 6. The omission of provisions directed to the state of things which has arisen here is very strong to shew that the Legislature meant to use the term "persons" in the ordinary sense of the word. The 31 & 32 Vict. c. 121, was intended only to apply, as the preamble states, to "persons not already engaged" in the business of chemists and druggists; and prior to the passing of the statute, some co-operative stores existed which brought themselves within the provisions defined in section 3 as having, "prior to the passing of this Act, carried on in Great Britain the business of a chemist and

(2) 3 Q.B. Rep. 223; s. c. 11 Law J. Rep. M.C. 134.

(3) 9 Q.B. Rep. 315; s. c. 16 Law J. Rep. M.C. 16.

(4) 16 East, 6.

(5) 7 Com. B. Rep. N.S. 290; s. c. 29 Law J. Rep. C.P. 13.

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druggist, in the keeping of open shop for the compounding of the prescriptions of duly qualified medical practitioners." If, therefore, the word "person" includes a corporation, such incorporated stores might carry on business for all time in the sale of poisons without being liable to any penalties for so doing, because a corporation can never die. "Persons" in the ordinary acceptance of the term would die out, so that the Act would in time embrace everybody under its provisions; if, however, limited companies are also included, and they carried on business as chemists and druggists prior to 1868, they might contrive to do so to all time. *Prima facie* a body corporate is not included under the word "person" unless something be said to the contrary, and there are innumerable Acts where "person" is defined as including a corporation; for instance, the Rules of Court under the Judicature Act, 1875, expressly provide that "person" shall include a body corporate and politic.—See Order LXIII.

[COCKBURN, L.C.J.—If this had been the case of an ordinary partnership, would individual partners, not qualified, have been liable?]

Probably they would, but the defendants are a corporation, and, as a matter of fact, the drugs were dispensed by a qualified person. Again, an action cannot be maintained against a corporation to recover penalties. In the cases cited the proceedings were taken either by way of indictment or information, and were not, as here, purely civil.

*Lumley Smith* replied.

*Our. adv. vult.*

The following judgments were delivered on the 23rd of April:—

COCKBURN, L.C.J. (after stating the facts already set out, continued as follows):—It was fully admitted on the argument, nor could it be contested, that if this had been an ordinary partnership, the individual partners, at all events such of them as were not qualified under the statute, would have incurred the penalties it imposes. The intention of the Legislature appears clearly to have

been to prevent any shop or establishment to exist for the sale of poisons except under the immediate superintendence and control of a duly qualified proprietor. It is not enough that the proprietor employs a qualified person to manage the business. The master must himself be duly qualified. Two parties could not combine to carry on the joint business of grocer and chemist, though the one attending to the latter department of the business might be a qualified chemist. There would be nothing to insure in such a case that in the absence of the qualified partner the other might not take upon himself to act in his stead, and thus the security against fatal mistakes in the dispensation of medicines which the statute was intended to insure might be seriously compromised. The defendants are therefore within the scope of this legislation; the case comes within the evil against which the statute was intended to provide a remedy. But they are said not to be within the statute as being an incorporated company; the main ground on which this contention rests being that the Act in question, in its prohibitory as well as penal clauses, uses the term "person," a term which it is contended cannot be properly applied to a corporate body.

The objection thus founded on the use of the word "person" in the penal clauses of the Act would seem at first sight to present some difficulty, but when the scope and purpose of this legislation are taken into account, the difficulty does not appear to be insuperable. Reliance was placed by the Attorney-General, in his argument in support of the appeal, on the enactment of the 14th section of the 7 & 8 Geo. 4. c. 28, that whenever any statute relating to any offence, whether punishable by indictment or summary conviction in describing the offender, uses words importing the singular number or the masculine gender only, it shall be understood to include several matters as well as one matter, several persons as well as one person, males as well as females, and bodies corporate as well as individuals, unless it be otherwise specially provided, or there be something in the subject or context re-



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pugnant to such construction. But that Act is expressly confined to proceedings on indictments or summary convictions, and therefore cannot apply here where the proceeding is by civil action. It shews, no doubt, the disposition of the Legislature to include corporations under the general designation of person or individual, in penal statutes; but the terms of the Act will not admit of its application to the present case.

To solve the question we must therefore confine our attention to the statute itself on which this action is brought. That an incorporated company is within the mischief against which the legislation was directed is, I cannot help thinking, quite obvious.

If a company by reason of its being incorporated, is not within the provisions of the Act and amenable to its penalties, and effect is to be given to the argument of Mr. Wills, it necessarily follows that such a company might openly carry on the business of a chemist and druggist and sell poisons, without a single member of the company or even the person employed to conduct this portion of their business being qualified. The person actually selling the poisons might be amenable—and it was probably with a view to avoid this that in the present instance a qualified person was employed to manage this department of the defendants' business—but the company employing him would enjoy complete immunity. A person desiring to combine the business of a chemist and druggist with that of a grocer would have only to get one or two persons to join him, providing them with a share or two, as appears to have been done in the formation of this company, and so forming an incorporated company, to set the statute at defiance. It cannot be supposed that the Legislature can have contemplated a result so entirely at variance with the policy and purpose of the Act, or intended to place companies on a different footing in this respect from that of ordinary partnerships or individuals. It is no doubt possible that, although joint stock companies existed at the time this statute was passed, the formation of such companies for the purpose of combining

trades, whether carried on singly, and among other things for that of superadding the business of the chemist to that of a grocer or provision merchant, may not have been present to the minds of those who framed and passed this statute. Still, if the case, though unforeseen, is within the mischief which the Legislature had in view, and the enactment is large enough to embrace it, without any formal or strained construction being put on the language of the Act, it is our duty to advance the remedy intended to be afforded.

It is true that the term used in the 1st section of the Act is "person," and that ordinarily speaking that word would not be applicable to a corporation; but when the meaning and effect of the enactment is looked at without too close an adherence to its precise phraseology, it amounts to no less than a general prohibition to everyone, not qualified according to the Act, from dealing in poisons, or carrying on the business of a chemist and druggist. The fallacy of the argument urged on behalf of the defendants is, that it assumes that the prohibition is addressed to individual persons. But the provision being universal, must extend to all persons, whether acting in an individual or corporate capacity.

The defendants, it is true, in thus infringing the law are not acting in their individual capacity, and may not—but as to this it is unnecessary to pronounce any opinion—be liable individually. But in their aggregate or corporate capacity they are breaking the law, and being in the latter capacity, as well as individually, within the prohibition, they must, if capable of being sued for it, be also amenable to the penalty, and must for this purpose be taken to be sufficiently "persons" within the meaning of the statute. The fact, so strenuously insisted on by Mr. Wills, that in other sections of the Act the word "person" is applicable to individual persons only, and not to a corporate body, only tends to shew that the adoption of the business of chemist and druggist by incorporated companies like the present was not contemplated when the Act was passed. It by no means shews that the prohibition being

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general, and the mischief clearly within the statute, the company, though as such they may be incapable of complying with some of its requirements, as, for instance, to undergo examination under section 6, ought not to be held to be within the penal clauses of the Act, or should be allowed openly to break the law under the belief that they are beyond its reach.

In the present case it so happens that a member of the company, and who manages the chemical department of its business, Mr. Henry Edward Longmore, is a qualified chemist. But it is not as a member of the company that he so acts, but as the paid servant of the company. It is clear, therefore, that his being qualified will not exonerate the other members of the company who are not so. Nor would it be otherwise even if it were as a member of the company that he so acted; so long as any of the company are disqualified, the body is disqualified, and the one who, though himself qualified, acts for the body, becomes a party to their offence, and becomes liable conjointly with them. The qualified chemist who, in partnership with a grocer, carried on the business of grocer and chemist, would be as liable to the statutory penalties as his unqualified partner.

The County Court Judge was therefore wrong in holding that because the chemist department of the defendants' business was managed by a qualified person, the defendants were not liable to the penalty.

Being thus of opinion that a company, though incorporated, is none the less within the prohibition of the statute, I come to the remaining question, whether such a company is capable of being sued for the penalty provided by the 15th section?

Upon this point the authorities referred to by the Attorney-General in his argument appear to me to afford a satisfactory answer. Although it is true that a corporation cannot be indicted for treason or felony, it was established by the case of *The Queen v. The Birmingham and Gloucester Railway Company* (2) that an incorporated company might be indicted for non-feasance in omitting to perform a duty im-

posed by statute, such as that of making arches to connect lands severed by the defendants' railway. It was further held in *The Queen v. The Great North of England Railway Company* (3) that an incorporated company could be indicted for misfeasance, as in cutting through and obstructing a highway, though they could not be indicted for treason or felony, or offences against the person. In the present instance we are dealing not with an indictment or information, but with an action in a civil Court. Though the sum to be recovered is no doubt a penalty for the infraction of the statute, the means to be resorted to for its recovery are of a purely civil character. If a corporation can be indicted for misfeasance, I am wholly at a loss to see why it may not be proceeded against in a civil suit for the recovery of a penalty which it has incurred by disobedience of a statutory prohibition.

I am therefore of opinion that this appeal must be allowed, the decision of the late Judge of the County Court reversed, and judgment entered for the plaintiffs.

MELLORE, J.—I have come, with considerable hesitation, to the conclusion that our judgment should be for the plaintiffs, and that both questions submitted to us must be answered in their favour.

I was for some time inclined to think that the circumstances of the defendants' case were not within the contemplation of Parliament when the Pharmacy Act, 1868, was passed, and that, although clearly within the mischief intended to be provided against, words sufficiently comprehensive had not been used in framing the Act to include the acts of the defendants, and consequently it became a *casus omissus*.

A fuller consideration of the provisions of the Act 31 & 32 Vict. c. 121, has, however, brought me to the same conclusion as that expressed by my Lord Chief Justice in his judgment in this case.

I think that the great object of the Legislature was to prevent the sale of poisonous or dangerous drugs by persons not qualified by skill or experience to

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deal in such commodities. It therefore proposed to form into one association all persons who for the future should alone be deemed qualified to deal in the same, and who should be registered under the provisions of the Act which we are now considering. It accordingly provided for the interests of all chemists and druggists who had been in business as such previously to the passing of the Act, but with regard to the future it made careful provisions for the examination and registration of all persons who should in future form the only qualified body of persons who should be permitted to keep open shop for the retailing or compounding of poisons; and I now think that the sections which mainly embarrassed me as to the extent of the prohibitive sections are really, when carefully considered, only the provisions regulating the steps which in future are to be taken by all persons who desire to obtain the privilege of keeping open shop and retailing, dispensing or compounding the poisonous drugs in question, and who, upon being registered as pharmaceutical chemists, or chemists and druggists within the provisions of the Act, will become qualified so to do. To incorporate such a society, to whose members in future the sole privilege of keeping open shop as chemists or chemists and druggists for the sale or dispensing or compounding poisons should be intrusted, rendered it necessary to prohibit all other persons not so registered or qualified from keeping open shop or retailing, dispensing or compounding such drugs for sale, and from assuming the title of pharmaceutical chemist or chemist and druggist; and therefore, whilst one set of sections are qualifying, and intended to regulate for the future the mode in which persons should become qualified as members of the association, and to provide for the government of the body incorporated, sections 1 and 15 of the Act, which contain the prohibitory words upon the meaning of which we have to decide, have an entirely distinct effect. The object of those sections is absolutely to prevent the danger assumed to be likely to arise to the public by the keeping open shop for the retailing, dispensing or compounding poisons by any persons not being quali-

fied pharmaceutical chemists or chemists and druggists; and the intention and scope of those sections, and the general object of the Act, is absolutely to exclude, from the time of the passing of the Act, all persons other than the registered members of the Pharmaceutical Society from keeping open shop or retailing, dispensing or compounding of poisons.

Now before the passing of the Act of 1868 all persons, whether "natural persons" or "artificial persons," constituted by incorporation for trading purposes, might, either as individuals or as a corporation, have kept open shop and retailed, dispensed or compounded poisons. It was essential, therefore, to the effectuating the objects of the Act, that all persons, whether natural or artificial, should for the future be prevented from dealing as before in the prohibited matters; and the cases cited by the Attorney-General in his argument shew that an incorporated company may commit an offence either of nonfeasance or misfeasance, and may be punished by indictment for the same as if the act had been done by a natural person. We may well therefore interpret the word "person" in the 1st and 15th sections so as to include not only any natural person, but any artificial person created by the law who would be capable of committing the offence referred to in the 15th section, as having committed it by the course of proceeding actually adopted by the defendants; and we are authorised upon the principle of decided cases to say not only that the "offence" has been committed by the defendants, but that they are liable to be punished for it under the provisions of the 15th section.

*Judgment for appellants.*


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Solicitors—Flux & Co., for appellants; Crouch & Spencer, for respondents.

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[IN THE COMMON PLEAS DIVISION.]

1879. }  
March 31. } PULLEN v. SNELUS.

*Pleading—Contract—Statute of Frauds—Judicature Act, 1875—Order XIX. rules 4, 18 and 23—Order XXVII. rule 1.*

*Where a defendant relies on the Statute of Frauds as a defence to an action he must not only state in his statement of defence that he relies on such statute, but the facts which make the statute applicable must distinctly appear on the pleadings.*

*To an action for goods sold and delivered and for work and labour, a statement that the defendant will avail himself of the statute 29 Charles 2. cap. 3, without stating facts which would bring the case within the statute, was ordered to be struck out as embarrassing.*

The plaintiff's statement of claim, after stating that the plaintiff and defendant were builders, stated that between the months of August, 1878, and February, 1879, the plaintiff, at the request of the defendant, supplied to him certain sashes, frames, sets of stairs, doors, skirtings, stoves, cupboards, dressers and presses, and did certain work and provided certain materials as a carpenter and builder for the defendant at his request to the value of 61*l.* 0*s.* 4*d.*; that the plaintiff had furnished to the defendant accounts and invoices of the various goods so supplied and work done and materials provided, and had at various times applied to the defendant for payment of such sum of 61*l.* 0*s.* 4*d.*, but that the defendant had not paid the same or any part thereof.

The plaintiff claimed 61*l.* 0*s.* 4*d.*

The defendant's statement of defence contained, *inter alia*, the following paragraphs:—

8. The defendant further says that although often thereto requested by the plaintiff the defendant has at all times objected to the plaintiff doing any work for him further than as covered and exceeded as aforesaid by the payment and credit hereinbefore mentioned, [referring to a payment and a credit mentioned in the second paragraph of the statement of defence,] and the defendant requires the plaintiff to prove that he has per-

formed any work or supplied any materials to the order of the defendant which is now an outstanding liability from the defendant to the plaintiff.

4. The defendant will further avail himself, if necessary, as an answer to this action, of the provisions of the Statute 29 Charles 2. chap. 3.

A summons was taken out on behalf of the plaintiff under Order XXVII. rule 1, to strike out the 4th paragraph of the said statement of defence as tending to "embarrass or delay the fair trial of the action." This summons was heard and dismissed by Master Dodgson on the 19th of March last, and on appeal such dismissal was affirmed by an order of Lindley, J., of the 24th of the same month.

*McOall* now moved by way of appeal from such last mentioned order, that the said 4th paragraph might be ordered to be struck out from the statement of defence.—That paragraph is contrary to Order XIX. rules 4, 18 and 23. In *Oatling v. King* (1), the Court of Appeal was of opinion that under rule 23 a defence on the Statute of Frauds could not be raised by demurrer. The object of these rules is to require the parties to state precisely the facts and point on which they rely, so that the opposite party may not be taken by surprise, and to force the parties to traverse, confess or demur to that which has been pleaded—*Thorp v. Holdsworth* (2), where the Master of the Rolls stated that the rules for this purpose should be construed strictly, and that the object of the pleading was to bring the parties to an issue—*Byrd v. Nunn* (3); and *Davy v. Garrett* (4). Here the defendant only says that if necessary he will avail himself of the Statute of Frauds. It is impossible for the plaintiff to take issue on that paragraph or to know how to deal with it.

(1) 46 Law J. Rep. Chanc. 384; s. c. Law Rep. 5 Ch. D. 660.

(2) 45 Law J. Rep. Chanc. 406; s. c. Law Rep. 3 Ch. D. 637.

(3) 47 Law J. Rep. Chanc. 1; s. c. Law Rep. 7 Ch. D. 287.

(4) 47 Law J. Rep. Chanc. 218; s. c. Law Rep. 7 Ch. D. 473.

*Pullen v. Snellus, C.P.*

The defendant does not even state the section of the Act on which he relies, and under this statement he might set up numerous defences and put the plaintiff to unnecessary expense in endeavouring by his evidence to meet such possible defences. In a late case of *Bottoms v. The Goyl Mill Company, Limited* (not reported), the Exchequer Division refused a rule for a new trial on the ground that the defence under the Statute of Frauds was not raised by a notice like that contained in this 4th paragraph. In *Philipps v. Philipps* (5), a general statement that by assurances, wills and documents the plaintiff was entitled to the land sought to be recovered was held to be embarrassing, and liable to be struck out under Order XXVII. rule 1. The case of *Clarke v. Callow* (6) is the converse of the present case, as there the plaintiff, in anticipation of the Statute of Frauds being set up as a defence to his claim for goods sold to the defendant, stated not only the contract, but that there had been an acceptance and receipt of the goods, and the defendant had traversed both the contract and the acceptance and receipt, and the jury having found that there had been no acceptance and receipt, the defendant sought to take advantage of the Statute of Frauds, but the Court of Appeal, affirming the decision of the Divisional Court, held that he could not do so, because he had not pleaded the statute. He is bound to do both; he is bound to state the facts on which he relies as bringing the case within the Statute of Frauds, and he is also bound to give notice that he relies on the statute. In *Clarke v. Callow* (6), the defendant omitted giving such notice. In the present case he omits the facts. The 4th paragraph is bad, as being against the spirit of the rules. The plaintiff can neither traverse nor admit what is alleged there, and it is therefore embarrassing—*Stokes v. Grant* (7).

*Yelverton* shewed cause.—The case of *Clarke v. Callow* (6) is in favour of that which is stated in the 4th paragraph.

(6) 48 Law J. Rep. Q.B. 135; s. c. Law Rep. 4 Q.B. D. 127.

(6) 48 Law J. Rep. Q.B. 53.

(7) Law Rep. 4 C.P. D. 25.

The Court of Appeal there held that the defendant could not take advantage of the want of a contract in writing as required by the Statute of Frauds without pleading the statute specially. "He must allege," says Kelly, C.B., "that he intends to rely on the statute." This is in accordance with Order XIX. rule 23, which states that "a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds or otherwise." The plaintiff is put to no real inconvenience by such a statement as that in this 4th paragraph. If he really does not know in what respects the Statute of Frauds is to be used against him as a defence, he can interrogate the defendant on interrogatories. It appears sufficiently on the pleadings that this action is on a contract for goods above the value of 10*l.*, for the claim is for 61*l.* Then the defendant by his statement of defence says to the plaintiff, "I require you to prove such contract, and, further, I state that I shall avail myself of the Statute of Frauds."

[LINDLEY, J.—Here the claim of the plaintiff is for work and labour as well as for goods sold.]

In *Johnsson v. Bonhote* (8) the Court of Chancery considered that the objection of the Statute of Frauds might be taken by demurrer, and that where it had been so taken, then, although the demurrer had been overruled, it was not necessary to repeat it in an answer to the bill, because sufficient notice had already been given that the defendant meant to insist upon there being no contract within the Statute of Frauds.

[GROVE, J.—Order XIX. rule 4, requires "a statement of the material facts on which the party pleading relies."]

No doubt if such facts have not been stated in the previous pleading—Order XIX. rule 18.

[LINDLEY, J.—That rule 18 is what presses against you. What are the facts

(8) 45 Law J. Rep. Chanc. 651; s. c. Law Rep. 2 Ch. D. 298.

*Pullen v. Snelus, C.P.*

so stated on which the defendant relies as supporting his objection founded on the Statute of Frauds?]

The defendant relies rather on the absence of facts. He contends that the plaintiff cannot shew facts which, according to the Statute of Frauds, would make a binding contract. The Statute of Limitations is different from the Statute of Frauds, inasmuch as it does not make the contract void, and therefore it must be pleaded and cannot be relied on by demurrer—*Wakeles v. Davis* (9).

GROVE, J.—I think the appellant is entitled to our judgment, though I confess my mind has come to an opposite conclusion from that which I formed on a first impression. I think that it is not sufficient for the defendant to state that he will avail himself of the Statute of Frauds. Such a statement does not afford a sufficient definite issue to which the opposite party may reply, and it may be embarrassing. Whether it is in fact embarrassing I am not able to know, I can only say it is calculated to embarrass and to lead to unnecessary expense. If it were sufficient for a party to say that he relies on the statute, he might do so with reference to a statute which has a great number of sections. On the other hand, I do not say that it will never be sufficient to refer only to a statute, for a statute may be so short and of such a nature that a reference to it will at once definitely point to that matter on which the party pleading relies; but all that I need say is that in the present case the reference to the statute is not enough. The 17th section of the Statute of Frauds involves the consideration of several elements which might or not apply to the subject of this action, such as whether there had been an acceptance of part of the goods, or a payment or memorandum in writing, and it is a question whether it is proper by such a general reference to the statute as is given here to throw on the plaintiff the expense of procuring evidence some of which may be unnecessary. But I further think that such a mode of pleading under the Judicature Act

is not sufficient, because Order XIX. rule 18 states that each party in any pleading "must raise all such grounds of defence or reply, as the case may be, as if not raised on the pleadings would be likely to take the opposite party by surprise, or would raise new issues of fact not arising out of the pleadings, as for instance, fraud, or that any claim has been barred by the Statute of Limitations or has been released." In the present case I do not think that sufficient facts appear in the statement of claim to point to the defence which is intended to be raised by the defendant on the Statute of Frauds, and therefore it becomes incumbent on the defendant to state the facts on which he intends to rely as raising the defence under the statute. There must not, according to rule 23, be a mere denial of the contract where, for example, the contract is void because of the Statute of Frauds, but the pleading must shew in what particular it is insufficient with respect to such statute. Rule 18 points the same way, and rule 16, which expressly preserves the right of pleading "not guilty by statute," has, to my mind, some bearing on the matter, because the being enabled to plead the general issue by statute is a benefit given to certain persons only who are specially protected by the Legislature, and if pleading in the general form, as stated in this 4th paragraph, were allowed, it would be simply giving in all cases the advantage of a plea of "not guilty by statute," and that too without naming even the section relied on. This is not what, as I think, was ever intended. Then with regard to the authorities which have been cited, the one which has been mainly relied on by Mr. Yelverton, namely, *Clarke v. Callow* (5), does not much assist him. That was the converse of the present case, and the Court said it was not sufficient to do, as the defendant had there done, traverse only allegations in the pleading of the plaintiff made in anticipation of objections to the contract on the ground of the Statute of Frauds, and that, if the defendant relied on the Statute of Frauds, he must set it up in his defence, but the Court did not say how or in what form it was to be set up. Having set out the

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facts which in the defendant's view brought the case within the Statute of Frauds, it would there have been enough no doubt for the defendant to have stated that he relied on that statute, but, to my mind, that case makes rather against than in favour of the defendant in the present case, because the scope of the judgment is that the nature of the defence must be distinctly shewn to the opposite side. As to the other authorities, I do not think that they do more than shew what the Judges considered to be the object of the Judicature Act and its orders. I think that each pleading should fairly let the opposite party know what it is which the party pleading intends to rely on, and that the facts in support of it should be so clearly stated that the opposite party could, if he pleased, take issue on them. I may add that we have consulted the Chief Baron and Mr. Justice Hawkins, who are now sitting in the Exchequer Division, with reference to the case of *Bottoms v. The Goyl Mill Company, Limited*, and they both confirm the statement of Mr. McCall as to that case, and are of opinion that a pleading in the form of that in this 4th paragraph is not sufficient in such a case as this, and as my opinion goes the same way I decide as I now do with more confidence. The appeal, therefore, in my opinion, should be allowed, but considering it is an appeal from a Master, confirmed by the decision of my brother Lindley, I think it is only right and equitable that the costs should be costs in the cause.

LINDLEY, J.—I am of the same opinion. Mr. McCall has persuaded me that I took an erroneous view of the matter at chambers. I there thought that the pleading of the Statute of Frauds was sufficient, as the action was for goods sold and delivered, and the claim was for more than 10l.; but on looking now at the statement of claim I see it is also for work and labour, and that I think is not immaterial, for it may make it difficult to say whether the 17th or 4th sections of the Statute of Frauds is relied on by the defendant, as part of the claim for which the work was done may relate to an interest in land. I am satisfied that the facts which make the statute applicable

ought to appear distinctly on the pleadings, and that the party relying on the statute is bound to do both, namely, to state such facts and refer to the statute. In *Clarke v. Oallow* (5) the defendant did the one but not the other, and in the present case he states that he relies on the statute, but he does not state the facts which make the statute applicable. That is not sufficient. I will take by way of illustration an action against an infant. There, if the defendant were to state that he relies on the statute 37 & 38 Vict. c. 62 without stating that he was an infant, the pleading would be embarrassing. It ought to appear from the pleading what is the contract which the defendant relies on as being insufficient by reason of the Statute of Frauds, and then there should be a statement that he relies on the statute for his defence. It may be that it is sufficient if the action be for goods sold, for the defendant only to state that he relies on the 17th section of the Statute of Frauds, and to leave it to the plaintiff to take the case out of the statute, but it is not now necessary to determine that, and it is enough in the present case to say that I consider the 4th paragraph of the statement of defence is embarrassing.

*Appeal allowed.*

Solicitors—T. J. Holmes, for appellant; Parkes, for respondent.

1878. } ROSSITER (*appellant*) v. PIKE  
Dec. 4. } (*respondent*).

*Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), section 20—Fishing Mill Dam—Obstruction to Fish—Abandonment of Fishery—Removal of Fishing Appliances.*

[For the report of the above case, see 48 Law J. Rep. M.C. 81.]

[IN THE EXCHEQUER DIVISION.]

1879. } HOUGH AND COMPANY v.  
March 11, 14. } MANZANOS AND COMPANY.

*Contract—Agent—Personal Liability of Agent signing in his own Name—Charter-party.*

*The defendants signed in their own name, without qualifying their signature, a charter-party purporting in the body to be made by them "as agents for charterers":—Held, that the defendants were personally liable upon the charter-party.*

Demurrer in an action upon a charter-party.

The pleadings, so far as they are material, were as follows:—

Statement of claim, that the plaintiffs are the owners of the steamship *Ellen* and the defendants are iron ore importers at Cardiff; that an agreement by way of charter-party was entered into between the plaintiffs and the defendants, and that thereunder the defendants became liable to pay to the plaintiffs divers sums for not loading, and have not paid the same.

Statement of defence, denying that the alleged agreement was entered into between the plaintiffs and the defendants as alleged, and setting out the same, which, so far as is material, was as follows:—

"Iron Ore Charter.

"Cardiff, March 9, 1877.

"It is this day mutually agreed between Hough & Co., owners of the steamship *Ellen*, of 900 tons or thereabouts, now at Newport, and Manzanos, and Cristobal & Co., as agents for charterers: That the said ship shall with all convenient speed proceed to Bilbao, and there load from the agents of the said freighters a cargo of iron ore, quantity at captain's option, and therewith proceed to Cardiff, Newport, Alexandra Dock, or old dock (as ordered on signing bills of lading), and deliver the same to the said freighters or their assigns on being paid freight at 12s. per ton. The freight to be paid in cash on delivery of cargo. Cash for ship's disbursements, not exceeding one-third of the freight, to be advanced at Bilbao,

if required. The captain to sign bills of lading at any freight required by the charterers not less than the above rates of freight. Demurrage, if any, at the rate of 20l. per day. The captain to have an absolute lien on the cargo for all freight, dead freight and demurrage due under this charter-party. The cargo to be put on board and taken from alongside the ship at merchant's risk and expense. The captain to employ Messrs. Medina, Vicuna & Manzanos in Bilbao for custom-house business on the usual terms, and failing to do so, the charterers or their agents shall be at liberty to deduct five guineas when settling freight. This charter being entered into on behalf of others, it is agreed that all liability of charterers shall cease on completion of loading and payment of advance, captain having a lien on cargo for freight, dead freight and demurrage. This charter to be in force for as many consecutive voyages as she can do during six calendar months.

"Manzanos, Cristobal & Co.

"10/3/77.

"By authority of Hough & Co.,

"And as Agents,

"P. pr. W. Y. Edwards,

"Fred. Edwards."

The statement of defence continued (paragraph 3):—The defendants in making the said charter-party were agents for the charterers therein referred to, that is to say, for Eusebio Garcia, of Bilbao, in Spain, and they entered into the same on his behalf.

Reply, admitting that the charter-party was correctly set out by the defendants, and joining issue on so much of the rest of the statement of defence as denied or avoided the plaintiff's claim; also demurrer to the 3rd paragraph of the statement of defence, and to so much of the statement of defence as denied the personal liability of the defendants.

The demurrer was argued on the 11th of March.

*Douglas Walker*, for the plaintiffs.—The defendants having signed the charter-party in their own name, without qualifying their signature, are, by well-



*Hough v. Manzanos, Exch.*

settled law, *prima facie* liable personally—2 *Smith's Leading Cases*, 7th ed., p. 386. And there is nothing in the body of the charter-party to exempt them from personal liability. The words "as agents," in the commencement of the charter-party, are insufficient—*Lennard v. Robinson* (1); *Oooke v. Wilson* (2); *Tanner v. Christian* (3); *Parker v. Winlo* (4); *Oglesby v. Yglesias* (5); *Paice v. Walker* (6).

*Hannen*, for the defendants.—The body of the charter-party shews clearly that the defendants were contracting only as agents, and were not intended to be bound as principals—*Gadd v. Houghton* (7); *Hutchinson v. Tatham* (8).

*Our. adv. vult.*

POLLOCK, B. (on March 14).—The law not being in a very satisfactory state, I took time to consider the question of the personal liability of the defendants upon this charter-party, signed by them in their own name, without reservation, but purporting in the body to be made by them "as agents for charterers." If the matter were *res nova* I might doubt whether the defendants have made themselves personally liable as principals. But in the existing state of the authorities I am of opinion that my judgment must be in favour of the plaintiffs. The actual signature itself being without reservation, the case falls within the general rule of law as expressed in the well-known statement in *Smith's Leading Cases*, Notes to *Thompson v. Davenport*, vol. ii., 7th ed., p. 386, where it is said: "It may be laid down as a general rule that, where

a person signs a contract in his own name without qualification, he is *prima facie* to be deemed to be a person contracting personally; and in order to prevent this liability from attaching it must be apparent from the other portions of the document that he did not intend to bind himself as principal." That which is referred to in the second branch of that statement of the law, namely, evidence from the body of the contract that the person signing in his own name did not intend to bind himself as principal, does not sufficiently exist here. See *Oglesby v. Yglesias* (5), where the defendant was held to be the contracting party, though he contracted in the body of the charter-party "as agent for the freighter;" and *Paice v. Walker* (6), where the defendants were held liable as principals, although in the body of the contract they used the words "as agents for" a firm named. No doubt in *Gadd v. Houghton* (7) James, L.J., commented adversely upon the decision in *Paice v. Walker* (6), but sitting here I do not feel at liberty to act upon his dictum that *Paice v. Walker* (6) was wrongly decided, that case having there been distinguished not overruled.

*Judgment for the plaintiff.*

Solicitors—Lyne & Holman, for plaintiffs; Ingledew, Ince & Greening, agents for Ingledew, Ince & Vachell, Cardiff, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1879. } TOMLINSON (*appellant*) v.  
March 25, 27. } BULLOCK (*respondent*).

*Bastardy*—35 & 36 Vict. c. 65. s. 3—*Application of Statute to Children born "after passing of Act"*—*Order for Maintenance*—*Birth the same day as the passing of Act.*

[For the Report of the above case, see 48 Law J. Rep. M.C. 95.]

(1) 5 E. & B. 125; s. c. 24 Law J. Rep. Q.B. 275.

(2) 1 Com. B. Rep. N.S. 163; s. c. 26 Law J. Rep. C.P. 15.

(3) 4 E. & B. 591; s. c. 24 Law J. Rep. Q.B. 91.

(4) 7 E. & B. 942; s. c. 27 Law J. Rep. Q.B. 49.

(5) E., B. & E. 930; s. c. 27 Law J. Rep. Q.B. 356.

(6) 39 Law J. Rep. Exch. 109; s. c. Law Rep. 5 Exch. 173.

(7) 46 Law J. Rep. Exch. 71; s. c. Law Rep. 1 Ex. D. 357.

(8) 42 Law J. Rep. C.P. 260; s. c. Law Rep. 3 C.P. 482.

[IN THE COMMON PLEAS DIVISION.]

1879. } BERRINGER v. THE GREAT EAST-  
March 11. } ERN RAILWAY COMPANY.

*Master and Servant—Loss of Service—  
Injury to Servant—Railway—Action for  
Tort.*

*A master cannot maintain an action per quod servitium amisit against a railway company for an injury to his servant whilst a passenger on the company's railway, caused by neglect of their duty to carry safely the servant according to their contract with him as such passenger, unless the master was a party to the contract.*

*But where the servant is injured by the negligence of another railway company, not party to the contract, in running their train against the train in which the servant is such passenger, the master can maintain an action quod servitium amisit against such other company.*

Statement of claim: that the plaintiff John Berringer carried on the business of a butcher, and was the father of the plaintiff Frederick Berringer, who was an infant (1).

The London, Tilbury and Southend Railway Company were carriers of passengers for hire between Fenchurch Street and Southend, and the defendant company were carriers of passengers for hire between Fenchurch Street and Woolwich. The defendant company supplied the engines, drivers and firemen for working the traffic of the London, Tilbury and Southend Company's line, and also the signalmen for working the said traffic at Stepney Junction.

The plaintiff Frederick took a ticket at Fenchurch Street Station by a train leaving there at a certain hour upon the London, Tilbury and Southend Company's line to Southend, and proceeded as far as Stepney Junction when the said train came violently into collision with a train belonging to the defendant company proceeding from Woolwich to Fenchurch Street, and the plaintiff Frederick was thereby injured. The collision was

caused through the negligence of the defendants' servants, partly owing to the defective construction and working of the defendants' down-home main line signal arm at Stepney Junction, in that it would not shew the "danger" signal when it was so required, and partly owing to the fact that the defendant company's signalman at the said junction so negligently and improperly shifted certain points there as to turn the down train in which the plaintiff Frederick was travelling across the road of an up-train belonging to the defendant company then leaving Stepney Junction for Fenchurch Street, whereby the former train ran into the latter and the collision occurred.

Par. 5. Prior to the 5th of August, 1878, the plaintiff Frederick was in the habit of assisting the plaintiff John Berringer in his business. Since that date he had been utterly unable to render his father any assistance, whereby the plaintiff John Berringer had lost his son's services and had been put to expense.

Demurrer to so much of the statement of claim as supported the alleged claim of the plaintiff John Berringer mentioned in the 5th paragraph thereof, on the ground that the facts therein alleged shewed no contract between the plaintiff John Berringer and the defendants or the London, Tilbury and Southend Railway Company, to carry the plaintiff Frederick Berringer.

*A. O. Nicoll*, for the defendants, in support of the demurrer.—A master cannot sue a railway company for loss of services in consequence of his servant having been injured by the negligence of the company unless the master was party to the contract by which the servant was carried as a passenger. See *Alton v. The Midland Railway Company* (2). The master was no party to the contract in this case.

[*Reginald Brown*, for the plaintiff.—If there had been a contract between the infant plaintiff and the defendant company, *Alton v. The Midland Railway Company* (2) would be conclusive in

(1) The infant also sued by his father as his next friend for the personal injuries he had sustained.

(2) 19 Com. B. Rep. N.S. 213; s. c. 34 Law J. Rep. C.P. 292.

*Berringer v. Great Eastern Rail. Co., C.P.*

favour of the defendants, but in the present case the infant plaintiff takes a ticket by company A. and is injured by company B. while he is in company A.'s carriage. In such a case it is a trespass of his person, for which the master can sue company B.]

A. C. Nicoll.—But this action arises out of contract, because only by contract would the infant be lawfully in the carriage. The defendant company accept the responsibility of the Tilbury and Southend Company and claim their rights. If this claim were allowed, a double set of plaintiffs would be let in.

[LOPES, J.—Is it not analogous to the case of a cart in the street running over an infant?]

There the infant would be lawfully in the highway, whereas the infant would not be lawfully on the railway except by contract, therefore it is a wrong arising out of contract, and comes within the general rule of law that only those who are parties to a contract have any rights under the contract. This is not a case of pure trespass; the statement of claim shews a failure of the Tilbury company to fulfil the contract from the fact that they had to supply the signals, &c., and the parties who were negligent were the servants of both companies.—See *Martin v. The Great Northern Railway Company* (3); *Powell v. Layton* (4); *Blackmore v. The Bristol and Exeter Railway Company* (5); *Winterbottom v. Wright* (6).

[LOPES, J.—Supposing the statement of claim had stated a contract with the defendants, would it not have been open to them to say, “the plaintiff did not contract with us”? The defendants are not the contracting party, the master does not bring his action against the contracting company but against the company who caused the injury.]

If there was no contract at all, the infant was unlawfully on the line. The

plaintiff must shew there is an action of pure tort which can be brought against the defendants.

R. G. Webster and Reginald Brown, for the plaintiff, were not called upon.

LOPES, J.—The plaintiff in effect says, “We admit the principle of *Alton v. The Midland Railway Company* (2) would have been applicable had we been suing the contracting party, namely, the Tilbury company, but we are suing the defendant company with whom we have no contract. Therefore, as far as that railway is concerned, we are suing upon an ordinary tort, and not only is the infant plaintiff entitled to recover in respect of the injuries he has received by the negligence of the defendants, strangers to us, but the father is also entitled to recover for loss of services.” What I have to decide now is, whether the statement of claim is good, and I am of opinion that the statement of claim is good. I hold, therefore, that this demurrer ought not to be allowed.

*Demurrer overruled.*

Solicitors—Gush & Phillips, for plaintiff; C. A. Curwood, for defendants.

[IN THE COMMON PLEAS DIVISION.]

1879. } DAVIS (*appellant*) v. BROWNE  
Mar. 14. } (*respondent*).

*Highway—Locomotive on Highway—*  
28 & 29 Vict. c. 83. s. 3—41 & 42 Vict. c. 77. s. 29—*Person preceding Locomotive on Foot.*

[For the report of the above case, see 48 Law J. Rep. M.C. 92.]

(3) 16 Com. B. Rep. 179; s. c. 24 Law J. Rep. C.P. 209.

(4) 2 Bos. & P. N.R. 365.

(5) 8 E. & B. 1035; s. c. 27 Law J. Rep. Q.B. 167.

(6) 10 Mee. & W. 109; s. c. 11 Law J. Rep. Exch. 415.

1879. } FORBES AND ANOTHER v. THE  
Jan. 25. } LEE CONSERVANCY BOARD.

*Public River—Duty of Conservancy Board—Act of Parliament—Permissive or Compulsory Words*—7 Geo. 3. c. 51.

*The conservancy board of a public river acting under a statute by which they "shall be and are authorised and empowered from time to time at their discretion to cleanse, scour, &c., the river, and to remove all obstructions and impediments whatever to the navigation," are not liable for damage to a barge caused by a pile in a part of the river, the bed of which is not vested in them and in respect of which they are not entitled to take tolls, although the pile was dangerous, and the board ought to have known the danger and were guilty of negligence.*

This was a case on further consideration argued by—

A. Charles and L. Smith, for the plaintiffs.

J. Brown, R. E. Webster and St. Aubyn, for the defendants.

The facts and arguments appear from the following written judgment:—

POLLOCK, B. — The plaintiffs in this action are the owners of the barge *Globe*; the defendants are the Lee Conservancy Board, who have been appointed by statute conservators of the River Lee, and the cuts and works connected therewith. The action is brought to recover damages for an injury which the plaintiffs' barge and its cargo received whilst navigating the River Lee in January, 1878, by reason of its striking upon a pile which projected above the bottom of the river, whereby the barge sunk, and its cargo was injured. The trial took place before me during the last sittings for Middlesex, when the jury found a verdict for the plaintiffs for the agreed amount of £82l. 14s., and answered certain questions which I put to them with a view of determining, after argument, the legal rights of the parties.

From the evidence adduced at the trial for the plaintiffs and the defendants it appeared that the place where the barge met with the injury is near to

Five Bells Bridge, and a portion of the natural course of the River Lee between Bow Creek and Old Ford Lock, which is an ancient navigable stream, in respect of which the defendants, although they have rights given to them by statute, cannot levy any toll from boats or barges using it, and of which they are neither owners or occupiers. The pile against which the plaintiffs' barge struck had been placed in the bed of the river many years ago. The date of its being so fixed could not be ascertained, and its existence was unknown to the defendants or their agents until October, 1877, when Chamberlain, a lighterman, having to discharge a number of lighters at a wharf near the pile, obtained the permission of the defendants' engineer to lower the water so as to see whether the bottom of the river was in a safe condition should barges take the ground. This accordingly was done, and the pile in question and several others were found projecting, and were cut level with the bottom by men employed by Chamberlain. After this several barges lay aground there in safety, but heavy floods having occurred, the bottom of the river was scoured to a lower level, and the piles again projected. What was done in October, 1877, was known to the water-bailiff and engineer of the defendants, but they considered that that part of the river bed was within the district of the Poplar Board of Works, and that they were bound to keep it in good order. No evidence was given which shewed whether this opinion was correct or otherwise.

At the close of the plaintiffs' case, counsel for the defendants submitted that no duty had been shewn to exist whereby the defendants were bound to remove the pile complained of. I thought the question so doubtful that the better course would be to hear the case for the defendants, and then take the opinion of the jury upon any questions of fact which arose. Accordingly, after the defendants' witnesses had been examined I summed up, reading to the jury the section of the statute upon which the alleged duty of the defendants was said to exist, to the language of which I will shortly call attention, and

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left to them the following questions, the answers to which are appended.

First. Assuming it was the duty of the defendants to remove all obstruction and impediments to the navigation, were the piles at the time of the accident dangerous?

Answer. "Yes."

Second. Were the piles so likely before then to become dangerous that the defendants ought to have been aware of the danger?

Answer. "Yes."

Third. Did the defendants neglect their duty?

Answer. "Yes."

Upon these findings I reserved judgment until after argument of the questions of law. These were very fully and ably presented to me during the last sittings, and the conclusion at which I have arrived is that, taking the facts as proved, and the findings of the jury based upon them, the defendants are entitled to judgment.

The River Lee, which flows from the town of Hertford to the River Thames, is an ancient navigable river. Statutes have been passed from time to time whereby powers have been given to trustees for preserving and improving the navigation, and by the Lee Conservancy Act, 1868, section 62, all the powers, authorities and rights of the trustees are vested in the defendants. The earliest statute which need be noticed for the purposes of the present case is the 7 Geo. 3. c. 51, which provides for the preserving and improving the navigation of the River Lee, and also for the making of new cuts, canals and other works in connection therewith. Section 1 of that Act, after appointing as trustees a large body of gentlemen, including the Lord Mayor and Aldermen of the City of London, the Mayor and Recorder of Hertford, contains a provision upon which the plaintiffs chiefly rested their case. It is as follows:—

"The said trustees, or any five or more of them, shall be and they are hereby authorised and empowered from time to time, at their discretion, to cleanse, scour, deepen, enlarge or straighten the channel or course of the said River Lee, and also

to set out, open, make and maintain all or any of the new cuts or canals hereinafter specified and described to communicate with the said River Lee, and to be used for the said navigation, and also to remove all obstructions and impediments whatsoever to the said navigation."

The plaintiffs contended that this provision gave a power to and imposed a duty upon the defendants to remove the pile which caused injury to their barge and her cargo. The defendants admitted that such a power was conferred upon them, but denied that any duty was imposed beyond the doing of that which, according to their discretion, they might from time to time deem necessary or proper.

Before I consider which of these two contentions is correct, it will be well to notice more closely what was the plaintiffs' precise cause of action, and also what was the position of the defendants under the statutes. The plaintiffs complained not of any wrongful act or misfeasance committed by the defendants, but of a neglect of a supposed duty arising out of their position as conservators under the Act, and but for the intervention of the Legislature it is clear that at common law, had an obstruction or impediment to the navigation arisen at the place where the pile existed, those who navigated the river would have been without remedy except against the parties who caused the obstruction. Looking next to the legislation affecting the matter, I find that by none of the many Acts which have been passed dealing with the navigation, is the bed of the river or any part of it vested in the trustees or conservators, so that they are in no sense owners of the river or navigation, but are an unpaid body of trustees appointed for public purposes in aid of the common law right of navigating an ancient highway. Further, by section 69 of the 7 Geo. 4. c. 51, the navigation is declared to be a free navigation, subject to the payment of certain rates which are provided for by section 80, and all of which are referable to the user of the locks and artificial cuts where they are collected; and the Lee Conservancy Act, 1850, s. 45, expressly

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provides that the trustees shall not demand or receive any toll in respect of such part of the navigation as is between Bow Creek and Old Ford Lock, but the use of that part of the navigation is for ever, and notwithstanding any alteration or works to be made by the trustees of or in the same, to continue to be wholly free from all toll.

Under these circumstances, therefore, it becomes necessary to consider what is the true construction of section 1 of the Act of Geo. 3. Are its provisions compulsory or do they merely vest a discretion in the trustees? The words used are, "Authorised and empowered from time to time at their discretion," &c., and this clearly governs all that follows, including the power to make and maintain all or any of the cuts or canals which, according to all reason and authority [see *The York and North Midland Railway Company v. The Queen* (1) and *The Great Western Railway Company v. The Queen* (2)], is clearly discretionary and not compulsory, and also the power to remove all obstructions and impediments whatsoever to the said navigation, unless some good reason for holding otherwise is shewn to exist. The language in itself would appear to create a discretionary and not a compulsory power, and at the close of the section the trustees are empowered generally to do and perform all acts, matters and things which the trustees or any five or more of them shall think necessary for the making, extending, improving and maintaining the said navigation, implying, as plainly as language can express, a discretion. Moreover, it should be noticed, in accordance with an undoubted rule of construction, that when the same statute imposes a duty on the trustees as to which no discretion is left to them, very different language is employed. Thus by section 20, in order to secure the free navigation of the river during the progress of the works authorised by the Act, the trustees

are required to cause the said river to be kept navigable.

There is abundant authority to shew that when a statute gives an authority to do an act which the public interest demands, especially where judicial functions are created, words which would seem to give merely an option should be so construed as to confer a duty, but in the case illustrating this principle the rule has been acted upon only where the general object and intention of the Act is best supported by so holding. In the present case it may truly be said that one great object of the Act was to keep the navigation free from obstructions and impediments, but there still remains the question, who are the persons who are to decide what is an obstruction or impediment, and when, in what manner, and at what cost they are to be removed. Extreme cases may be put on either side; on the one hand, it may be said if a vessel were to sink in the river, so as wholly to obstruct all navigation, are not the conservators bound to remove it? and should they fail to do so, are they not liable in damages to any who whilst using the navigation suffers therefrom? On the other hand, it may be asked, what discretion can the conservators be properly said to possess, if they are bound at all times, irrespective of other claims upon their funds, to remove at great cost that which first an individual barge owner and afterwards a jury may pronounce to be a dangerous obstruction? The fair result of what can be said upon both sides of the question appears to me to be this, that the Legislature has, partly for the purpose of the construction of new cuts, and partly for the purpose of maintaining the navigation of an ancient navigable river, created a body of trustees, and without giving them any property in the river, or right to levy tolls for the user of it, has vested in this body large and important powers, including the power at their discretion to remove obstructions and impediments to the navigation, and that, although the trustees would be responsible in damages to one injured by any misfeasance committed by them, or by any nonfeasance where the duty imposed was imperative, they are

(1) 1 E. & B. 858; s. c. 22 Law J. Rep. Q.B. 225.

(2) 1 E. & B. 874; s. c. 22 Law J. Rep. Q.B. 263.

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not liable where the matter in respect of which the nonfeasance is alleged is one which comes within the scope of their discretion, and as to which they are the persons whose express duty it is to say whether the act should or should not be done. It might be said that in the present case it was not shewn by the defendants that they had ever exercised any discretion, or indeed taken the matter into their consideration. This point was not made by counsel, nor does the statement of claim raise it. Were the statement of claim to allege that the attention of the defendants had been called to a dangerous obstruction, and they had declined to meet and consider as to its removal, it might disclose a good ground for a mandamus requiring the board to proceed, but in such a case it is difficult to see how the plaintiffs could recover any damages.

It was suggested by counsel for the plaintiffs, though not much pressed, that one mode of giving effect to the words, "at their discretion," would be by holding them to refer, not to the removal or non-removal of an obstruction, but to the mode of removal. I cannot, however, find any ground for so cutting down what is the plain meaning of the words, and to do so would, in my judgment, be giving an artificial effect to them which cannot be justified. It would, moreover, suppose the Legislature to have used the words without any need, for had they been omitted, it is clear that the trustees are the only persons who could direct how any obstruction should be removed. Several authorities were cited by the plaintiffs' counsel. The earliest in date was *Parnaby v. The Lancaster Canal Company* (3). The plaintiff in that case, who was the owner of a fly-boat, brought his action against the defendants who were owners of a canal, and by their Act were entitled to levy tolls upon boats navigating it, and had power to remove any boat obstructing the navigation. The plaintiffs alleged that they had failed to remove a boat which had sunk and obstructed the navigation,

whereby the plaintiffs' boat struck against it and was damaged. The plaintiffs contended for the liability of the defendants upon two grounds—first, that they were liable by reason of the clause in their Act by which they were empowered, and therefore it was argued, bound to remove the sunken boat; and secondly, that a duty attached to the defendants at common law to make good the navigation of the canal whilst they exacted tolls for their own benefit. The Courts of Queen's Bench and Exchequer Chamber decided in favour of the plaintiff upon the latter ground, the Court of Queen's Bench saying that the case is not like that of public officers who derive no benefit ("the present defendants on the contrary invite the whole public to navigate on their canal in consideration of the tolls paid"), and further likening the case to that of a shopkeeper who leaves a trap-door open in his shop. The Court of Exchequer Chamber also says, "The facts stated in the inducement shew that the company made the canal for their profit, and opened it to the public upon the payment of tolls to the company, and the common law in such a case imposes a duty upon the proprietors, not perhaps to repair the canal or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property." As to the first ground the decision was in favour of the defendants, the Court of Exchequer saying, "The principal objection in this case was that the clause recited in the declaration and which is therein stated to have cast a duty on the company to remove the obstruction caused by the sunken boat was not obligatory, but was an enabling or a permissive clause only, and we are all of that opinion. Neither the clause recited nor anything in the Act of Parliament contained, imposes such a duty on the defendants below, and the allegation in the declaration as to the duty of the company seems to have been founded on a mistake as to the true meaning and effect of the clause." In

(3) 11 Ad. & E. 230; s. c. 9 Law J. Rep. Exch. 338.

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*The Mersey Dock Trustees v. Gibbs* (4), the House of Lords decided that the trustees were liable for negligently allowing a bank of mud to remain at the entrance of their dock, but in so holding the judgment was based upon the principle acted upon in *Parnaby v. The Lancaster Canal Company* (3), the Lord Chancellor (Lord Cranworth) saying that the only difference between that case and the one before the House was that in the latter the trustees did not collect tolls for their own profit but merely as trustees for the benefit of the public, which did not in his opinion make any difference in principle in respect to their liability, and I find nothing either in the opinions given by the noble and learned Lords who took part in that case or in that of the Judges who were called in to shew that they disapproved of that portion of the judgment of the Court of Exchequer Chamber in *Parnaby v. The Lancaster Canal Company* (3) which negatived any liability of the defendants based upon the language of their Act. The tendency of the opinion of the Judges in *The Mersey Dock Trustees v. Gibbs* (4), is no doubt to limit the effect of some of the decisions whereby trustees and commissioners of public works have been shielded from the result of their negligence, and there is great weight in the observation that it is contrary to the general rule of law, not only in this country but in every other, to make a person judge in his own cause, but to this is added, though the legislature can and no doubt in a proper case would depart from the general rule, an intention to do so is not to be inferred except from much clearer enactments than any to be found in these statutes. The position of the present defendants who have no property or pecuniary interest in the old River Lee, and the language of their Act is very different to that which existed in the case last cited. Moreover it is to be noticed that in all the cases which are carefully collected and commented upon in the opinion of the Judges, not only were the defendants persons incorporated

for the purpose of constructing and carrying out particular works essential to the expressed object of the Legislature, but the injuries in respect of which damages were sought arose from an act of commission or omission connected with such works, whereas here, so far as the ancient course of the River Lee is concerned, it does not appear from the Acts that any new works were to be erected, or that except in the discretion of the trustees anything whatever was to be done. The more recent case of *Winch v. The Conservators of the River Thames* (5), in which the defendants were held liable for the non-repair of the towing path adjoining the river Thames, judgment proceeded upon the same principle as was acted upon in *The Mersey Dock Company v. Gibbs* (4), the majority of the Courts of Exchequer Chamber saying, "we think it is enough to support this verdict if the defendants were, so long as they kept the towing path open and took toll for its use, under an obligation to those whom they invited to use it, to take reasonable care to see that the towing path was in such a state as not to expose those using it to undue danger." Before quitting the cases which bear upon this part of the case I ought to allude to *Hartnall v. The Ryde Commissioners* (6), in which the defendants, who were improvement commissioners, were held liable for non-repair of a footway which was a highway, and *Orhby v. The Ryde Commissioners* (7), where the defendants were held liable for not properly fencing a footway, but on reference to these cases and the statutes upon which they are founded it will be seen that in the first the defendants were substituted for the parish as to the repair of highways within their district and by the neglect complained of had, according to the express provision of their Act, committed a misdemeanour. In the second the language of the Act by which the defendants were constituted

(5) 43 Law J. Rep. C.P. 167.

(6) 4 B. &amp; S. 361; s. c. 33 Law J. Rep. Q.B. 39.

(7) 5 B. &amp; S. 743; s. c. 33 Law J. Rep. Q.B. 296.

(4) 36 Law J. Rep. Exch. 225.



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and their duties defined was clearly imperative. On the other hand, in *Parsons v. St. Matthew, Bethnal Green* (8), where the words of the statute under which it was sought to make the defendants liable were, "it shall be lawful for every vestry" to repair, the Court said this gave the defendants a discretion and therefore they were not liable for non-repair of a highway. The case of *Re Newport Bridge* (9), is to the same effect.

Thus far I have been led both by principle and authority to the conclusion that there is no such obligation laid upon the defendants by statute as makes them liable for the non-removal of the obstruction complained of, and in dealing with this part of the case it has, I think, been made also to appear that the position of the defendants is such that no Common Law liability can be inferred, but before I so hold I would notice an argument which, were it well founded in fact, would certainly be entitled to great weight. It was said on behalf of the plaintiffs that although the particular place where the plaintiffs' barge was injured was a portion of the old River Lee, the navigation of which was especially exempt from toll, the statutes must be read together, and that their intention was to deal with the whole navigation as one entire subject matter as to which the trustees must be treated as proprietors, and that although the right to take tolls is confined to the new cuts and locks, it is taken for the benefit of and to be expended upon the whole navigation whether new or old. I have carefully considered the defendants' acts with a view to see whether any true foundation for this argument exists, but so far from finding any it appears to me that an intention is clearly shewn throughout to preserve the legal status of the old River Lee and the right of the public to navigate it intact, and this is only what would be expected where the Legislature was dealing with an ancient highway navigable at all times and by all persons. This contention must therefore

fail. The conclusion at which I have arrived makes it unnecessary to enter upon the consideration of a question which was argued before me and has been much discussed in many of the cases, namely, whether the funds of the defendants derived from their tolls are applicable to the satisfaction of damages in an action such as the present. The result of this conclusion is that, notwithstanding the finding of the jury, no legal cause of action has been established and judgment must be entered for the defendants with costs.

*Judgment for the defendants.*

Solicitors—Thomson, Son & Brooks, for plaintiffs; R. J. Pead, for defendants.

## [IN THE QUEEN'S BENCH DIVISION.]

1879. { THE QUEEN v. THE VICAR AND  
March 1. { CHURCHWARDENS OF TOTTEN-  
HAM.

*Vestry Meeting—Regulation of Business at—Authority to fix Hour for holding—38 Geo. 3. c. 69. s. 1.*

*The authority to determine the hour at which a vestry meeting shall be summoned is vested in the same person or persons in whom is the authority to summon; and that, by 58 Geo. 3. c. 69, is in the vicar and churchwardens, one or both. It is not, therefore, competent to the inhabitants in vestry assembled to regulate the hour at which subsequent meetings (other than an adjournment of the present one) shall be held; and the vicar, as the summoning authority, cannot be compelled to give notice of a resolution that future meetings shall be held at a particular hour.*

In this case a rule *nisi* had been obtained, calling upon the vicar and churchwardens of Tottenham to shew cause why a mandamus should not issue, commanding them to insert on the notice paper of the next meeting notice that a resolution

(8) 37 Law J. Rep. C.P. 62; s. c. Law Rep. 3 C.P. 56.

(9) 2 E. & E. 377; s. c. 29 Law J. Rep. M.C. 52.

*The Queen v. Vicar of Tottenham, Q.B.*

would be proposed "that the hour for the vestry meetings shall be seven p.m."

*W. G. F. Phillimore* shewed cause.—The question really is whether the vicar and churchwardens, or the inhabitants, have power to determine the hour for holding vestry meetings. The facts are, that as the evening meetings had become very disorderly, the vicar and churchwardens had of late appointed an earlier hour in the day for the meetings, and it is contended that they have power to do this, and cannot be compelled to give notice of a resolution which denies their right, and assumes to make it a question for the decision of the inhabitants generally. By 58 Geo. 3. c. 69, the summoning of vestries is left to the vicar and churchwardens, and the vicar is chairman as of right. It must surely, therefore, be competent to those who summon to fix the time of meeting. The case of *The King v. The Archdeacon of Chester* (1) shews that they may fix the place. *The Queen v. D'Oyly* (2) is an authority for the vicar or rector having power to regulate all things connected with the vestry meeting.

*A. Charles* (*Ounningham* with him), *contra*.—The statute has conferred no express authority on the vicar, and in the absence of it the vestry themselves have the authority to regulate the holding of their meetings. Indeed, apart from the statute, the notice might be given by any parishioner—*Butt v. Fellowes* (3). Then, although the vicar may summon and preside, that does not give him a power of adjournment, and his position is only like that of the sheriff in the old County Court. In *Stoughton v. Reynolds* (4) it is so stated. And, therefore, it is contended that as the law has not placed in the vicar the power of adjourning or of fixing the time, it resides, at Common Law, in the inhabitants.

[COCKBURN, L.C.J.—In *Burn's Justice*, p. 1,054, it is said, quoting from Sir J.

Nichols' judgment in *Dawe v. Williams* (5), that it is for the churchwardens, with the consent of the vicar, to call the vestry.]

Yes, but that has been regulated by the statute, which has not taken any power from the vestry as to the time for holding the meeting.

[COCKBURN, L.C.J.—Does not your whole argument rest on the assumption that the vestry are a permanent legislative body?]

I contend that it is the same assembly, meeting from time to time.

[MELLOR, J.—You must shew that it is a continuing body; when once summoned they may perhaps adjourn the same meeting; but when dissolved, it is a new body called into existence by a fresh summons.]

The vicar and churchwardens act merely as the agents of the inhabitants in summoning the vestry.

COCKBURN, L.C.J.—I think that this rule must be discharged.

It is necessary that the vestry shall be duly summoned; but whether it rests with the vicar to give the notice, or with the churchwardens, or with the vicar and churchwardens together, it is not necessary now to say. This, however, is clear, that it rests with one or the other, or both, to summon the vestry, and that being so, I think that in whomsoever is vested the authority to summon, in him or them is also vested the authority to determine the time at which it shall be summoned. I agree with what fell from my brother Mellor in the course of the argument, that when once they have been summoned the inhabitants so assembled may, perhaps, adjourn the meeting to some time then agreed upon by the majority present; but we are asked here to compel the vicar by mandamus to give notice of a resolution which will conflict with his authority, and which, if carried, will assume to abrogate his authority to decide at what hour the next vestry, which he and the churchwardens have

(1) 1 Ad. & E. 342.

(2) 12 Ad. & E. 139.

(3) 3 Curt. 680.

(4) 2 Str. 1,045.

(5) 2 Add. Ec. Rep. 138.

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the undoubted right and power to summon, shall be held.

MELLOR, J.—I am of the same opinion. When Mr. Charles admits, as he is obliged to admit, that when a vestry has been assembled and separated again, there is an end of it, and it is a fresh vestry that must be summoned next time, the question raised by this rule seems to me to be determined. I am perfectly satisfied that this rule should be discharged.

*Rule discharged.*

Solicitors—Brooks, Jenkins & Co., for vicar and churchwardens; Peckham & Co., for prosecution.

[IN THE QUEEN'S BENCH DIVISION.]

1879. } THE QUEEN v. THE GREENLAW  
March 31. } TURNPIKE TRUSTEES.

*Highway—Turnpike—Disused Tollhouse—4 Geo. 4. c. 95. s. 57—“Not required for Purposes of the Road”—Encroachment on Road by Dwelling-house—3 Geo. 4. c. 126. s. 118.*

*Where a toll-house had ceased to be used as such since 1867, but was used as a dwelling-house for one of the men employed in the repair of the road, and the trustees had no intention of reimposing the toll at that point,—*

*Held, that the toll-house had become “useless and was no longer required for the purposes of the road” within the meaning of section 57 of 4 Geo. 4. c. 95; that the turnpike trustees were not entitled to maintain it as a dwelling-house, it being an encroachment on the road within section 118 of 3 Geo. 4. c. 126; and that the adjoining land owner, as being a person using the road, had a right to call upon the trustees by mandamus to pull down and remove the materials of the toll-house.*

This was a rule for a mandamus to the trustees of the Greenlaw Turnpike Trust, commanding them to pull down a toll-house, as being no longer required for the purposes of the road, and to sell or remove the materials.

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It appeared that the toll-house in question had been erected in 1851, and used for the purpose of taking tolls from that date until 1867. In the latter year the bar was removed, and the trustees thenceforward used the house as a dwelling-house for one of the men in their regular employ as road surface man, that is upon the repair of the road. The house was built upon the side of the road in such a position that it could not have been erected originally as a dwelling-house by any person without a violation of section 118 of 3 Geo. 4. c. 126, which forbids the building of a dwelling-house within thirty feet from the middle of any turnpike road.

The application for the mandamus was made by the proprietor of the adjoining land.

*Candy shewed cause.*—The only ground on which any trustees can be required to remove a toll-house is, that it has become useless and no longer required for the purposes of the road. Now here the trustees say that it is required for the residence of a road surfaceman, and it is useful and used for that purpose. That is a purpose of the road, as it is essential that the road shall be kept in proper repair, and the use of this house facilitates this being done. Though not used now as a toll-house it may be necessary to reimpose the toll at this particular point, and the trustees are not to be deprived of the opportunity of so doing. This is an attempt by the adjoining landowner to get the site into his possession, because he has given a notice to the trustees to offer the site for sale to him.

*E. Ridley, contra.*—The adjoining owner has a right of pre-emption. This is conferred upon him by section 57 of the 4 Geo. 4. c. 95, referring to section 89 of 3 Geo. 4. c. 126. He has, therefore, authority to call on the trustees to dispose of that which has become useless for the purposes of the road. Then this has become useless as a toll-house, and its maintenance in its present position cannot be justified, except as a toll-house. The trustees do not say that they certainly will want to use it again as a toll-house; and they do in fact use it as

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a dwelling-house only. That being so it is an obstruction, and is in contravention of section 118 of 3 Geo. 4. c. 126.

[COCKBURN, L.C.J.—The argument is that you may obstruct with a toll-house, but may not continue to obstruct when you cease to use the building as a toll-house.]

That is so, for the Acts do not allow the trustees of the turnpike road to obstruct the road any more than a private individual. The decisions with regard to superfluous lands in the case of railways illustrate what is meant by land being required for the purposes of the road. In *Hooper v. Bourne* (1), Bramwell, L.J., says, "I think land is 'required' where, although it is not at the moment used by the company, it will be wanted within a definite and ascertained time." Here it cannot be said that this will be wanted at any definite time.

COCKBURN, L.C.J.—I think this rule should be made absolute. The first question is, whether the toll-house has become useless, and is no longer required for the purposes of the road; and the decision of this question turns on what is the proper construction of the words "required for the purposes of the road." It is quite clear that this has ceased to be useful as a toll-house, and I do not think that the turnpike trustees have shewn anything to lead us to believe that they seriously contemplate setting up a toll again at this place. As an inference of fact from their statement I do not believe there is any intention to use this again as a toll-house. I start, therefore, with the assumption that this is useless as a toll-house. Then it is said that it is still required for road purposes, because it is occupied by one of the men employed on the road; we must, therefore, consider whether such occupation can come within the meaning of section 57. In order to determine that, we were very properly referred to section 118 of the 3 Geo. 4. c. 126, forbidding encroachments by means of dwelling-houses or other buildings being made on or at the sides of any turnpike road so as to reduce the breadth, which seems to me to make all the differ-

ence in the case. It is clear that if the trustees had erected this, not as a toll-house but as a dwelling-house, they would have obstructed the road, and gone in direct contravention of this section. If they had done so, then the neighbouring landowner, who it must be presumed uses the road, would have a right to call upon them to pull the house down, or to proceed by information as prescribed.

Turning again to section 57, and reading the purposes there as meaning lawful purposes, we see that the use of the house otherwise than as a toll-house, is not within it.

The only other question is, whether the neighbouring proprietor is entitled to call upon the turnpike trustees by mandamus to proceed under the Act, and pull down the toll-house, and sell or remove the materials. I think that he is. He has a right to have the road kept unobstructed, and we may, as I before said, assume that, being a neighbouring owner, he uses the road. That being so, he has, in my opinion, a right to call on the trustees to proceed, so soon as it is established that the toll-house has become useless.

MELLOR, J.—I am of the same opinion. For some little time I hesitated as to whether this might not still be said to be required for the purposes of the road, but I am satisfied now that it has become useless within the meaning of the section. The object of that section is to deal with toll-houses, and their removal when useless for toll purposes. Furthermore, it is clear, in view of the other sections about the erection of houses, that the trustees would have no right to erect any such house except for a toll-house, and it is only as such that it can be continued. Otherwise it is a nuisance and obstruction on the road; and section 57 is express that the land shall not be sold with the obstruction on it; the rule for a mandamus must therefore be made absolute.

*Rule absolute.*

Solicitors—Shum, Crossman & Co., agents for Fenwick & Manisty, Newcastle-on-Tyne, for prosecution; Adam Burn, for Turnpike Trustees.

(1) 47 Law J. Rep. Q.B. 437; s. c. Law Rep. 3 Q.B. D. at p. 274.

[IN THE HOUSE OF LORDS.]

1878. }  
Nov. 14. }

FISHER v. SMITH.

*Marine Insurance — Broker's Lien on Policies for Premiums.*

*The plaintiff employed S. & Co. to insure a cargo. S. & Co. employed the defendant for the same purpose, who effected the policies required. According to the course of trade monthly credits were given for the premiums by the defendant to S. & Co., and by S. & Co. to the plaintiff, the defendant retaining the policies in his hands. The plaintiff paid S. & Co. in due course, but S. & Co. became insolvent before paying the defendant :—*

*Held, that there was nothing in the contract or course of business inconsistent with the common law right of an insurance broker to a lien upon policies for premiums due thereon.*

*Held also, that the lien was the lien of the defendant, and was, therefore, not discharged by the payment to S. & Co.*

This was an appeal from an order of the Court of Appeal reversing a judgment of the Exchequer Division.

The action was brought to recover certain policies of insurance under the following circumstances. The plaintiff Fisher, who was a shipper of steel rails at Barrow-in-Furness, was in the habit of employing Messrs. Skinner & Co., insurance brokers at the same place, to effect insurances on his behalf. Skinner & Co. generally employed the defendant Smith, an insurance broker in Liverpool, to effect such insurances. The usual course of business between the plaintiff and Skinner & Co., and between Skinner & Co. and the defendant (which was also the usual practice in the trade), was this. Skinner & Co. at the beginning of each month sent in to the plaintiff an account, in which they charged him with the premiums, brokerages, &c., in respect of policies effected during the preceding month, and the plaintiff accepted a bill at a month's date for the amount due on such account. Similarly the defendant, who actually paid, or became answerable to the underwriters for, the premiums, sent in to Skinner & Co. on the 10th of each month his account

in respect of the preceding month. The policies in question in this action were effected in the usual manner. The plaintiff, in July, 1871, employed Skinner & Co. to insure a cargo of steel rails for 4,000*l.*, and Skinner & Co. employed the defendant for the same purpose, who effected the policies and became answerable for the premiums. The plaintiff was informed by Skinner & Co. that the policies had been effected by the defendant; but the covering note was made out by Skinner & Co. and sent by them to the plaintiff. In the beginning of August Skinner & Co. sent in their account, in which the premiums were charged for, and this was paid by the plaintiff by a bill dated the 8th of August at a month's date met at maturity. The defendant charged Skinner & Co. for the same premiums in his account sent in on the 10th of August, but Skinner & Co. became insolvent before paying him. A loss occurred in respect of the cargo insured, and the plaintiff applied for the policies to the defendant, who had retained them without the plaintiff's knowledge. The defendant refused to give up the policies, claiming a particular lien for the premiums paid thereon, and a general lien for premiums paid on other policies effected through Skinner & Co. for the plaintiff. The plaintiff then brought an action of detinue, which came on for hearing before Archibald, J., at the Gloucester Spring Assizes in 1875, when it was referred to a barrister to state a Special Case for the opinion of the Court.

The Exchequer Division gave judgment for the plaintiff, but the Court of Appeal reversed the judgment in respect of the particular lien, affirming it in respect of the general lien.

The plaintiff appealed against the judgment of the Court of Appeal in respect of the particular lien.

*Watkin Williams and T. S. Pritchard*, for the appellant.—The common law right of lien cannot subsist where it is inconsistent with the contract or course of business. Here the course of business was for credit to be given, both between Fisher and Skinner & Co., and between Skinner & Co. and Smith. Suppose a policy effected on the 1st of August, and

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a loss on the 3rd, Smith cannot claim a lien because nothing is due to him till the 10th of September. In *Crawshaw v. Homfray* (1) the defendant claimed a lien for wharfage dues, and it appeared that the course of trade was, that such dues were paid by the importer the Christmas following the importation, whether the imported goods were previously removed or not. It was held that there was no lien. And in *Chase v. Westmore* (2) Lord Ellenborough, delivering the judgment of the Court of King's Bench, said they were agreed "that, where the parties contract for a particular time or mode of payment, the workman has not a right to set up a claim to the possession inconsistent with the terms of his contract." The judgment in *Kirchner v. Venus* (3) also lays down that the common law lien for freight cannot subsist where a day is fixed by the contract for payment of the freight.

Next, assuming that there was a lien, it was discharged by the payment to Skinner & Co. Smith knew what the course of business was and assented to it. He knew that Skinner & Co. would be paid by Fisher at the beginning of the month, and it would be most unjust that he should claim a lien till Fisher had paid twice over. The lien, if any there was, was that of Skinner & Co. Smith is, as regards Fisher, a mere voluntary agent, whose position is defined in *Duer on Marine Insurance*, vol. ii. p. 136. There was no privity between him and Fisher. Skinner & Co. were Fisher's brokers, and Smith acted as their servant, sharing in the commission. He never sent in any account to Fisher. All his dealings were with Skinner & Co.; he elected to take them as his debtors, and gave exclusive credit to them—*Man v. Schiffner* (4).

*H. Matthews and MacLachlan*, for the respondent, were not called upon.

THE LORD CHANCELLOR (EARL CAIRNS).—I do not think that your Lordships entertain any doubt as to the propriety

of the decision of the Court of Appeal in this case.

There are here substantially three questions in the case which have been argued by the learned counsel for the appellant. In the first place, was there in the respondent, from the nature of the transactions, a lien? Secondly, was that lien superseded by any contract or course of business inconsistent with it? And thirdly, was it discharged by any payment which was a payment to the respondent?

Now, as to the question whether this is a case in which lien originally would arise in the respondent, I think there can be no doubt. He is the person who effected the policies of insurance, he either paid the premiums or became liable for the premiums, and his was the labour and the care through which the insurances were effected. According to the well-known rule of law he would be entitled, by common law, for his labour and care and his money expended, to a lien, in the nature of holding possession of the policies, and he would be entitled to that lien against every person, against the owner of the goods for whose benefit the policies were effected, and against any intermediaries who might have intervened between the owner of the goods and himself. That appears to me to be the ordinary and well-known rule of law, and I do not think it was seriously disputed at your Lordships' bar.

But was there any contract or course of dealing in the case superseding that lien which, ordinarily speaking, would have arisen? As to that, the argument has assumed the shape of an argument that the lien was superseded, whether it was a lien of the respondent or of the intermediary Skinner, but I will take it as a lien of the respondent. The course of dealing is a question of fact, and is to be ascertained from the statements in the case, with the power which your Lordships have, and which the Court below had, to draw whatever may be the inferences of fact that you think a jury would or ought to have drawn. The course of dealing was this:—The respondent Smith effected in the course of

(1) 4 B. & Ald. 50.

(2) 5 M. & S. 180.

(3) 12 Moore P.C. 361.

(4) 2 East, 523.

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the month a number of insurances for Skinner & Co.; at the end of the month, or within the first ten days of the succeeding month, he furnished Skinner & Co. with an account of all that he had expended, and of his commission, and he expected to receive payment in cash on the 10th of the following month for what he had so expended. It is said that that was a giving of credit, and that it was inconsistent with maintaining a lien, and that it superseded any right of lien which might otherwise have existed.

I could quite understand a course of business of that kind, with a slight addition, superseding the lien. A case of *Crawshaw v. Homfray* (1) was cited, in which there was an additional element in the course of business. There a wharfinger was in the habit of receiving goods upon which he might have had a lien, but the course of business was that he parted with the goods from time to time, receiving payment at the end of every six months, or at the end of every year, for all his dues; and it was held that that course of business prevented him from maintaining his right of lien. If it had been the course of business here for the respondent not merely to effect these policies, but from time to time to give them up as they were effected, and simply to stand upon his right to be paid at the end of the month, then I can understand that the case ought to be likened to the case to which reference was made.

But instead of that being so here, your Lordships have exactly the opposite state of facts found in this case, because not only is there no statement that it was the habit for the policies to be delivered up at the end of the month, and not only is the case one in which you are dealing with a kind of article, namely, policies of insurance, as to which there is no immediate necessity for delivering them up as soon as they are effected, but, in addition to that, you have a precise statement, inserted apparently for this very purpose, that it was not the usual practice for the defendant or his partner to part with the original stamped policies to Skinner & Co. until the premiums were received from them. What does that mean but

this, that the habit of business between the parties was that the respondent insisted upon and held firm by his lien? And no instance can be given of an opposite kind. The conclusion of course, as a matter of fact, upon that is, that the course of business was not any superseding of the lien, but was a course of business by which the premiums were settled month by month, the lien notwithstanding being maintained until payment. That answers the second question.

Then is there anything which has discharged the lien by payment? The moment your Lordships find that the lien was a lien of the respondent, there is no pretence for saying that there was any payment to him, because such payment as has been made was payment to Skinner & Co., the intermediary, and the learned counsel for the appellant very properly said that he could not contend that Skinner & Co. were the agents of the respondent to receive payment.

That exhausts the whole of the case, and under these circumstances I submit to your Lordships that the appeal must be dismissed with costs.

LORD PENZANCE.—I have listened with great attention to the argument which has been urged upon the part of the appellant, and I confess I have been quite unable, throughout that argument, to appreciate the existence of any considerable difficulty in this case.

The plaintiff, Mr. Fisher, lived at a place called Barrow-in-Furness, which is at some distance from Liverpool, and he was minded to open a policy of insurance upon some goods belonging to him. He employed a local agent at Barrow-in-Furness, named Skinner, to effect that policy, and Skinner obviously would have to communicate with Liverpool in order to do it. Skinner might have addressed himself to some Liverpool underwriter, but I apprehend that although, as appears in this case that might be done, a much more convenient method of carrying out Fisher's purpose was to employ some broker in Liverpool who would be able to make terms on the

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spot for a satisfactory premium. Accordingly Skinner employed the defendant as a sub-agent of Mr. Fisher, the owner of the goods, and employed him to effect the policy. Thereupon the defendant effected the policy and kept it in his hands, as I believe is the universal practice of brokers effecting insurances.

The result of that transaction, as it seems to me, would be to make Mr. Smith, the defendant, the sub-agent of Mr. Fisher. Mr. Fisher knew that he had been employed for the purpose of effecting the policy, and Mr. Smith knew that he was effecting the policy, not for Skinner, but for Fisher. It was, therefore, a perfectly well understood transaction; the principal at Barrow-in-Furness had employed the local agent, the local agent had employed the agent at Liverpool, that agent thoroughly understanding for whom he was acting, and the principal thoroughly understanding that the local agent was acting for him. Under these circumstances it appears to me that the ordinary rule of law, that a lien would arise in favour of the broker who held in his hands the policy, could not but be applicable to this case. It is precisely the same as if there had been no intermediate agent at all, and as if Mr. Fisher had written direct to Mr. Smith to ask him to open a policy for him. Having opened that policy, and having got possession of it, he was not liable to give it up to his principal until he had received the premium, which he had either paid or became liable to pay, in respect of it. It appears to me that up to this point, and looked at in this way, the case does not admit of argument. But then it is said, and it is upon this ground that Mr. Watkin Williams has based his argument, conceding that there would have been originally, from the nature of the transaction, a lien in Smith as against Fisher and as against everybody, yet if you look at the case you will find that a bargain was made by the defendant Smith which was inconsistent with his having any such lien. And the learned counsel refers to paragraph 12 of the case which says:—"The course of business was for the said W. H. Brand or the defendant to effect the policy with

the underwriters, and procure and deliver to Skinner and Co. copies of the policies." Therefore the course of business, as there stated, was not to effect a policy and hand it over to Skinner, but to hand over to Skinner a copy of it. "And also to send to Skinner a debit note of the premiums paid, and at the commencement of each month to make out and deliver to Skinner an account debiting them with the money due in respect of the premiums paid on the several insurances effected for them during the month then preceding, and on the 10th of each month the account of premiums paid on the preceding month was paid." That is to say, the course of business was, that when he had effected a policy he kept that policy in his own hands, he forwarded a copy of it to Skinner, and he debited Skinner for it in the general account of all the moneys that were due between them, which general account was paid at the end of the month, or at least on the 10th day of the following month. That was the mode in which the business was usually carried on. Then the case goes on:—"It was not the usual practice for the defendant or Brand to part with the original stamped policies to Skinner & Co. until the premiums were received from Skinner & Co."

Now I confess, reading that as a statement of the way in which the defendant and Skinner carried on business, I am wholly at a loss to understand how that was inconsistent with the idea of Smith retaining the policy and retaining a lien. It is very true that it shews that the payment was, according to the common understanding between them, ordinarily postponed for a month or till the 10th day of the following month; but that postponement of the payment was not coupled with the giving up of the thing in the meantime. Undoubtedly a lien may be lost, as was suggested in the argument, in cases where the party agrees to give up the thing, making a bargain at the same time for payment on a future day. If the agreement is that the thing is to be surrendered, and that the payment is to be postponed, that is inconsistent with a lien. But there is nothing inconsistent with a lien in saying, "I will,



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for convenience sake, take payment at the end of the month, and I will keep the policy in my hands in the meantime; if a loss should occur in the meantime and you want the policy, then you must pay the premium, but, subject to that event occurring, the premium need not be paid till the end of the month." It seems to me that that is the natural consequence and effect of the sort of agreement, as it is called, or rather the course of business which is here set up, and, if the matter be viewed in that aspect, of course the ground taken by the appellant entirely fails.

As regards the remaining proposition which was argued, namely, that though there was once a lien yet that lien has been discharged, I have nothing to add to what has fallen from my noble and learned friend on the woolsack.

I am therefore of opinion that the judgment of the Court below should be affirmed.

LORD O'HAGAN.—I am quite of the same opinion, and I had some difficulty, I confess, in following the argument, ingeniously and forcibly as it was put.

There were two points argued in this case. On the first point, as to the existence of a lien, the matter stands in this way; it is found that the appellant here, Mr. Fisher, employed an intermediary to do his work, but the person who effected the insurance, the person who got the insurance made, and who paid the money for the making of it, and who got the policy into his hands, was the defendant, and that was with the full knowledge and assent of the plaintiff himself, because in the 5th paragraph of this case it is found that although Skinner & Co. were the persons directly employed, the plaintiff generally knew the name of any insurance office with which Skinner & Co. effected policies, without the intervention of any broker, and in the present case had been informed, before receiving the covering note, that the policies which Skinner & Co. were authorised to effect, as above stated, had been effected through Brand and the defendant at Liverpool. I do not say that that makes any great difference in the case, or that it would have been

necessary for the case of the defendant that that should have been found; but it is a fact that what was done by the defendant here was done with the full knowledge, privity and authority of Mr. Fisher, and in that way he became the authorised maker of this particular insurance.

Then it is said that the lien does not exist, because there is an antagonism between the contract made by the parties and the existence of a lien. I do not think that I can say anything more on that subject than has been said so very well by my noble and learned friend beside me. It seems to me as plain as light, that the principle of antagonism between a contract and the existence of a lien, does not apply to this case. The principle would have applied if, in this case, there had been a contract that, on the making of the insurance, the policy should be given up immediately and absolutely; then the lien could not have existed without interfering with the contract between the parties. But that is not the ordinary bargain, and it is not found to be the bargain which existed between these parties; indeed, on the contrary, the bargain was that the policy should remain with the person who had made it and paid for it, and that he should hold it until his debt should be discharged. Therefore, I think upon the first branch of the argument there is nothing further to be considered.

As to the second branch, I shall only say one word. If there was a lien in the case, the question is, how was that lien discharged? If Mr. Smith, having done this work, was entitled to be paid for it, how has he been paid? He has not been paid at all; *ex concessis* he never was paid.

But it was attempted to shew that the payment which Mr. Fisher undoubtedly made to Skinner & Co. was a payment to Mr. Smith, the defendant. But how is that made out in any manner of way? It is said that according to the course of business he recognised a payment to Skinner as a payment to himself. He recognised nothing of the kind in the course of business. The course of business found to have existed, on the face of

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this case, was a course of business which led to the payment to Skinner by a monthly bill, and then a payment by Skinner to his under-agent, this Mr. Smith, and why Mr. Smith should be bound to stop in the middle of that course of business so far as it helped him, I cannot at all understand. I put the question more than once myself to the learned counsel, whether or no there was anything in the case that would entitle him to contend that the intermediary had been constituted as agent to receive payment for the sub-agent, and the answer was that there was nothing of the kind. There is not a particle of evidence in the case, or any finding upon the case, that any such acceptance was ever authorised by Smith to the intermediary; and if not, I cannot at all comprehend how the payment to the intermediary can be held to have been a payment to the sub-agent. If that was no payment to him, and if he had a lien, the lien is there still undischarged in justice and in law.

I observe that in the Court below, not a case of authority exactly, but a statement of the law was referred to, which I think I may very fairly and properly submit to your Lordships as covering, as the learned Judge says who cites it, the whole of this case. It is from the 2nd volume of *Phillips on Insurance*, section 1909. Your Lordships will observe how very fully it touches all parts of this case: "The agent who effects a policy for his principal, and advances the premium, or becomes responsible for it" (which is this case), "and retains the policy in his hands, has a lien upon it for his commission and the premium until the same are paid to him, or he is supplied with funds for the payment, whether his immediate employer is the assured himself or an intermediate agent, and in the latter case whether the intermediate agency was known or not known to the sub-agent claiming the lien." Here there was an intermediate agent, here there was a sub-agent, and here the knowledge of the whole transaction was in the minds of all the parties. It appears to me quite impossible to contend that, under those circumstances, this lien does

not exist as fully now as it ever existed at any period of the transaction.

On the whole I have no doubt that the judgment of the Court below was right, and that the appeal should be dismissed.

LORD SELBORNE.—I have but a few words to add to what has been already said. As to the cases of *Crawshay v. Homfray* (1), and *Kirchner v. Venus* (3), I understand their principle to be this: that a lien cannot be claimed, so as to intercept the performance of the actual contract between the parties, whether that contract is express, or is to be inferred from a certain course of dealing. If the contract is to deliver goods at a certain time, or to deliver them whenever demanded, it would be inconsistent with that contract to refuse to deliver them (the proper time having arrived) upon the ground of any lien for a price, which by agreement was not then payable. Here no such contract has been found by the special case; for if, on the one hand, there was a course of dealing, according to which payment of the premiums was usually made to the broker by monthly settlements with his principal, it is also found (on the other hand) that it was not the course of dealing between these parties (for which purpose I identify Fisher with Skinner) that the policies should ever be delivered to the principal, until the premiums were actually paid to the broker. The true result is, in my opinion, that payment of the premiums was postponed till the monthly settlement only when possession of the policies was not, in the meantime, demanded; but that, if the policies were sooner demanded, they were then to be delivered up to the principal, upon payment of the premiums, and not otherwise.

*Judgment of the Court below affirmed;  
and appeal dismissed, with costs.*

Solicitors—Chester, Urquhart & Co., agents for R. B. D. Bradshaw, Barrow-in-Furness, for appellant; Sharpe, Parkers, Pritchard & Sharpe, agents for Gill & Archer, Liverpool, for respondent.

## [IN THE EXCHEQUER DIVISION.]

1879. }  
Feb. 25. } BOX v. JUBB AND ANOTHER.

*Use of Property to Damage of another—Escape of Water from Reservoir—Escape occasioned by Cause beyond Owner's Control—Act of Third Party—Mazim; Sic utere tuo ut alienum non ledas.*

*The plaintiff sued for the flooding of his premises by the overflowing of a reservoir of the defendants. The reservoir was constructed in a proper manner, such as to prevent its overflowing under any ordinary circumstances, and the overflowing was caused by the forcing into it of an additional quantity of water through circumstances over which the defendants had no control, and which they could not be expected to anticipate, namely, a large discharge of water from a reservoir of a third party into a public watercourse feeding the defendants' reservoir and an obstruction in the watercourse below the outlet of the reservoir at places over which the defendants had no control:—Held, that the defendants were not liable.—Fletcher v. Rylands (37 Law J. Rep. Exch. 161) distinguished, Nichols v. Marsland (46 Law J. Rep. Exch. 174) followed.*

This was an appeal, by the following Special Case, from a judgment of the judge of the County Court of Yorkshire, holden at Bradford, in favour of the plaintiff, in an action tried there by consent.

1. The defendants are the owners and occupiers of a woollen cloth mill, situate at Batley, in Yorkshire; and, for the necessary supply of water to the said mill, is a reservoir, also belonging to the defendants. Such mill and reservoir have been constructed and used as at the time of the overflowing hereinafter mentioned for many years.

2. The plaintiff is the tenant of premises adjoining the said reservoir.

3. The said reservoir is supplied with water from a main drain or watercourse, such supply entering the reservoir by a certain inlet. The surplus water from the said reservoir passes through a certain outlet into the said main drain or watercourse. The said inlet and outlet are furnished with proper doors, or sluices,

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so as (when required) to close the communications between the said reservoir and the said main drain or watercourse.

4. The whole of the said premises are within the borough of Batley, and the defendants have the right to use the said main drain or watercourse by obtaining a supply of water therefrom and discharging their surplus water thereinto as hereinbefore stated, but have otherwise no control over the said drain or watercourse, which does not belong to them.

5. In December, 1877, the plaintiff's said premises were flooded by reason of the overflowing of the defendants' reservoir.

6. Such overflowing was caused by the emptying of a large quantity of water from a reservoir, the property of a third party, into the said main drain or watercourse at a point considerably above the defendants' premises, and by an obstruction in the said main drain or watercourse below the defendants' premises, whereby the water from such main drain or watercourse was forced through the said doors or sluices (which were closed at the time) into the said reservoir.

7. Such obstruction was caused by circumstances over which the defendants had no control, and without the knowledge of the defendants, and had it not been for such obstruction the overflowing of the reservoir would not have happened.

8. The defendants' reservoir, and the communications between it and the said main drain or watercourse, and the said doors, or sluices, are constructed and maintained in a proper manner, so as to prevent the overflowing of the reservoir under all ordinary circumstances.

9. No negligence or wrongful act is attributable to either party.

10. The damages sustained by the plaintiff are agreed at 75l.

*Gully (B. O. B. Lane with him), for the defendants.*—This case does not fall within the facts or the principles of *Fletcher v. Rylands* (1). Both Lord Cairns and Lord Cranworth, who decided that case in the House of Lords,

(1) 37 Law J. Rep. Exch. 161; s. c. Law Rep. 3 E. & L. App. 330.

*Box v. Jubb, Exch.*

concurrent in the statement of the law by Blackburn, J., in delivering the judgment of the Exchequer Chamber, which said: "We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes must keep it in at his peril; and if he does not do so is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major* or the act of God; but, as nothing of this sort exists here, it is unnecessary to enquire what excuse would be sufficient." [He was stopped.]

*Bray*, for the plaintiff.—This case is within the principles of *Fletcher v. Rylands* (1). The cause of the overflow was not *vis major* as in *Nichols v. Marsland* (2).

[POLLOCK, B.—In delivering the judgment of the Court of Exchequer in that case Bramwell, B., said (3), "Suppose a stranger let the water loose, would the defendant be liable? If so, then if a mischievous boy bored a hole in a cistern in any London house, and the water did mischief to a neighbour, the occupier of the house would be liable. That cannot be."]

But the Court of Appeal decided entirely on the ground that the cause of the overflow was *vis major*.

[POLLOCK, B.—If the question is, whether the cause of the overflow in the present case was *vis major*, was it not so?]

No. Even apart from the act of a third party in emptying his reservoir, the cause was not *vis major*. The force was not irresistible; and the watercourse itself resisted it; the watercourse did not burst, and it was the duty of the defendants or their predecessors to make the reservoir at least as secure as the watercourse.

*Carstairs v. Taylor* (4), *Ross v. Fedden* (5), *Smith v. Fletcher* (6), and *Bell v. Twentymen* (7) were also referred to.

*Gully* was not called upon to reply.

KELLY, C.B.—This case has been argued for the plaintiff strenuously and ably, but is not really arguable. The facts are these: The plaintiff is in possession of premises adjoining a reservoir of the defendants, who are mill-owners and have a reservoir for the supply of water to their mill. This reservoir is supplied with water from a main drain or watercourse, and the surplus water from the reservoir passes out into that watercourse. The inlet and outlet are furnished with doors or sluices, for closing the communications when required. The defendants have been in possession of the reservoir with its communications and the doors or sluices thereto, and the water has flowed in the same way, for many years. The case states (in paragraph 8) that the reservoir, and the communications and the doors or sluices, are "constructed and maintained in a proper manner, so as to prevent the overflowing of the reservoir under all ordinary circumstances." The case states also (in paragraph 4) that, although the defendants have the right to use the watercourse by obtaining water therefrom and discharging their surplus water therein, they have otherwise no control over the watercourse. Such being the condition of things, the plaintiff's premises were flooded in December, 1877, by the overflowing of the defendants' reservoir, and the plaintiff suffered damage to the amount of 75*l.*, for which he brings this action. The question is, what was the cause of the overflow? Was it something for which the defendants are responsible—say an act or default of their own—or was it something for which they are not re-

(4) 40 Law J. Rep. Exch. 120; s. c. Law Rep. 6 Exch. 217.

(5) 41 Law J. Rep. Q.B. 270; s. c. Law Rep. 7 Q.B. 661.

(6) 47 Law J. Rep. Exch. 4 (nom. *Smith v. Musgrove*); s. c. Law Rep. 2 App. Cas. 781.

(7) 10 Law J. Rep. Q.B. 278; s. c. Law Rep. 1 Q.B. 766.

(2) 46 Law J. Rep. Exch. 174; s. c. Law Rep. 2 Ex. D. 1; affirming 44 Law J. Rep. Exch. 134; s. c. Law Rep. 10 Exch. 266.

(3) 44 Law J. Rep. Exch. at p. 135; s. c. Law Rep. 10 Exch. at p. 269.

*Box v. Jubb, Exch.*

sponsible? Now we find stated in the case (paragraph 9) that no negligence or wrongful act is attributable to either party; and, from this and other portions of the case, it is clear that the overflow was not occasioned by any act or default of the defendants or by any act or default for which they are directly responsible. On the other hand we find stated in the case (paragraph 6) that the overflowing was caused by the emptying of a large quantity of water from a reservoir, the property of a third party, into the watercourse, at a point considerably above the defendants' premises, and by an obstruction in the watercourse, whereby the water from the watercourse was forced through the doors or sluices already mentioned, which were closed at the time, into the defendants' reservoir; and the case expressly states (paragraph 7) that "the obstruction was caused by circumstances over which the defendants had no control and without their knowledge, and had it not been for such obstruction, the overflowing of the reservoir would not have happened." It appears, therefore, that the overflow was occasioned by an act of a stranger, done without the knowledge of the defendants, over which they had no control, and at a place over which they had no control, coupled with an obstruction equally unknown to them and equally beyond their control; and consequently that the overflow was occasioned by what was entirely beyond their control. It is, however, contended that the defendants were bound to render their reservoir secure against being made to overflow by the pressure to which it was thus subjected. And the question is whether they were thus bound. I am of opinion that they were not. They could not be expected to anticipate that which occurred. I need not refer to the authorities which have been cited. It is sufficient to say that no case has ever decided that which we are invited on the part of the plaintiff to hold. I am clearly of opinion that the defendants are entitled to our judgment.

POLLOCK, B.—I am also of opinion that the defendants are entitled to our judgment. But I am far from desiring to say

that the case was not in my opinion deserving of great consideration.

The parts of the Special Case to be mainly attended to are paragraphs 4, 6, 7 and 8. From these it appears that the overflowing of the defendants' reservoir was caused by the discharge of a large quantity of water from the reservoir of a third party and by an obstruction in the watercourse; that the defendants had no control over the watercourse; that the obstruction was caused by circumstances over which they had no control and without their knowledge; and that their reservoir and its communications and sluices were constructed and maintained in a proper manner sufficient for all ordinary circumstances. Now apart from the decisions, what wrong can the defendants be charged with? The defendants have an ordinary milldam well-built, and it overflows under such circumstances as those. What right of action can that give? As to the decisions, *Fletcher v. Rylands* (1), if read carefully and applied logically, does not by any means bear out the contention for the plaintiff. The House of Lords there concurred in the statement of law contained in the judgment of the Exchequer Chamber delivered by Blackburn, J.; and both Lord Cairns and Lord Cranworth, by adopting that judgment and by their own expressions, relied upon the fact that the defendants in that case had collected the water. The decision in *Fletcher v. Rylands* (1) does not say, nor did anyone who had judicially to consider that case say, that a millowner, having an ordinary milldam well built, is liable for damage done by water which he did not collect but which got into his milldam by the act of a stranger. *Nichols v. Marsland* (2), where the judgment was for the defendant, is more nearly in point. In *Nichols v. Marsland* (2) the cause of the overflow was considered to be *vis major*. But the principles of that case apply to the present case. The Court of Exchequer, in their judgment delivered by Bramwell, B., did not rest their decision upon the ground simply of *vis major*; they rested their judgment upon the broader ground that the cause of the overflow was "the act of an agent

*Boz v. Jubb, Exch.*

whom the defendant could not control," treating, indeed, the case of a human agent as still clearer than the case of a natural agent. And what the Court meant by impossibility of control is shewn at the commencement of their judgment, where Bramwell, B., said: "I understand the jury to have found . . . that the storm was of such violence as to be properly called the act of God or *vis major*. . . . No doubt not the act of God or *vis major* in the sense that it was *physically* impossible to resist it, but in the sense that it was *practically* impossible to do so. Had the banks been twice as strong, or if that would not do, ten times, and ten times as high, and the weir ten times as wide, the mischief might not have happened. But those are not practical conditions, they are such that to enforce them would prevent the reasonable use of property in the way most beneficial to the community." The Court of Appeal, in effect, rested their decision on similar principles. Mellish, L.J., in delivering their judgment, said: "The wrongful act is not the making or keeping a reservoir, but the allowing or causing the water to escape;" and "a defendant cannot, in our opinion, be properly said to have caused or allowed water to escape, if the act of God or the Queen's enemies was the real cause of its escaping without any fault on the part of the defendant." And, upon the question whether the defendant made out that the escape of the water was owing to the act of God, the Court of Appeal, after saying: "The jury have distinctly found not only that there was no negligence in the construction or the maintenance of the reservoirs, but that the flood was so great that it could not reasonably have been anticipated, although, if it had been anticipated, the effect might have been prevented;" said: "this seems to us in substance a finding that the escape of the water was owing to the act of God;" and went on to say: "In the late case of *Nugent v. Smith* (8) we held that a carrier might be protected from liability for a loss occasioned by the act of God, if the loss by

no reasonable precaution could be prevented, although it was not absolutely impossible to prevent it." It appears to me, upon the authority of *Nichols v. Marsland* (2) as well as upon principle, that the defendants, as they could not by any reasonable amount of precaution have anticipated and guarded against this overflowing of their reservoir, are not liable. Reverting to *Fletcher v. Rylands* (1) and to its bearing, generally, upon the present case, it seems to me that *Fletcher v. Rylands* (1) is clearly distinguishable. In *Fletcher v. Rylands* (1) the cause of the mischief was the wrongful act of the defendants in making a reservoir under such circumstances that the collection of the water itself caused the flooding of the plaintiff's mine; whereas in the present case the water collected by the defendants was harmless; the water which overflowed or which caused the overflow was not collected by the defendants, but was added or added itself to the water collected by the defendants.

*Judgment for the defendants.*

*Bray* asked leave to appeal.

*Leave to appeal refused.*

Solicitors—Torr & Co., agents for F. S. Wooler, Batley, for plaintiff; Layton & Jaques, agents for Scholefield & Taylor, Batley, for defendants.

[IN THE COMMON PLEAS DIVISION.]

1879. } STANANOUGH (appellant) v.  
March 14. } HAZELDINE (respondent).

*Municipal Election—Ballot Act, 1872* (35 & 36 Vict. c. 33), s. 4—*Infringement of Secrecy—Communication—Means of Knowing.*

[For the report of the above case, see 48 Law J. Rep. M.C. 89.]

(8) 45 Law J. Rep. O.P. 697; s. c. Law Rep. 1 C.P. D. 423.

## [IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)  
 1879. } LAMB v. BREWSTER AND  
 March 27. } ANOTHER.\*

*Landlord and Tenant—Landlord's Property Tax—Deduction after Payment of Rent in full—Promise to Repay—5 & 6 Vict. c. 35. ss. 60, 68, 103.*

*A landlord promised his tenant that if he would continue to pay his rent in full without deducting anything for property tax, he, the landlord, would repay to him all sums which he had paid or should pay for such property tax. The tenant having paid his rent in full to the landlord during his life time, claimed from his executors the amount of property tax so paid and not deducted from his rent:—*

*Held, on demurrer, affirming the decision of the Queen's Bench Division, that the agreement was not void as "an agreement for the payment of rent in full" within section 103 of 5 & 6 Vict. c. 35.*

This was an appeal from a decision of the Queen's Bench Division, reported 48 Law J. Rep. Q.B. 277, where the pleadings are fully set out.

The action was brought against executors to recover 37l. for six years' landlord's property tax paid by the plaintiff, as tenant of two tenements of the defendant's testator, for the testator.

The defendants pleaded that the plaintiff had made each payment of rent without making or claiming any deduction of the amount liable to be deducted in respect of property tax, according to the statutes in such case made and provided.

The plaintiff in reply alleged a promise by the testator that if the plaintiff would continue to pay the rent in full, without deducting anything for the said payments of property tax, he, the testator, would pay to him all sums which he had paid or should pay for the said property tax; and the plaintiff did continue to pay the said rent in full, but the testator did not repay such sums as agreed.

The defendants demurred to the reply, on the ground that any such agreement

would be void in law by reason of the Property Tax Acts, and that the payment of the full rent to the landlord was a voluntary payment by the tenant and could not be recovered.\*

The Queen's Bench Division overruled the demurrer, and the defendants appealed.

*Meadows White and A. P. Stone*, for the defendants.—The agreement is void under 5 & 6 Vict. c. 35. s. 103.

Section 63, schedule B, No. 9, rule 1 (1), makes the landlord's property tax payable by the occupier.

Section 60, schedule A, No. 9, rule 4, provides for the recouping of the tenant by deduction from the next payment of rent.

Section 73 provides that no agreement contrary to the meaning of the Act shall be binding, and section 103 expressly makes void any agreement for the pay-

(1) By 5 & 6 Vict. c. 35. s. 63, schedule B, No. 9, rule 1, the landlord's property tax "shall be charged on and paid by the occupier for the time being."

By section 60, schedule A, No. 4, rule 9, "the occupier of any lands, tenements, hereditaments or heritages, being tenant of the same and paying the said duties, shall deduct so much thereof in respect of the rent payable to the landlord for the time being (all sums allowed by the commissioners being first deducted) as a rate of sevenpence for every 20s. thereof would by a just proportion amount to, which deduction shall be made out of the first payment thereafter to be made on account of rent, and all receivers of her Majesty, and all landlords, both mediate and immediate, . . . shall allow such deduction upon receipt of such rent under the penalty herein contained."

By section 73, "no contract, covenant or agreement between landlord and tenant or any other persons touching the payment of taxes and assessments to be charged on their respective premises, shall be deemed or construed to extend to the duties charged thereon under this Act, nor to be binding contrary to the intent and meaning of this Act. . . ."

By section 103, "if any person shall refuse to allow any deduction authorised to be made by this Act out of any rent or other annual payment mentioned in the 9th and 10th rules of schedule A . . . every such person shall forfeit the sum of 50l.; and all contracts or agreements entered into for payment of any interest, rent or other annual payment aforesaid in full without allowing such deduction as aforesaid shall be utterly void."

\* *Coram* Bramwell, L.J.; Cotton, L.J.; and Thesiger, L.J.

*Lamb v. Brewster (App.), Q.B.*

ment of rent in full without any deduction.

The statute has two objects, first, the tax is, for the purpose of easy collection, to be paid by the tenant; and secondly, there is to be a compulsory method of repayment by deduction from the rent. There is but one machinery for this purpose. If the tenant does not follow the course provided by law, he loses his security for repayment, and he cannot recoup himself in any other way.

[BRAMWELL, L.J.—Has the landlord "refused to allow" the deduction?]

Yes. He has induced the plaintiff to enter into the alleged agreement. That agreement gives the defendant no security, and it is not a deduction. A "deduction" must be made from some fund actually *in esse* at the time of the deduction.

They cited *Denby v. Moore* (2).

*Day and Dodd*, for the plaintiff, were not called upon.

BRETT, L.J.—I am of opinion that this judgment should be affirmed. In the absence of an agreement like the specific agreement put forward in the reply, the fact of the tenant paying the rent in full would prevent him from recovering back the amounts so paid. But the question is not whether on a mere payment of the rent in full by the tenant an action would lie for the amount of taxes paid against the landlord, but whether, where the tenant pays in full on the undertaking of the landlord to pay back the sums due for property tax, there is anything to prevent the tenant from recovering on that specific agreement. In my opinion this depends on section 103 of the Act, and on section 103 only, for it seems to me that section 73 has no bearing on the matter. I think that in construing an Act of Parliament, as in construing any other document, we ought to try and see what is the substantial reason for the enactment, and unless there is something in the words of the Act which actually prevents it, we ought to say that a substantial fulfilment of the object of the statute is sufficient.

Now the substantial result which is in-

tended to be attained by the Act is that the taxes in question are to be levied on the tenant for purposes of convenience; but the person who is finally to pay is to be the landlord. In order to effect this object it is provided that any agreement the result of which will be in the final result that the tenant will have to pay the whole rent and also the tax, is a void agreement. But the Act does not say that an agreement that the payment is to be made by the tenant at the time, but is afterwards to be repaid by the landlord, is void. There are no express words to that effect, and in substance under such an agreement as that the tax, though levied upon the tenant in the first instance, is afterwards to be paid by the landlord; and if such an agreement is carried out, that which the statute requires will be fulfilled. It is, however, contended that the word "deduction" in the Act is equivalent to deduction either at or before the payment of the rent, so that the full rent may never under any circumstances be paid. If we go to the strictest limits of verbal construction, perhaps payment of the full rent by the tenant, and a subsequent return of part by the landlord, may not be a deduction in the strict sense of the word. But on a fair construction of the Act, I think it only forbids an agreement the final result of which will be that the tax will be borne by the tenant, and no reason has been shewn for holding this to be a void agreement, or for preventing the plaintiff from recovering upon it if it is proved.

COTTON, L.J.—The question in this case is, whether or no the express promise alleged in the reply is void under the Property Tax Acts. There is some little ambiguity as to the terms of the agreement, which is given in the indirect form and subjunctive mood, but substantially it is an agreement that if the tenant in the first instance will pay the full rent, the landlord will afterwards repay the amount of the taxes.

Now, as I understand the Act, the object of it is to make the property tax under all circumstances a landlord's and not a tenant's tax. This is partly provided for by section 73 which provides that



*Lamb v. Brewster (App.), Q.B.*

in the case of any agreement on the part of the tenant to pay rates and taxes, such agreement is not to apply to income tax and landlord's property tax, and it provides that for convenience the occupier is to pay the tax, and then to be at liberty to deduct the amount from his rent. This is for the tenant's benefit. If he neglects to avail himself of his right to deduct, then, as he has paid his rent in full in his own wrong, he has no remedy. The Act throws the burden of payment on the tenant, and then gives him a special method of setting himself right, and if he pays the full rent, he does so in his own wrong and has no right to recover.

But what is the agreement? If under it the landlord receives the whole rent and promises to pay back the amount of the tax, that is in substance allowing the deduction, and it still leaves the tax a landlord's and not a tenant's tax. If this is not so, we must go so far as to say that if the whole rent were paid one day under a promise to repay the amount of the tax on the following day, that promise would be void.

But on a reasonable construction of the Act this is not a violation of the intention of the Legislature. We must assume that the landlord will perform his contract. It would be adhering too closely to the words to say that what has been done has the effect of making this a tenant's and not a landlord's tax. I go further and say it is allowing the deduction within the meaning of the section. Then it is said that the Act of Parliament makes this agreement void. If that were so, of course the plaintiff could not recover. But what are the words of the section? It says that the tenant is to have a right to deduct these taxes from his rent. If he does not, and there is no agreement with the landlord about it, he has no further remedy. Then we have section 103, which is as follows:—[His Lordship read the section.]

Now we have not got to deal with that, except so far as to see whether it can operate so as to make the promise alleged to be given by the landlord void. If the contract in question had been by the tenant to pay the whole rent, the sec-

tion might be pointed at by the tenant as rendering the contract void; though it is not necessary to say what would be the effect if such a contract were accompanied by a promise by the landlord to pay the tax. But here the tenant has at the request of the landlord paid the rent in full, thus waiving his power to deduct the amounts from the rent. Then the landlord has contracted to pay. That contract does not come within the express provisions of the section, nor can it be brought within them by reference to the object of the Act, although it provides a power to deduct the tax from the rent, that is for the benefit of the tenant, and we must not so construe it as to hold that if the tenant gives up that benefit at the request of the landlord he cannot by an action enforce the landlord's promise to refund, or that such an arrangement makes the tax a tenant's and not a landlord's tax.

THE SINGER, L.J.—I am of the same opinion. The statute has two main objects. First, to facilitate the collection of the tax, it is made payable in the first instance by the tenant. Secondly, as a matter of policy it is intended that in all cases the landlord shall be the person ultimately liable to pay. These objects are carried out by the following sections. Section 63 provides that the tax shall be in the first instance collected from the tenant. Section 60 that the tenant shall deduct it from the next payment of rent. Section 73 that no agreement touching the payment of taxes is to extend to the tax in question, or to be binding contrary to the intent of the Act; while section 103 imposes a penalty on landlords refusing to allow the deduction and enacts that all contracts for the payment of the rent by the tenant without such deduction are to be "utterly void."

The question, then, comes to be, what is the meaning of the expression, "refusal to allow the deduction"? In interpreting the words we must, I think, take the latter part of section 103 as correlative to the earlier part. Suppose at the time of the payment of the rent the tenant were to say, "I am now going to give

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you a cheque for the whole amount, and I must ask you to pay me back the amount of the property tax." It cannot be said that in such a case the landlord would be liable to penalties for refusing to allow the deduction. If that be so, I then understand the latter part of the section to be substantially equivalent to this, that no contract is to be allowed to be valid under which the tenant is to be ultimately liable. But any arrangement between the parties as to the way in which the deduction is to be made is valid, and does not prevent it from being a good deduction within the meaning of the Act.

*Judgment affirmed.*

Solicitors—J. W. Marsh, agent for T. Bescoby, East Retford, for plaintiff; Collyer-Bristow, Withers, & Russell, agents for Freer, Hett, & Hett, Brigg, for defendants.

[IN THE COMMON PLEAS DIVISION.]

1878.	} THE IMPERIAL MARINE INSURANCE COMPANY v. THE FIRE INSURANCE CORPORATION, LIMITED.
Dec. 14.	
1879.	
March 13.	

*Marine Insurance—Re-insurance against Fire—Declarations of Risk—Usage of Underwriters.*

In accordance with an agreement entered into between the plaintiffs, a marine insurance company, and the defendants, a fire insurance company, the defendants subscribed a policy whereby they undertook to re-insure the plaintiffs against loss or damage by fire to the extent of 50,000*l.* by the ships as might be declared at and from certain ports to destination, the policy to be subject to the same conditions (as far as they related to the fire risk only) as the original policy or policies, and would pay as might be paid thereon. The policy provided that the arrangement was to be in force for one year from the 1st of October, 1876, and to include only such vessels as were coal-laden; the policy to be supple-

mented by further policies on like terms should the amount thereof not prove sufficient for the year's transactions.

This policy becoming exhausted by declaration of risk, the defendants, on the 9th of July, subscribed a second policy similar in terms to the former policy, and this second policy becoming likewise exhausted, a third policy was, on the 25th of October, subscribed by the defendants, similar in terms to the former policies.

On the 7th of June the plaintiffs insured a coal-laden ship, the "*Hampden*," and there was a loss by fire of the cargo on the 18th of September, which would have been covered by the policy of insurance if the risk had been duly declared, but through the negligence of the plaintiffs' manager the risk had not been declared. At the time the third policy was effected the plaintiffs knew of the loss, and on the 2nd of November they declared the "*Hampden*" and claimed for a loss. The plaintiffs having brought an action to recover the loss, it was—

Held that the plaintiffs were entitled to recover, for that the defendants were insurers in respect of a marine risk, and as such subject to the usage of underwriters, stated in *Stephens v. The Australasian Insurance Company*, by which, in the case of open policies on ships to be declared, the policy attaches to the goods as soon as, and in the order in which they are shipped, in which order the assured is bound to declare them, and in case of mistake as to the order of shipment, the assured is bound to rectify the declaration which may, in the absence of fraud, be altered even after the loss is known.

CASE, on further consideration, argued on the 14th of December, 1878. The facts and arguments appear in the judgment of the Court.

*Charles Russell and Myburgh*, for the plaintiffs.

*Herschell and Wheeler*, for the defendants.

LOPES, J. (on March 13, 1879), delivered judgment as follows:—

This case came before me for trial last Liverpool summer Assizes. The jury were discharged by consent without a

*Imperial Marine Ins. Co. v. Fire Ins. Co., C.P.*

verdict, and all questions were left to my decision.

The plaintiffs are a marine insurance company, carrying on business at Liverpool, and the defendants are a fire insurance corporation.

In November, 1876, it was agreed between the plaintiffs and defendants that the defendants should, upon certain agreed terms, re-insure the plaintiffs against loss by fire to the extent of not more than 1,000l. by any one vessel, upon all coal-laden ships, which should be insured by the plaintiffs under policies at and from certain agreed ports to certain other agreed ports.

In accordance with such agreement the defendants subscribed and issued to the plaintiffs a policy dated the 28th of February, 1877, whereby the defendants in consideration of 250l. undertook to guarantee or re-insure the plaintiffs against loss or damage by fire, and the consequence thereof to the extent of 50,000l. by the ships or vessels as might be declared at and from certain ports therein mentioned to destination, the said policy to be subject to the same clauses and conditions (as far as they related to the fire risk only) as the original policy or policies, and would pay as might be paid thereon. In the said policy it was provided that the arrangement was to be in force for one year, from the 1st of October, 1876, and was to include only such vessels as were coal-laden. It was also provided that the said policy was to be supplemented by further policies on like terms, should the amount thereof not prove sufficient for the year's transaction.

Declarations were made on the 19th of February and on the 29th of June, such declarations were far in excess of the policy. On the 9th of July defendants subscribed and issued a second policy for 50,000l., similar in terms in every respect to the former policy.

On the 7th of June the plaintiffs insured a coal-laden ship called the *Hampden*, on a voyage between the prescribed ports. The *Hampden* was lost on the 18th of September. The loss was posted at Lloyd's on the 24th of December. Further declarations were made on the 10th of August, and were in excess of the

second policy. The *Hampden* was not declared either on the 29th of June nor on the 10th of August.

On the 24th of October the plaintiffs applied to the defendants for a covering slip, which was sent them by the defendants, and on the 25th of October a third policy was subscribed and issued by the defendants in the same terms in all respects as the two previous policies. On the 2nd of November the plaintiffs declared the *Hampden* and claimed for a loss. At this time, and when the third policy was effected, the plaintiffs knew of the loss of the *Hampden*.

It was admitted at the trial and in the argument that the plaintiffs had taken a risk of a coal cargo in respect of the *Hampden*, and that there was a loss which would be covered by the policy of insurance if the plaintiffs were not debarred from attributing it to one of the said policies by reason of delay in declaring the risk. It was also undisputed that, taking the risks in chronological order, the *Hampden* did not come under either of the first two policies, which were by previous risks exhausted, when the plaintiffs took the risk in the *Hampden*, but must rank under the third policy (if under any), which was effected on the 25th of October.

It was also undisputed that the plaintiffs' manager had been most negligent in not declaring the *Hampden*, but the defendants admitted that there was no want of good faith on his part nor on the part of the plaintiffs' company.

It was also admitted that a usage in fact existed such as that in *Stephens v. The Australasian Insurance Company* (1), to the effect that in the case of open policies on ships to be declared, there is a usage of merchants and underwriters that the policy attaches to the goods as soon as, and in the order in which they are shipped, in which order the assured is bound to declare them, and in case of mistake as to the order of shipment the assured is bound to rectify the declaration, which is sometimes done after loss.

The defendants contended that they,

(1) 42 Law J. Rep. C.P. 12; a. c. Law Rep. 8 C.P. 18.

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the defendants, not being a marine insurance company, the usage stated in *Stephens v. The Australasian Insurance Company* (1) did not attach. As the case depends mainly on whether this custom applies or not, it is convenient first to consider that question. I think it does. The argument is that the usage does not attach because the plaintiffs are insurers against marine risks, and the defendants are insurers against fire. It is conceded, however, that it is within the powers of the defendant company to re-insure against loss by fire in case of ships at sea. The plaintiffs here insure against perils by sea generally, and in order to ease their liability, they reinsure their risks in respect of coal-laden vessels for a limited amount in each case and in respect of fire only, and between specified ports, with the defendants. The contract with the defendants is a contract of fire insurance no doubt, but a contract of fire insurance in respect of a marine risk. The defendants when they entered into that contract were doing the trade or business of marine insurance. The plaintiffs in the course of their business undertook certain marine risks, the defendants for their own benefit take upon themselves to indemnify the plaintiffs against one of those marine risks (being a risk against fire). It was a marine risk in the hands of the plaintiffs, and did not become less so when undertaken by the defendants. When the defendants contracted with the plaintiffs they contracted with them according to the usage of the particular trade or business to which the contract related. It related to the trade or business of marine insurance. I think, therefore, the usage in *Stephens v. The Australasian Insurance Company* (1) applies.

This being my view, it is not necessary for me to determine how the case would stand if that usage did not attach. I will only say that it appears to me that if the usage did not attach the contract could not be regarded as an ordinary open policy on ship or ships to be hereafter declared. Having regard to the terms of the contract between the parties, I should be inclined to adopt the argument that there is no necessity, except as a matter of convenience (as shewing when one policy was exhausted, and another had

become necessary), that there should be any declaration, but that the policy attached when the risk was incurred.

It was argued by Mr. Wheeler, on the part of the defendants, that the negligence of the plaintiffs' manager was such that it afforded facilities for fraud, and consequently disentitled the plaintiff from recovering. A passage from *Parsons on Insurance* (2) was relied on. I am not prepared to hold there was such negligence, nor can I find any authority for Mr. Wheeler's contention. I am of opinion that the plaintiffs, having acted in good faith, are not debarred by that delay in making a declaration on the *Hampden* from recovering.

*Judgment for the plaintiffs.*

Solicitors—Field & Roscoe, agents for Bateson & Co., Liverpool, for plaintiffs; Learoyd & Co., for defendants.

*Novell. In. D. R. 572. Cl. 160.*

[IN THE COMMON PLEAS DIVISION.]

1879. } DOLPHIN v. LAYTON  
March 7. } (SCOTT, garnishee).

*Attachment of Debt—Garnishee—Registrar of County Court—Payment into Court—County Court Rules, 1875 (Order XXIV. rules 3, 4).*

*Money paid into a County Court by the judgment debtor to answer a judgment obtained by A. cannot be attached by a judgment creditor of A. under a garnishee summons against the Registrar of the Court issued after the money has been paid into Court.*

Appeal from the County Court of Worcestershire, holden at Bromsgrove.

1. At a Court holden at Bromsgrove on the 9th of January, 1878, Mark Layton recovered against James Chapman a judgment for debt and costs, amounting to 11l. 3s. At the same Court George Dolphin recovered a judgment against the same Mark Layton for 16l. 4s. 6d., debt, and 5l. 3s. 7d., costs.

2. On the 22nd of January, 1878, and before the issuing of the garnishee summons next hereinafter described, Chap-

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man paid the sum of 11*l.* 3*s.* into Court, into the hands of the Registrar, in satisfaction of the judgment against him.

3. On the 22nd of February, 1878, Dolphin sued out a garnishee summons against Thomas Scott, the Registrar of the Court, to recover the 11*l.* 3*s.* paid into his hands by Chapman in satisfaction of Layton's judgment, claiming that sum as money received by Scott to the use of Layton, or as money holden by Scott as trustee for Layton absolutely.

4. Scott, the Registrar, appeared, and submitted to the judgment of the Court; but Mr. Simmons, who had been Layton's solicitor in the proceedings against him, intervened, and claimed the fund in Court as assignee of Layton.

5. Simmons, the intervener, made two points—first, he relied upon his title under the assignment, which, he contended, being prior in date to the garnishee summons against Scott, overrode the title of Dolphin thereunder; and, secondly, he argued that the proceedings were misconceived, and that a garnishee summons did not lie against Scott, the Registrar, who could not be said to be Layton's debtor by reason of the payment of the money into Court to Layton's credit.

6. The Judge of the County Court decided that the alleged assignment to Simmons was void within the statute of Elizabeth (18. c. 5); and no question is to be raised upon that part of his decision.

7. He further decided that, assuming Simmons to have, under the circumstances, a *locus standi* to dispute the liability of the Registrar to proceedings by garnishee summons, such a summons *did* lie against him as being, *quoad hoc*, the banker of Layton; but on this point (which is one of general importance), he gave leave to appeal.

The question for the opinion of the Court was:—1. Whether a proceeding by way of garnishee summons could, under the circumstances above stated, be maintained by Dolphin against Scott.

*Dodd*, for the appellant.—The sole question is whether money in the hands of the Registrar under the circumstances stated in the case, can be attached.

By Order in Council, the sections of the Common Law Procedure Acts, 1854 (17 & 18 Vict. c. 125. sects. 60–67), and 1860 (23 & 24 Vict. c. 126. sects. 28–31), relating to attachment of debts, are extended to County Courts (see *Pollock's County Court Practice*, 8th edit. pp. 211, 841, 886), so that there is no difference in this respect between the practice of the Superior Courts and the County Courts.

Before a garnishee summons can be maintained it must be shewn that the garnishee is indebted to the judgment debtor in respect of a debt for which he could be sued by the latter. (County Court Rules, 1875, Order XXIV. rules 3 and 4). In the present case the money has been paid into Court, into the hands of the Registrar, in pursuance of County Court Rules, 1875, Order XVIII. rule 6.

[DENMAN, J.—I can see no distinction between the Registrar of the County Court and the Masters of this Court.]

*Dodd* was then stopped by the Court.

The plaintiff and the garnishee did not appear.

LORD COLERIDGE, C.J.—I entertain no doubt on this question. I am clearly of opinion that money thus paid to the Registrar of the County Court cannot be subject to process of attachment.

DENMAN, J., concurred (1).

Solicitors—Pitman & Lane, agents for W. E. Simmons, Birmingham, for appellant.

## [IN THE QUEEN'S BENCH DIVISION.]

1879. } TAYLOR (*appellant*) v. GOOD-  
March 25. } WIN (*respondent*).

*Highway Act* (5 & 6 Will. 4. c. 50), s. 78—*Furious Driving of Carriage along Highway—Bicycle.*

[For the report of the above case, see 48 Law J. Rep. M.C. 104.]

(1) See *Stevens v. Phelps*, 44 Law J. Rep. Chanc. 680.

[IN THE COMMON PLEAS DIVISION.]

1878.	} THE YORKSHIRE BANKING COMPANY v. BEATSON AND MYCOCK.
Dec. 5.	
1879.	
March 13.	
April 24.	

*Partnership carried on in the Name of an Individual Member—Bill of Exchange—Accommodation Acceptance of Individual Member—Liability of Dormant Partners—Onus of Proof.*

Where a partnership is carried on in the name of an individual member of it, any note or other obligation signed by such individual member in his name is *prima facie* presumed to be the note of the individual and not of the partnership.

Plaintiffs sued the defendants, Beatson and Mycock, on two bills of exchange: one drawn by K. on W., and indorsed "William Beatson;" the other drawn by O., addressed to "Mr. William Beatson, Chemical Works, Rotherham," and accepted and indorsed "William Beatson."

Before January, 1878, Beatson had carried on the business of a chemical manufacturer at Rotherham. On the 1st of January the two defendants entered into a partnership in the same business, on the terms that the style of the firm was to be "William Beatson," that Beatson was to have the whole management of the business, and that neither partner should have authority to draw, indorse, or accept bills without the previous consent, in writing, of the other. Beatson had kept an account at the Rotherham bank for several years: after the formation of the partnership no change was made either in the heading of the account at this bank, or in the method of keeping it. It was headed "William Beatson, Esq." The firm had no separate account.

The bills sued on were dated respectively the 6th and 13th of March, 1878, and were renewals of earlier bills, originating in accommodation transactions, between Beatson and O., K. and W. The bills were indorsed and accepted by Beatson without the knowledge of Mycock. The proceeds of the bills went into the account at the Rotherham bank, and Beatson drew on this account from time to time for goods

supplied to the business, but his account with the bank was overdrawn; and he had drawn out of the account, for his own purposes, a much larger sum than was brought into the account by the proceeds of the bills in question. The plaintiffs who had discounted the bills on the 14th and 18th of March respectively never heard of the existence of any partnership until four months afterwards, and knew nothing of Mycock till then:—

Held, that Mycock was not liable on the bills as dormant partner.

Action on two bills of exchange, tried at the Leeds October Assizes, 1878, before Lindley, J., and a special jury, when the defendant Beatson allowed judgment to go by default, and a verdict and judgment were entered for the plaintiffs against the defendants Beatson and Mycock. A rule for a new trial was afterwards obtained on several grounds; but the question mainly argued was whether, upon the proved facts, there was any evidence of liability on the part of the defendant Mycock.

The case was argued on the 5th of December, 1878, and the 13th of March, 1879. The facts of the case are sufficiently stated in the judgment of the Court.

Digby Seymour and Tindal Atkinson, for the plaintiffs, shewed cause against the rule for a new trial, and contended that, as "William Beatson" was the name of the firm, and the defendant Mycock a sleeping partner, he was liable on a bill drawn in the partnership name.

Waddy and Gainsford Bruce, for the defendants, in support of the rule, contended that "William Beatson" was *prima facie* the name of the individual, and that the onus of shewing that the bill was the bill of the firm, and not of the individual partner, lay on the plaintiffs.

In addition to the authorities referred to in the judgment, the following were cited:—*Edmunds v. Bushell* (1); *Byles on Bills*; *Siffkin v. Walker* (2); *Baker*

(1) 35 Law J. Rep. Q.B. 20; s. c. Law Rep. 1 Q.B. 97.

(2) 2 Campb. 308.

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*v. Charlton* (3); *Ex parte Buckley* (4); *The Bank of Scotland v. Watson* (5); *Shirreff v. Wilks* (6); *Nicholson v. Ricketts* (7); *Lloyd v. Ashby* (8); *Ex parte Baird* (9); 1 *Parsons on Bills*, p. 182; and the following American cases:—*Woodward v. Winship* (10); *The Manufacturers' Bank v. Winship* (11); *The Mercantile Bank v. Cox* (12); and *In re Warren* (13).

*Our. adv. vult.*

The judgment of the Court (14) was, on the 24th of April, 1879, delivered by

DENMAN, J.—In these two actions, the second of which was to abide the event of the first, the plaintiffs were the holders of two bills of exchange. The defendant, Beatson, had allowed judgment to go by default; and the question was whether the defendant Mycock was liable as Beatson's partner.

The first action was brought upon two bills: one for 276*l.* 15*s.*, at four months, dated the 6th of March, 1878, drawn by one Kelly on one Wilson, and indorsed "William Beatson;" the other for 484*l.* 18*s.*, at four months, dated the 18th of March, drawn by one Carr, addressed to "Mr. William Beatson, Chemical Works, Rotherham," and accepted and indorsed "William Beatson." The bills were discounted by the plaintiffs on the 14th and 18th of March respectively. It appeared that these bills were renewals of earlier bills originating in accommodation transactions between the defendant Beatson and Carr, Kelly and Wilson, and that the bills were accepted and indorsed by Beatson without the knowledge of Mycock. Before January, 1878, Beatson had carried on the business of a

chemical manufacturer at Rotherham. On the 1st of January, 1878, the two defendants entered into partnership in the same business, on the terms that the style of the firm was to be "William Beatson;" that the defendant Beatson should have the whole management of the business; that neither partner should have authority to draw, indorse, or accept bills without the previous consent, in writing, of the other. The plaintiffs never heard of the existence of any partnership until long after the discount of the bills, namely, on the 17th of July, and knew nothing of Mycock until then. Beatson had kept an account at the Sheffield and Rotherham bank for fifteen years. After the formation of the partnership no change was made either in the heading of the account at this bank or in the method of keeping it. It was headed "William Beatson, Esq." The firm had no separate account. The proceeds of the bills went into this account, and Beatson drew on this account from time to time to pay for goods supplied to the business; but his account with the bank was overdrawn, and he had drawn out of the account, for his own purposes, a much larger sum than was brought into the account by the proceeds of the bills in question.

It appears to us that the liability or non-liability of the defendant Mycock in this case must turn mainly on the question whether, where the name of a firm is identical with that of an individual member of it, and that individual member accepts or indorses bills of exchange directed to or indorsed by him in his own name, being also that of the firm, these are to be taken to be *prima facie* the bills of the firm or the bills of the individual member; in other words, on whom is the burden of proof? Does it lie on the plaintiff to shew that the bill is one which the individual member had authority to draw, so as to bind the firm? or on the defendant, to shew the contrary?

The learned Judge put two questions to the jury—First. "Was the name, Wm. Beatson, put to the bills to denote the firm, or to denote Wm. Beatson only?" and, secondly, "Did the bank take the bills as the bills of the chemical works,

(3) 1 Peake N.P. 111.

(4) 14 Mees. & W. 469; s. c. 14 Law J. Rep. Exch. 341.

(5) 1 Dow. 40.

(6) 1 East 48.

(7) 2 E. & E. 497; s. c. 29 Law J. Rep. Q.B. 55.

(8) 2 B. & Ad. 23.

(9) Law Rep. 5 Ch. App. 725.

(10) 12 Pick. 430.

(11) 5 Pick. 11; s. c. 22 Mass. Rep. 11.

(12) 38 Maine, 500.

(13) Davesis, 320.

(14) Denman, J., and Lopes, J.

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whoever their proprietors might be, or as the bills of Wm. Beatson only?" The jury found as follows:—"The bill dated the 13th of March having been drawn by Josiah Carr & Son upon Wm. Beatson, at the address, Chemical Works, Rotherham, we agree that Wm. Beatson's acceptance of it must be held to denote the acceptance of the firm. The bill dated the 6th of March gives no evidence upon the point put by the Judge."

If the case turned upon whether these findings were satisfactory or not, for the purpose of giving judgment, we should be of opinion that they were not, and that, even if there was evidence which required to be submitted to a jury at all in the case, there must have been a new trial. The reasons given by the jury shew that they were not answering the questions put to them by the learned Judge, but rather laying down the proposition that Carr's addressing the bill to Beatson at the works, and the bill being accepted by him, was evidence that it was a bill intended to be addressed to the firm, and therefore binding on the firm. The bill was, in fact, addressed to "Mr. Wm. Beatson, Chemical Works, Rotherham," which was his evidence; and we think that this mode of addressing the bill is really no evidence at all, as against Mycock, that the bill was a bill of the firm, or one which the plaintiffs had any ground for considering to be a bill binding on any one but William Beatson personally. The jury being asked afterwards what they said as to the bill of the 13th of March, said that, "from the fact of its being put in connection with the other, they supposed it must follow the same result."

Both sides contended that it was not necessary to have left any question to the jury at all, Mr. Seymour, for the plaintiff, urging that, because "Wm. Beatson" was the firm name, and the defendant Mycock a sleeping partner in a firm of that name, he was liable as in an ordinary case of partnership with an ordinary firm name, as "A. & Co.," or "A. & B.," or "A., B. & Co.," Mr. Waddy, for the defendant, on the other hand, contending that "Wm. Beatson" was *prima facie* the name of the man Wm. Beatson, and

that it lay on the plaintiff to establish that a bill accepted or indorsed by him in that name was a bill of the firm and not of the individual. The rule was granted on the ground that the learned Judge was wrong in leaving the questions he left to the jury, and that the verdict was against the evidence. But it was also contended, upon the argument for the defendant Mycock, that he ought to have judgment, upon the ground that there was no evidence at all which could properly have been left to the jury in support of his liability, and that, upon the undisputed facts, the judgment ought to have been entered for him. Several authorities were cited on both sides, which we purpose briefly to consider.

The question is stated as follows in the 12th edition of *Byles on Bills*, p. 48:—"If a man be at the same time a partner in distinct firms, but each firm use the same style, and he draw a bill in the common name of both, it has been held that an indorsee may charge either firm at his election. But where the name of the firm is the same as the name of the individual, and the bill is drawn by the individual for his separate benefit, *perhaps* the firm is not pledged." In *Windle v. Orouther* (15) Bayley, B., p. 318, draws a distinction between the case where a partnership name is pledged and the case of *Ex parte Bolitho* (16), in which a joint and a separate trade were carried on in the name of the same individual. In that case it was held that the firm was not liable unless it could be shewn that the bill was drawn as a bill of the firm and not as a bill of the individual only. On the other hand, in the case of *Furze v. Sharwood* (17), where the defendants were trustees to carry on the business of an embarrassed firm, A., M. and K., in the name of M. only, alone, and they employed M. to carry on the business, it was held, under the particular circumstances of the case, that indorsements of certain bills indorsed by M. in his own name were *prima facie* the indorsements of the defendants, and that the *onus* of

(15) 1 Cr. & J. 316; s. c. 1 Tyrw. 210.

(16) 1 Buck. 100.

(17) 2 Q.B. Rep. 117; s. c. 11 Law J. Rep. Q.B. 119.



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shewing that the indorsements were made on account of the separate business, and not on that of the trustees, which was the general and ostensible business, was on the defendants. The Court, however, in that case lay stress upon the fact that the bills were discounted with persons who were in the habit of discounting for the firm who had assigned their effects to the defendants, and said that the cases cited (*Ex parte Bolitha* (16) included) were not inconsistent with the view they took of the case under consideration; so that we think that case can hardly be regarded as laying down that, in every case, the *onus* is upon the defendants, where a bill is drawn by a person whose name is the same as that of the firm to which they belong, to shew that the bill is not the bill of the firm.

In the present case the only evidence beyond the bill itself given to shew that it was or was not a bill *intended* to bind the firm was the evidence of Beatson himself, who swore that he did not so intend; that the bills in question were not signed by him in respect of any trade transaction, but accommodation bills, never brought into any partnership book or account. Of course it was competent to the jury to disbelieve Beatson, but unless the *onus* of proof lay upon the defendants, we think there was no evidence upon which the jury could have found properly for the plaintiffs upon that question, and nothing which could have been properly put to the jury as evidence to contradict Beatson in that respect. The only evidence relied upon by the plaintiffs for the purpose was the fact that Beatson had paid the proceeds of the bills into the account kept in his name at the bank; but inasmuch as that account was always overdrawn so far as he was concerned, but so far as the business was concerned there was always a balance in hand, we do not think that his improper conduct in raising money on bills for his own purposes in his own name can properly be held to have had the effect of binding the partnership, or to amount to evidence that the bills were accepted or indorsed for the purposes of the firm.

Many other authorities were cited from the English reports, not exactly in point, but bearing more or less upon the ques-

tion whether in such a case as the present the presumption is in favour of or against the liability of the dormant partner. In *Emly v. Lye* (18), where one of two partners drew bills in his own name which he procured to be discounted by a banker through the same agent who had procured the discount by the same banker of bills drawn in the name of the partnership, it was held that the banker had no remedy upon the bills so drawn though the proceeds were carried to the partnership account, the money being advanced solely on the security of the persons whose names were on the bills by way of discount and not of loan to the partnership, although the bankers conceived at the time that all the bills were in fact drawn on the partnership account. In that case Lord Ellenborough, C.J., said: "*Nothing passed from the defendants to induce the plaintiff to believe that it was a partnership concern and to lend his money on that account.*" Grose, J., adds: "*At the time when the discount took place the partnership had made no contract with the discounter, who therefore must be taken to have purchased the bills of one of the partners only.*" Le Blanc, J., says: "To charge the defendants on these bills they must appear to have been drawn for and on account of the partnership;" and Bayley, J.: "There was no contract between the parties at the time." This case appears to us to be strong to shew that where no credit is given to a partnership on the face of the bill, the presumption of law must be that the individual signing the bill is the only person liable for it, in the absence of express proof of authority from his partners to bind the firm by bills given in his own name, as well as of the particular bill being in fact a bill signed for the purposes of the partnership. The case of *The South Carolina Bank v. Case* (19), which was strongly relied upon by the plaintiffs' counsel, appears to us not to assist the plaintiffs in the present case, because there the transaction in question was *in its commencement* one entered into for the partnership under such circumstances as to make them liable for the dealings of the individual member. It

(18) 15 East 7.

(19) 8 B. &amp; C. 427; s. c. 2 Man. &amp; Ry. 469.

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has been doubted whether that case was rightly decided—see *Miles' Claim* (20); but it is enough to say that it turned upon the question whether the individual who signed the bills had at the time he signed them an authority to pledge the credit of the firm by an indorsement in his own name—see per Bayley, B., in *Smith v. Craven* (21); and the case was one in which the bills were not accommodation bills as in the present case, as between the party whose signature was relied upon and the other original parties to the bill.

In *Stephens v. Reynolds* (22) it was held that where A. and B. carried on a business in partnership in the name of B., and A. accepted a bill in B.'s name for goods supplied to the partnership, B. was liable though the bill was not addressed to the place where the partnership business was carried on, but to a place where he carried on a separate business. There is some difficulty in understanding the report of that case, and Bramwell, B., did not agree with the judgment pronounced; but it does not assist us, because it is clear that the main ground of the decision of the majority of the Judges was that the bill had been accepted for goods supplied to the firm.

The case of *Edmunds v. Bushell* (1) was not a case of partnership, but a partnership name was used where the whole business was the business of the defendant, so that the persons advancing money on the bills were necessarily led to suppose that they were advancing money to a collection of persons in business or on the faith of a business being carried on, and not, as in this case, without anything to lead them to suppose that they were dealing with the individual only whose name appeared on the bills. The case of *Swan v. Steele* (23) is also a case in which the bills sued upon were accepted in a partnership name properly so called, and is therefore not in point. *Vere v. Ashby* (24) is open to the same observation; so

also is the case of *McNair v. Fleming*, cited by Lord Redesdale in 3 Dow. H.L. Cas. 229; 1 *Montague on Partnership*, 37. In the last edition of *Lindley on Partnership*, p. 342, the learned author lays down the law as follows: "Again, persons may carry on business in partnership in the name of one of themselves, and if they do they will be liable on bills accepted by him in that name if it was in fact used to denote all the partners, but not otherwise." This does not mean that the liability of the firm depends simply upon the question whether the person accepting has in his own mind an intention of improperly making his partner liable on bills accepted for his own accommodation; the meaning is that the firm will be bound if the bill was given for a partnership purpose, or for what purported to be a partnership purpose, and was not known to be otherwise by the person taking the bill. The statement, moreover, only applies to ordinary trading partnerships, which are *prima facie* bound by bills given by one partner in the name of the firm. The learned Judge himself (Lindley, J.), having read this judgment, has authorised us to give this explanation of the passage in question.

We think there is great force in Mr. Waddy's argument, that if the mere fact that there is a partnership, carried on in the name of one partner, were to make the firm liable for all bills accepted by that partner, it would be possible for him to bind his partner to an unlimited extent for all his own private debts, unless the partner could shew affirmatively facts which should disentitle the plaintiffs who never heard of his existence to make him liable upon the bill. It may no doubt be said it is his own fault for allowing his partner to carry on business in his own name. But this seems to us to be no ground for making the innocent partner liable for debts incurred by the guilty partner wholly for his own purposes and not for the benefit of the partnership, in a case where the name used in no way invites the person advancing money on the bills to consider that there is any plurality of persons undertaking the liability, and where there are no circumstances to lead that person to suppose that he is dealing

(20) 43 Law J. Rep. Chanc. 732; s. c. Law Rep. 9 Ch. App. at p. 649.

(21) 1 Cr. & J. 500.

(22) 5 Hurl. & N. 513; s. c. 29 Law J. Rep. Exch. 278.

(23) 7 East 210.

(24) 10 B. & C. 288.

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with a firm. In *Miles' Claim* (20) Lord Justice James forcibly states the law as follows: "It is the law of this country, and it has always been the law of this country, that nobody is liable upon a bill of exchange unless his name or the name of some partnership or body of persons of which he is one appears either on the face or the back of the bill." We think that is a true statement of the law, subject only to the qualification that in cases where a partnership is carried on in the name of an individual, without a partnership style, and it is affirmatively proved that the bill in question is one accepted for partnership purposes, or with the authority of the partner, the name of the individual may have the same effect as the name of a partnership or body of persons in ordinary cases has without such proof.

In America it has long since been decided and uniformly held that where the name of one partner is identical with that of the firm the burthen of proof is upon the plaintiff to shew that the bill is the paper of the firm and not of the individual partner. *Pearson on Bills of Exchange*, p. 131, so states the law, and it was so laid down by the Supreme Court of New York in *Oliphant v. Mathers* (25), and by Story, J., in *The United States Bank v. Binney and others* (26), who explains the law as follows: "Where the contract is made in the name of the firm it will *prima facie* bind the firm, unless it is *ultra* the business of the firm, whether the firm imports on its face a company, as A. B. & Co., or A. B. & C., then the contracts made by the partners in that name bind the firm, unless they are known to be beyond the scope and business of the firm. But where the business is carried on in the name of one of the partners *and his name alone is the name of the firm*, it is necessary not only to prove the signature, but that it was used as the signature of the firm by a party authorised to use it on that occasion and for that purpose. In other words, it must be shewn to be used for partnership objects and as a partnership act." See also *Story on Partnership*, ss. 106 and 142. We think that this is

in accordance with the true principles of the law of agency, of which the law of partnership is a branch, and that the weight of English authority is in favour of the American view of the law. Mr. J. A. Russell, in the 11th edition of *Ohitty on Bills*, lately published by him, p. 57, states the law, as we think correctly, to the same effect. We are of opinion, then, that this was a case in which the plaintiffs were bound affirmatively to prove the defendant's liability on the bills in question by proving something more than that the defendant was a partner in business with Beatson.

It was indeed argued on behalf of the plaintiffs that there was evidence in the case that the proceeds of these bills were applied for the purposes of the firm, and of such dealings between the defendants as that an authority might properly be inferred. If we thought this was so, we should still have thought it necessary, owing to the manner in which the questions were put and answered by the jury, to have made the rule absolute for a new trial; but, for the reasons given above, we are of opinion that there was no evidence at all proper to be submitted to the jury in favour of the plaintiffs' contention. The bills were clearly accommodation bills for Beatson's benefit; there was nothing on the face of them to indicate that any but Beatson was to be bound. The only evidence given as to the intention to bind Mycock was against such intention, and there was no general or special authority to Beatson to draw bills, or evidence of a mutual intention that Mycock should be so bound. Under these circumstances we feel bound, under the power given to us by Order XL. rule 10, to enter judgment for the defendant Mycock, with costs, and to set aside the judgment for the plaintiffs as against him.

*Judgment for defendant Mycock.*

Solicitors—Jacobs & Vincent, agents for North & Sons, Leeds, for plaintiffs; Learoyd, Learoyd & Peace, for defendants.

(26) 16 Barbour 608.

(26) 5 Mason 176.

[IN THE EXCHEQUER DIVISION.]

1879. } COOPER v. THE LONDON,  
March 28. } BRIGHTON AND SOUTH COAST  
April 1. } RAILWAY COMPANY.

*Railway Company—Passenger's Season Ticket—Forfeiture of Deposit for Breach of Conditions—Delivery of Ticket on Expiry.*

Upon purchasing a passenger's season ticket from the defendants the plaintiff agreed to be bound by certain conditions, of which one was that all benefit of the ticket, including a deposit of ten shillings paid with the price, should be forfeited on breach of any of the conditions, and another condition was that the ticket should be delivered up on the day after expiry. The plaintiff did not deliver up the ticket on the day after expiry, but delivered it up within a time which was found upon the trial to be a reasonable time. The defendants refused to return the deposit:—Held, that the defendants were justified on the ground that compliance by the plaintiff with the stipulations of the contract was a condition precedent to his right to a return of the deposit.

CASE stated by way of appeal from the City of London Court.

1. This is an action commenced in the City of London Court to recover the sum of 10s. deposited by the plaintiff with the defendants under the circumstances hereinafter mentioned.

2. In September, 1876, the plaintiff applied to the defendants for a season ticket to entitle him to travel for one month to and fro between London and Brighton. He thereupon signed a memorandum, agreeing, as the holder of his then present or any future main line season ticket, to abide by and conform to the following conditions:—

"Conditions upon which Main Line Season Tickets are issued and accepted.

"1. That it is to be used subject to and in conformity with the company's bye-laws, rules, regulations and time-tables from time to time in force. 2. That it is available only at and between the two stations named thereon, including intermediate stations, but no other. 3. That it is not to be used by any person other than the person named thereon.

4. That on every demand it is to be shewn to any officer of the company, and that it is to be considered as the property of the company, to be delivered up at the secretary's office on the day after expiry or on forfeiture. 5. [Non-liability of the company for delay, &c., of trains.] 6. That the ticket and all benefit and advantages thereof, including the deposit, shall be absolutely forfeited to the company if it shall be lost or in case of any breach of any of the above conditions. 7. [For any journey not included in the ticket, the holder, before starting, to pay excess or other proper fare, otherwise to pay full fare from the point of starting]."

3. The plaintiff at the same time paid to the defendants the usual charge for the season ticket and also the usual deposit of 10s. thereon.

4. The season ticket applied for by the plaintiff was then filled up and handed to him by the defendants. On the back of the ticket, besides a copy of the conditions, was the following note:—"In the event of this ticket being lost a reward of 10s. will be given to any person who brings it to the secretary, London Bridge Station."

5. The plaintiff renewed his ticket for another month on the same conditions.

6. A few days before the expiration of the second month the defendants sent to the plaintiff a notice reminding him that if he did not wish to renew the ticket, he ought to return it immediately upon expiry.

7. The said season ticket was returned to the defendants a few days after its expiration, the plaintiff at the same time requesting the return of the 10s. deposit, which was refused on the ground that the ticket was not returned on the day after expiry. The Court found as a fact that the ticket was returned within a reasonable time.

8. The Court gave judgment for the plaintiff, but gave the defendants leave to appeal.

9. The question for the Divisional Court is whether or not under the circumstances aforesaid the plaintiff is entitled to recover.

The appeal was heard on the 28th of March and the 1st of April.

*Cooper v. London, Brighton, &c. Rail. Co., Exch.*

*Jeune* (*Mossley* with him), for the defendants.—The question is merely, what is the meaning of the contract? The law as to penalties does not apply to forfeiture of a deposit—*Hinton v. Sparkes* (1).

*O. H. Anderson* (*A. M. Bremner* with him), for the plaintiff.—The objection supposed to be supported by *Hinton v. Sparkes* (1) is answered by *In re The Dagenham Dock Company; ex parte Hulse* (2).

A penalty or forfeiture inserted only for a collateral object is to be regarded as intended only as a security for damage really incurred—*Story's Equity Jur.*, section 1314, and the defendants do not allege that they have been damnified. Further, the case falls within the well-established rule for distinguishing between a penalty and liquidated damages, that a sum mentioned in a contract as damages for the non-performance of any of a great number of stipulations must be treated as a penalty—*In re Newman; ex parte Capper* (3). He referred also to *Woolfe v. Horne* (4) and *Bellini v. Gye* (5).

*Jeune*, in reply.—Equity will not interfere where liquidated damages were intended—*Story's Equity Jur.*, section 1318. And the fact of deposit shews that intention—*Lea v. Whitaker* (6). He referred also to *The London Tramways Company v. Bailey* (7).

KELLY, C.B.—The case before us is a case of very small importance to the plaintiff, but of immense importance to the defendants.

No one can doubt the necessity to the defendants of their carefully protecting themselves from frauds consequent on the loss of tickets such as this, or failure to deliver them up when expired.

(1) 37 Law J. Rep. C.P. 81; s. c. Law Rep. 3 C.P. 161.

(2) 43 Law J. Rep. Chanc. 261; s. c. Law Rep. 8 Chanc. 1022.

(3) 46 Law J. Rep. Bankr. 57; s. c. Law Rep. 4 Ch. D. 724.

(4) 46 Law J. Rep. Q.B. 534; s. c. Law Rep. 2 Q.B. D. 355.

(5) 45 Law J. Rep. Q.B. 209; s. c. Law Rep. 1 Q.B. D. 183.

(6) Law Rep. 8 C.P. 70.

(7) 47 Law J. Rep. M.C. 3; s. c. Law Rep. 3 Q.B. D. 217.

The contract is very plain and clear; and no doubt can arise as to the meaning of the two clauses we have to consider, two of the conditions upon which the ticket was issued and accepted. One is—“6. That the ticket and all benefit and advantages thereof, including the deposit, shall be absolutely forfeited to the company if it shall be lost or in case of any breach of any of the above conditions.” And the other, namely, the 4th, is, “That on every demand the ticket is to be shewn to any officer of the company, and that it is to be considered as the property of the company, to be delivered up at the secretary's office on the day after expiry.” According to the clear language of the contract, the ticket with all benefit thereof, including the deposit, is to be forfeited if the ticket be not delivered up on the day after expiry. It would be making a new contract between the parties, in lieu of that which they themselves have made, to hold, as we are asked, that delivery of the ticket within a reasonable time after expiry (a time which would be, to say the least, very difficult to determine) satisfies the terms of the contract. The terms of the contract then being clear, and directly opposed to the plaintiff's claim, are we nevertheless to say that the plaintiff is entitled to recover? I think we cannot. If, on the ground that the forfeiture is to be deemed a penalty and not liquidated damages, we say that the plaintiff is entitled to recover, we say in effect that the plaintiff was not in any way bound by the conditions.

It is noticeable that the defendants have said, upon the back of the ticket, that, “in the event of the ticket being lost a reward of 10s. will be given to any person who brings it to the secretary, London Bridge Station,” so that if the holder of a ticket may recover his deposit of 10s. notwithstanding loss of the ticket, the defendants may be required to pay the deposit of 10s. when they may have already paid 10s. reward to the finder.

The authorities from the Courts of Equity, which have been cited for the plaintiff, have no application to this case.

HAWKINS, J.—I am also of opinion that our judgment must be for the ap-

*Cooper v. London, Brighton, &c. Rail. Co., Exch.*

pellants. I think that fulfilment of each of the conditions referred to in clause 6 was necessary as a condition precedent to the plaintiff's right to recover.

It is not necessary for us to consider whether the intention of the parties was reasonable or unreasonable, but I may say that I entirely agree with my Lord that the defendants would expose themselves to much fraud if they did not take great care in the matter of requiring return of tickets on expiry.

On the ground that the conditions upon which the plaintiff was to be entitled to a return of his deposit were not fulfilled, I am of opinion that the plaintiff is not entitled to recover and that our judgment must be for the appellants.

*Judgment for the appellants.*

Solicitors—T. C. Russel, for plaintiff; Norton, Rose, Norton & Brewer, for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1879. } THE PRISON COMMISSIONERS v. THE  
May 13. } CORPORATION OF LIVERPOOL.

*Prison Act, 1877 (40 & 41 Vict. c. 21), ss. 4, 57—Expense incurred in Maintenance of Prisoners—Prison Commissioners—Boy sent after Imprisonment to Reformatory—Expense of supplying proper Clothing for Reformatory—Prison Authorities—Reformatory Schools Act, 1866 (29 & 30 Vict. c. 117. s. 23).*

*The expense of providing a youthful offender sentenced to be detained, after a term of imprisonment, in a reformatory, with suitable clothing for admission to such reformatory, is an expense incurred for "the maintenance of a prisoner," for which the Prison Commissioners are responsible, under the Prison Act, 1877.*

This was a SPECIAL CASE stated as follows:—

1. Down to the commencement of the Prison Act, 1877, the Corporation of Liverpool were the prison authority of Liverpool and for the borough prison of that borough; and as such authority they

were liable to defray, and did defray, the expenses mentioned in section 23 of the Reformatory Schools Act, 1866, in the case of youthful offenders sentenced under section 14 to be sent to and detained in a certified reformatory school after imprisonment in the borough prison of the borough.

2. On the 28th of March, 1879, T. Mulloch was convicted by a magistrate for the borough of Liverpool, and was duly sentenced to be imprisoned for more than ten days in the borough prison, and to be sent at the expiration of the term of his imprisonment to a reformatory school, and to be detained there for a period of five years.

3. Mulloch was imprisoned in accordance with the sentence, and was sent by the plaintiffs to the reformatory school, and was there detained under the sentence.

4. Under the Prison Act, 1877, the prison powers are vested in a Secretary of State, and during the imprisonment of Mulloch in the said prison the general regulation of such prison was, and still is, vested in the plaintiffs, subject to the control of a Secretary of State.

5, 6. At the time of the removal of Mulloch to the reformatory, he was possessed of proper clothing necessary for his conveyance from prison to the school at the expense of the plaintiffs; and clothing was provided by the plaintiffs for the purpose of his admission at a cost of 30s.

The question for the opinion of the Court was whether, having regard to the provisions of the Prison Acts, 1865 and 1877, and the Reformatory Schools Act, 1866, the defendants were liable to repay to the plaintiffs the sum expended for providing proper clothing for the admission of Mulloch to the reformatory school (1).

(1) By the Prison Act, 1865 (28 & 29 Vict. c. 126), s. 5, the council of a borough is made the "prison authority" for a borough prison.

By the Reformatory Schools Act, 1866 (29 & 30 Vict. c. 117), s. 14, certain youthful offenders sentenced by a magistrate "for the term of ten days or longer" may also be sentenced "to be sent at the expiration of his period of imprisonment to a certified reformatory school for a period of not less than two years and not more than five years." By section 28, "the expense of conveying to any

*Prison Commissioners v. Corporation of Liverpool, Q.B.*

*Poland* (the Attorney-General with him), for the plaintiffs.—The defendants are a prison authority under the Prison Act, 1865 (28 & 29 Vict. c. 126), s. 5, and as such were liable to defray the expense of Mulloch's conveyance to a certified school, as well as the "expense of proper clothing for him requisite for his admission to the school"—29 & 30 Vict. c. 117. s. 23. Under the Prison Act, 1877 (40 & 41 Vict. c. 21), the plaintiffs are no doubt liable to maintain a prisoner so long as he is in prison; but the expense of providing proper clothing for a school reformatory is not an "expense incurred in respect of the maintenance of prisoners" within the meaning of section 4. As to what is included under the term "maintenance of a prisoner," see s. 57. It is, moreover, expressly provided by s. 52 that nothing contained in the Act shall affect "the powers or jurisdiction of a prison authority in relation to any reformatory school" under the Reformatory Schools Act, 1866. As soon as the conveyance to the reformatory has come to an end the imprisonment is at an end, and the defendants become liable, under 29 & 30 Vict. c. 117. s. 23, for any expense incurred in providing the clothing which is required before a youthful offender can be admitted to a school.

certified reformatory school any youthful offender who has been directed to be detained in such a school, and the expense of proper clothing for him requisite for his admission to the school, shall be defrayed as a current expense by the prison authority within whose district he has been last imprisoned."

By the Prison Act, 1877 (40 & 41 Vict. c. 21), prisons are vested in a Secretary of State, and the general regulation thereof in Prison Commissioners. By section 4, "all expenses incurred in respect of the maintenance of prisoners . . . shall be defrayed out of moneys provided by Parliament." By section 57, "the maintenance of a prisoner includes all such necessary expenses incurred in respect of a prisoner for food; clothing, custody, safe conduct and removal from one place to another, or otherwise, from the period of his committal to prison until his death, or discharge from prison, as would, if this Act had not passed, be payable by a prison authority." By section 52, "Nothing in this Act contained shall affect the powers or jurisdiction of a prison authority in relation to any reformatory school under the Reformatory Schools Act, 1866."

*Herschell* (*R. S. Wright* with him), for the defendants, were not called upon to argue.

PER CURIAM (2).—We are of opinion that the cost of this clothing was clearly an expense incurred for "the maintenance of a prisoner," for which the plaintiffs are liable under the Prison Act, 1877. There must be judgment for the defendants.

*Judgment for defendants.*

Solicitors—Hare & Fell, for plaintiffs; Venn & Son, agents for Rayner, Liverpool, for defendants.

## [IN THE EXCHEQUER DIVISION.]

1879.

March 4, 5. }

RILEY v. READ.

*Revenue — Assessed Tax — Inhabited House Duty*—"Dwelling-House"—*Club*—14 & 15 Vict. c. 36.

*A building used for the ordinary purposes of a club, and not slept in at night, is not an "inhabited dwelling-house" within the meaning of 14 & 15 Vict. c. 36, and is not liable to the duty payable upon inhabited dwelling-houses.*

CASE stated under 37 & 38 Vict. c. 16, part III., by Commissioners for the Inhabited House Duties, on an appeal by J. Riley, on behalf of the Working Men's Reform Club of Over Darwen, against an assessment to inhabited house duty for the year ending 5th April, 1877, at 9d. in the pound upon 40l., the annual value of the building occupied by the club.

The building consisted of two storeys. The upper floor was let to an auctioneer, and was used entirely as a place of trade. The ground floor was occupied as a club, containing the usual rooms, namely, billiard-room, news-room, lavatory, &c. The club was open each day from 9 A.M. to 10.30 P.M., and was then closed for the night, no person remaining inside the premises.

The building was not and never had been since its erection furnished as a

(2) Cockburn, L.C.J., and Mellor, J.

*Riley v. Read, Exch.*

dwelling-house, and was used during the daytime for club and trade purposes only.

The Commissioners were of opinion that the club was liable to duty.

*Bush Cooper*, for the appellant.—This building, being closed for the night and no one sleeping on the premises, was not an "inhabited dwelling-house," and was therefore not liable to duty under 14 & 15 Vict. c. 36. The Act, like the former Act, 48 Geo. 3. c. 55, schedule B, referred to in it, means by a "dwelling-house" a dwelling-house in the proper sense of the term. [He was stopped.]

*Dacey*, for the Crown.—The fact that a house is not occupied at night does not prevent its being an inhabited dwelling-house; per Bramwell, B., in *Rusby v. Newson* (1). The Act of 14 & 15 Vict. c. 36, is to be construed with reference to 48 Geo. 3. c. 55, schedule B. The rules contained in this earlier Act for charging the duties on inhabited dwelling-houses shew, e.g. by rule 5, as to a hall or office, that the expression "inhabited dwelling-house" is not to be read in the narrow sense contended for on the part of the appellant (2). The exemption by 57 Geo. 3. c. 25, s. 1, with its preamble, implies that a house may be an inhabited dwelling-house although no person abides therein at night. The like is implied by 5 Geo. 4. c. 44, s. 4, and by the recital of those enactments in 6 Geo. 4. c. 7, s. 7.

KELLY, C.B.—It appears to me that the claim of the Crown cannot be sustained. The Acts of Parliament to which, in his able argument, the learned counsel for the Crown has referred, taken either separately or together, impose the tax upon "inhabited dwelling-houses;" and the question is whether the building referred to in the case, which appears from the case to be occupied partly as a club, partly for trade purposes, is an inhabited dwelling-house within the meaning of the Act of Parliament, although no person sleeps in it.

(1) 44 Law J. Rep. Exch. 143, at p. 144; s. c. Law Rep. 10 Exch. 322, at p. 328.

(2) Scottish Widows Fund and Life Assurance Society, Income Tax Exchequer Cases, part ii., p. 7.

Now, so far as the word "inhabited" goes, I am not prepared to say that a building may not be an inhabited house although no one ever sleeps in it; but we have to put a construction not only upon the word "inhabited" but also upon the words "dwelling-house." Is any part of this building, although no person sleeps within it, a dwelling-house—a house dwelt in, or which may be dwelt in, by one or more persons? I think it is not. In the absence of authoritative interpretation by statute or decision, we are compelled to put an interpretation for ourselves upon the terms "dwelling-house" and "to dwell." And in my judgment "to dwell" in a house is to live in a house, that is, to live there day and night, to sleep there during the night, and to occupy it for the purposes of life during the day. That is the conclusion which I should draw from my own knowledge and experience of the English language. And if we refer to dictionaries—to Richardson's, to Johnson's, or to any other of the dictionaries to which resort may be had for such a purpose, some of them containing quotations from various sources—in no one of those dictionaries do we find the word "dwelling" or "to dwell" used otherwise than for living, actually residing and living, in the place in question. The learned counsel for the Crown has not, on the other hand, referred to any great English writer to shew that the term "to dwell" or "dwelling" has ever been used otherwise than as meaning living in the ordinary sense of the word, living in a place day and night, sleeping as well as waking. Why, then, are we for the first time to put a different interpretation upon it without being compelled to do so, either by an Act of Parliament or by a decision of a Court of law?

There is something which at first sight appears to be very plausible in the argument upon the recital to the first section of the Act of 57 Geo. 3. c. 25. When, however, we look carefully at the language of this recital or preamble, putting a reasonable interpretation upon it, it really only amounts to this, that, besides the residence itself in respect of which people have been assessed, they have also been assessed in respect of separate



*Riley v. Read, Exca.*

buildings, which, though not occupied at night and not physically connected with or forming part of the residence in which the people lived, were nevertheless used by them for the purposes of storing goods or for some other purpose in connection with the residence assessed; so that, if you could have before you the decisions to which this preamble or recital refers, it would be found that in every case the persons assessed were assessed in respect of the value or rental of these separate buildings by way of addition to the rental or value of the house in which they lived. At all events, if, because the framer of this Act of Parliament misapplied a word, its meaning be doubtful, that will not avail to impose a tax upon the subject which can only be enforced when the authority of some Act of Parliament or of some decision of a Court of law is clear. I think that this place is not a dwelling-house, and therefore that the assessment must be disallowed.

POLLOCK, B.—In my judgment, the members of the club who occupy for certain purposes these premises called the Working Men's Reform Club, in William Street, Over Darwen, are not properly assessable to the inhabited house duty. If it were necessary to decide that in all cases, in order to make a building assessable as an inhabited dwelling-house, some person or persons must sleep in that house, as well as occupy it by day, I should pause before I came to that conclusion; because, although I agree with what has fallen from my Lord and I am far from differing with him with respect to any words that he has used, I still see that there is force in the argument which Mr. Dicey has founded upon certain passages in the statutes, and which some dicta of learned Judges both here and in Scotland may be said to support. But I for my part think it unnecessary to decide this question here at all. The position of a person who occupies by day, either by himself or by himself and his clerks or agents, a warehouse or counting-house, and who occupies another place by night as his ordinary place of abode, where he resides with his family, is

entirely distinct from the present case. So, again, would be the case, more analogous to the present, of a gentleman who had a large domain where he lived, and slept in the ancient mansion-house of the domain, and had buildings for pleasure purposes in different parts, for lunching at when he was out shooting, or for any other purposes, such as we have seen in many parts of the country. In those cases Mr. Dicey's argument would be properly and strictly applicable; but the present case is an entirely different one. It is the case of a great number of persons, possibly and probably some hundreds, being members of a club and using the building not in any sense for the purpose of a dwelling-house, but merely as a place to which they may resort for the purposes of recreation and enjoyment, and during certain periods of the day and evening. I am far from expressing any opinion as to whether such a place ought or ought not to be taxed; but I am strongly of opinion that if it be the wish of the Legislature to tax a building such as this, a building which has for many years belonged and at this present time belongs to a club the objects of which and the character of the occupation of which are thoroughly well known, words should be used which properly comprehend such a case; and there could be no difficulty in framing a clause which would include a building like this. But when I look at the ordinary meaning of the words "inhabited house" and "inhabited dwelling-house," it seems to me that it is altogether a misapplication of language to say that it applies to the case of a club consisting of a great number of persons who have a house in order to carry out the objects of the club. Upon these grounds I think that this assessment is wrong, and cannot be supported.

*Judgment for the appellant, with costs. (3).*

Solicitors—The Solicitor of Inland Revenue, for the Crown; Pritchard & Englefield, agents for C. Costeker, Darwen, for appellant.

(3) See *Re William Russell*, Case in Court of Sessions, 4 Rett. 1143.

[IN THE COURT OF APPEAL.]

1879. }  
 March 26. } DAVIS v. GODBEHERE.\*

*Practice—Action remitted for Trial to County Court—19 & 20 Vict. c. 108. s. 26—Motion for New Trial, where to be Made—Order XXXIX. Rule 1.*

*Where an action brought in the High Court has been sent down for trial to a County Court by a Judge's order under 19 & 20 Vict. c. 108. s. 26, and has been tried by the County Court Judge without a jury, an application for a new trial must be made by motion to a Divisional Court, and not to the Court of Appeal. Order XXXIX. rule 1, does not apply to a trial by a Judge of County Courts.*

*London v. Roffey (47 Law J. Rep. Q.B. 16; s. c. Law Rep. 3 Q.B. D. 6) approved.*

This action was brought in the Exchequer Division, and remitted by that Court for trial to a County Court after issue joined, under 19 & 20 Vict. c. 108. s. 26 (1).

The Judge tried the action without a jury, and found for the plaintiff, who signed judgment in the Exchequer Division.

\* *Coram* Brett, L.J., and Cotton, L.J.

(1) By 19 & 20 Vict. c. 108. s. 26, "Where in any action of contract brought in a superior Court the claim indorsed on the writ does not exceed 50*l.*, or where such claim, though it originally exceeded 50*l.*, is reduced by payment into Court, payment, or admitted set-off or otherwise to a sum not exceeding 50*l.*, a Judge of a Superior Court, on the application of either party, after issue joined, may in his discretion, and on such terms as he shall think fit, order that the cause be tried in any County Court that he shall name, and thereupon the plaintiff shall lodge with the Registrar of such Court such order and the issue, and the Judge of such Court shall appoint a day for the hearing of such cause, notice whereof shall be sent by the post, or otherwise, by the Registrar to both parties and their attorneys, and after such hearing, the Registrar shall certify the result to the Master's office of such Superior Court, and judgment in accordance with such certificate may be signed in such Superior Court."

By Order XXXIX. rule 1, "Where in an action in the Queen's Bench, Common Pleas or Exchequer Divisions there has been a trial by a jury, any application for a new trial shall be to a Divisional Court. And where the trial has been by a Judge without a jury, the application for a new trial shall be to the Court of Appeal."

*Graham* now moved, on behalf of the defendant, for a new trial, on the ground that the finding of the Judge was wrong, under Order XXXIX. rule 1.

[COTTON, L.J.—Is the Judge of a County Court "a Judge" within the meaning of that rule?]

The case has been tried without a jury, and judgment has been signed in the High Court. Before the Judicature Act, the application would have been made to the Superior Court. There is no reason why it should not follow the same rule as if it had been in the Exchequer Division. The only authority is *London v. Roffey* (2). That case is against me, but may be overruled. The finding of an official referee is by special enactment equivalent to that of a jury. There is no such provision as to a County Court Judge.

BRETT, L.J.—In my opinion the defendant cannot move in this Court. It is clear to me that in Order XXXIX. rule 1, the words "a Judge," mean a Judge of the High Court of Justice, and do not comprise a Judge of the County Court. That being so, the case does not come within the rule which has been cited. Then there is no rule applicable, and unless there is, the old practice remains in force. Therefore, the proper Court for this application is the Divisional Court, and if the Divisional Court goes wrong, then there is an appeal to this Court.

COTTON, L.J.—The question in this case turns on rule 1 of Order XXXIX. If the case is not within that rule we have no jurisdiction. The question is, what is the meaning of the word Judge? It is suggested that the rule is intended to be exhaustive, that is to say, that in all actions tried in a Divisional Court where a verdict has been found by a jury, the motion for a new trial must be made in the Divisional Court, but that in all other cases the application must be made to the Court of Appeal. But these are not the words, and we must consider what is the fair meaning to be given to

(2) 47 Law J. Rep. Q.B. 16; s. c. Law Rep. 3 Q.B. D. 6.

*Davis v. Godbakers (App.), Exch.*

the words "a Judge" in the rule, for if those words do not include a Judge other than a Judge of the High Court, the rule does not apply where the case has been sent down by the Superior Court to be tried by a Judge of the County Court. When we look into the rules, it seems clear that the word Judge must mean Judge of the High Court, and that this rule does not contemplate such cases as this. We are, therefore, remitted to the old practice, and the application for a new trial must be to a Divisional Court. If by this means the litigants are deprived of any advantage they would have possessed if the action had been tried by a Judge of the High Court we cannot help it.

*Appeal refused.*

Solicitor—Percy Toynbee, agent for Toynbee, Larken & Co., Lincoln.

[IN THE COMMON PLEAS DIVISION.]

1879. } OPPENHEIM v. JACKSON AND  
April 26, 28. } ANOTHER.

*Bankruptcy — Composition — Statement of Affairs — Name of Creditor inserted, but Debt omitted — Waiver of Conditions — Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 126.*

*The plaintiff entered into a composition with his creditors under section 126 of the Bankruptcy Act, 1869. The defendants who were del credere agents of the plaintiff, claimed to rank as creditors for a sum of 1,100l., which was the aggregate amount of the plaintiff's debts to three merchants for goods sold to the plaintiff through the defendants, the purchase price of which the defendants, as such agents, had become bound to pay. In his statement of affairs presented at the meeting of creditors the plaintiff had set down this debt of 1,100l. as due to the three merchants. The plaintiff had also set down the defendants as creditors for a separate debt, which was of a smaller amount.*

*The defendants attended the meeting of*

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*creditors, tendered proof of their debt of 1,100l., which was admitted, took part in the discussion which ensued at the first meeting of creditors, resisted the resolution for a composition, which was duly carried, and did not accept the composition:—*

*Held, that the plaintiff had not complied with the provisions of the Bankruptcy Act, 1869, section 126, relating to composition, in respect of the debt of 1,100l., and that upon the authority of Ex parte Lang (Law Rep. 5 Ch. D. 971), that there had been no waiver of the provisions of section 126 by the defendants, and therefore that the defendants were not bound by the resolution of composition as to such debt.*

*Case on further consideration.*

By his statement of claim the plaintiff claimed to recover 500l. as money had and received to the plaintiff's use, being the difference between the purchase and resale of a cargo of rice which the defendants as brokers had purchased and resold for the plaintiff. Defence, set-off, and counterclaim, that there was owing to the defendants by the plaintiff a sum of 1,100l., making a balance of 600l. in favour of defendants on accounts stated between them. Reply, that after the accruing of the defendants' set-off, a composition under section 126 of the Bankruptcy Act, 1869, was entered into by the plaintiff, by which it was duly resolved that a dividend of 2s. in the pound should be received by the creditors of the plaintiff, that by such composition the defendants were bound, and that the same was a bar to their set-off and counterclaim. Rejoinder, that the defendants' debt was not included in the plaintiff's statement of affairs presented at the meeting of the creditors, and that the defendants were not bound by the composition. Issue thereon.

The case came on for trial at the London Michaelmas sittings, 1878, before Lord Coleridge, C.J., and a special jury, when the following facts were either admitted or proved. The plaintiff had employed the defendants, a firm of brokers, to purchase and re-sell cargoes of rice; the cargoes were purchased from Greek merchants, and by the course of dealing and the custom of the trade the Greek

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*Oppenheim v. Jackson, C.P.*

sellers contracted with the defendants as principals, and the defendants assented to being personally liable to them for payment. At the time of the composition the defendants claimed in respect of these transactions to be entitled to be creditors of the plaintiff for a sum of 1,100*l.* (1). At the first meeting of creditors the plaintiff produced a statement of his affairs, in which he had set down as owing to the defendants a sum of 391*l.*; the debt of 1,100*l.* was also set down, but as debts due to three Greek merchants for cargoes of rice; these cargoes had been purchased by the defendants for the plaintiff in accordance with the above course of dealing.

Till, one of the partners of the defendant firm, attended the first meeting of creditors and tendered proof of this debt of 1,100*l.* This was not objected to, and Till remained, took part in the discussion, and opposed the resolution, which was eventually passed, to accept a composition of 2*s.* in the pound. A trustee was appointed for the purpose of receiving and distributing the composition, and sufficient money was paid to him to pay the amount of the composition on all the debts of the plaintiff, including the debt which Till had produced at the first meeting. The trustee gave notice to the defendants to receive the composition payable on their debts, but the defendants did not attend to receive and did not receive the composition. On proof of these facts, the jury were discharged, a formal verdict was taken for the defendants, and all questions of law and fact were left for further consideration. The case now (April 26) came on to be argued.

*J. C. Mathew* (*Butt* with him), for the plaintiff.—The defendants' names were inserted as creditors in the plaintiff's statement of affairs, but the amount of the debt they claim, 1,100*l.*, was not opposite their names, but opposite the names of other creditors who were guaranteed by the defendants. This

(1) For the purposes of the case the amounts claimed were dealt with in round numbers, and it was agreed that the exact figures were, if necessary, to be settled by arbitration.

amounted to no more than a mistake which was capable of amendment, and was amended by the defendant Till. Creditors whose names, &c., are not inserted may come in and be bound—*Campbell v. Im Thurn* (2), explained in *Wilson v. Breslauer* (3); if the debt is ascertained and not disputed by the debtor, *Melhado v. Watson* (4). Whatever inaccuracies and informalities there were, were amended and waived by the defendant Till offering the proof which was accepted. On the defendants claiming to be inserted instead of the three creditors, their debt was so inserted in the amended statement of affairs.

[LORD COLERIDGE.—In *Wilson v. Breslauer* (3) in the House of Lords Lord Blackburn says: "I take it that if a man came in during the proceedings and said, I claim to prove for 1,000*l.* which has been left out of the list, and if his proof was admitted and he then used his power to vote against the composition, being an absolutely dissenting creditor, waiving the conditions for his benefit for the very purpose of opposing the resolution, nevertheless, if the resolution was carried by the statutory majority, he would be bound by it."]

That is precisely what occurred in the present case, the authority of Lord Blackburn is therefore in favour of the plaintiff's contention; namely, that the defendants are bound by the composition, which is a bar to their set-off.

*Herschell* and *Pollard*.—The defendants are not in the first instance bound by the composition. The judgments of Lords Hatherley and Blackburn in *Wilson v. Breslauer* (3) shew it to be a duty incumbent on a debtor compounding with his creditors to observe a strict compliance with the provisions of the Bankruptcy Act. He must set down the name and address of each creditor with the amount of his debt, otherwise the debtor would not be bound.

(2) 45 Law J. Rep. C.P. 482; s. c. Law Rep. 1 C.P. D. 267.

(3) 46 Law J. Rep. C.P. 593; s. c. Law Rep. 2 C.P. D. 314; s. c. on appeal, 47 Law J. Rep. C.P. 729; s. c. Law Rep. 3 App. Cas. 672.

(4) 46 Law J. Rep. C.P. 349; s. c. Law Rep. 2 C.P. D. 281.

*Oppenheim v. Jackson, C.P.*

[LORD COLERIDGE, C.J.—In this statement of affairs the defendants' names appear, and the 1,100*l.* appears but under other names. Could it be said that the defendants' names, addresses and amount of their debts appear within the terms of section 126? I confess I should not like to give such an interpretation to the Act.]

It is submitted such would not be a correct interpretation. There was no waiver of the conditions by the defendants. In *Campbell v. Im Thurn* (2) the creditor signed the resolution. It does not appear that the defendants did so here, nor is there evidence that the debt was admitted so as to stop the defendants from disputing the composition afterwards. The defendants opposed the resolution and did not accept the composition as in *Campbell v. Im Thurn* (2).

[LORD COLERIDGE, C.J.—In *Wilson v. Breslauer* (3) Lord Blackburn in the passage I have just read seems to intimate that the creditor under these circumstances would be bound.]

That was not necessary to the case, it amounts to no more than a dictum of Lord Blackburn's, and is opposed to *Ex parte Lang* (5).

*Mathew* in reply.—*Ex parte Lang* (5) is explained by *Ex parte Ord* (6), where it was held that a creditor by withdrawing his proof under rule 273 may be considered as not present at the meeting. After the amount of the composition has been paid to the trustee the liability of the debtor ceases, and the question comes to be one between the creditor and the trustee.

LORD COLERIDGE, C.J.—I will deliver judgment on Monday.

LORD COLERIDGE, C.J. (on the 28th of April).—I took time to deliver my judgment, as I was unable to reconcile an opinion expressed by Lord Blackburn, in *Wilson v. Breslauer* (3), with the decision of the Court of Appeal in *Ex parte Lang* (5), and I wished to see whether the one could be read so as to be fairly consistent with the other. The cases themselves are consistent, but the dictum of Lord Black-

burn seemed opposed to the decision of the Court of Appeal.

In the present case, the jury having been discharged, all questions of fact and law were left to me. The plaintiff claimed 500*l.*, which it was admitted the defendants had received to the plaintiff's use; the defendants counter-claimed for a sum of about 1,100*l.*, which also was admitted to be due to them from the plaintiff. In reply the plaintiff stated that there had been a composition in bankruptcy of his affairs, to which the defendants had been parties; that a dividend of 2*s.* in the pound had been agreed upon and declared; that the composition had not been taken by the defendants, but that they were bound, and that this composition of 2*s.* in the pound would cut down their counter-claim to a very much smaller sum, and leave a balance in favour of the plaintiff. I am stating all these figures in round numbers, as, for the purpose of my decision, the particular sum is not material, and it is agreed that any question arising as to the precise figures is to be settled hereafter.

Then arises the real question for my decision, which is, is this composition binding on the defendants? The counter-claim arises in the following way. The defendants were *del credere* agents of the plaintiff, and there were three merchants, creditors of the plaintiff, whose contracts the defendants, as such agents, had guaranteed, and whose debts—which at the time of the composition the defendants, as such agents, had become bound to pay, and which possibly they have paid—amounted in the aggregate to 1,100*l.* In his statement of affairs presented at the meeting of creditors the plaintiff had in substance set down the debt of 1,100*l.*, but as debts due from himself to these three merchants. The plaintiff had also set down a debt due to the defendants, which was a separate debt of a much smaller amount, so that, although the names of the defendants appeared in the debtor's statement of affairs, they did not appear as creditors for this sum of 1,100*l.*, but as creditors for a much smaller sum. The defendants attended the meeting of creditors and tendered proof of their debt of 1,100*l.* which was

(5) *Law Rep.* 5 Ch. D. 971.

(6) *Law Rep.* 6 Ch. App. 881.

*Oppenheim v. Jackson, C.P.*

admitted; they took part in the discussion which followed as to what should be paid by the debtor—whether they voted is not quite clear—but they resisted the resolutions, and they did not take the composition. The question is, were they bound by the composition in respect of this debt of 1,100*l.*? and the answer depends on the words of paragraph 7 of section 126 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), one on which many decisions have taken place, and one which it is necessary to scrutinize very carefully.

First, are the defendants within the section? The section, which, it is to be observed, contains affirmative and negative words, is one in favour of the debtor and not of the creditor; it contains strong provisions which deprive a dissenting creditor of his natural or legal rights by binding him to resolutions which have been passed by other persons, between himself and whom there is no privity; and therefore the section is one which must be carefully followed. Have its provisions been followed? I was at first disposed to think that, inasmuch as the defendants are creditors whose names appear and whose debts—though under other names—appear in the debtor's statement of affairs, it might be possible, by putting the two statements together, to say that they were creditors within the section in respect of this debt of 1,100*l.* But, as I remarked during the argument, I should be sorry to give such a construction to the section, because I think it would be a violent and not a natural construction to give, and after further reflection, and on the best consideration I have been able to bestow, I have come to the conclusion that creditors whose names appear in the debtor's statement of affairs, and who are bound within the terms of the section, are only bound to the extent of the debts which appear against their names, and that they are not bound as to other debts, though such other debts appear elsewhere in the debtor's statement of affairs. Consequently I hold that the defendants are not within the terms of the section, and cannot be held to be bound by the composition.

But then it has been held, and rightly held, that, irrespective of the words of the section, a creditor may be bound who comes in, adopts the proceedings, accepts the jurisdiction of the Court of Bankruptcy, and thereby waives these provisions, which are made for his benefit, and not for that of the debtor. If the creditor chooses to tender his proof and make himself a party to the composition, he cannot afterwards turn round and say he is no party. Have the defendants done this?

In *Campbell v. Im Thurn* (2) it was decided that a creditor whose name and address had not been shewn in the debtor's statement of affairs, yet who attended the meeting, claimed for his debt and the composition, was bound by the composition. This case came under consideration in *Wilson v. Braslauer* (3), when we (Lord Coleridge, C.J., Grove, J., and Denman, J.), thought that a creditor who had appeared, tendered and voted in respect of and received a dividend on a contingent debt, was bound in respect of such debt, although such debt had not been made in the debtor's statement of affairs. We thought that the principle of *Campbell v. Im Thurn* (2) applied, but the Court of Appeal, with the exception of Brett, L.J., was of a different opinion, and overruled our decision. The case finally went to the House of Lords (7), where again there was a divergence of opinion, but the majority upheld the decision of the Court of Appeal.

There is also the case of *Ex parte Lang* (5), a case which seems to me extremely like the present. The plaintiff in that case had brought an action against the bankrupt and recovered 50*l.*; the bankrupt next filed a liquidation petition, and in his statement of debts inserted the plaintiff as a creditor for 50*l.*, but made no mention of costs, which were estimated at 150*l.* The plaintiff attended and proved a debt of 200*l.*, the amount of his original debt and costs; subsequently he attempted to withdraw his proof, but as this was refused he went

(7) 47 Law J. Rep. C.P. 729; s. c. Law Rep. 3 App. Cas. 672.

*Oppenheim v. Jackson, C.P.*

on, took objections to the resolutions, and opposed their registration; he resisted the composition, and never took it. It was held that, on that ground, the case was distinguishable from *Campbell v. Im Thurn* (2), and that he was not bound. James, L.J., says, "The respondent is a creditor who has throughout opposed the resolutions," as the creditor has in the present case. "Whether he ought to have been admitted to prove and vote was a matter for the determination of the meeting. He never intended to withdraw his opposition. He has consented to nothing, and he has not misled any one. He is not within the principle of *Campbell v. Im Thurn* (2). He did not vote for resolutions, and neither by words nor by conduct has he led any one to believe that he assented to the composition. He stands upon his legal rights as they are defined by the Act, and there is no equity to deprive him of those rights." With the single exception I will presently proceed to point out that case appears to me to be directly in point. It was decided in 1877. *Breslauer v. Brown* (3), in the House of Lords, was decided in 1878; but I do not find that *Ex parte Lang* (5) was cited in the arguments nor alluded to in the judgments. But I find in the judgment of Lord Blackburn the following passage:—"I think it a condition for the benefit of creditors. I think that a creditor may waive it. I think that, by waiving it, he subjects himself to the jurisdiction of the Court of Bankruptcy; but not because he is an assenting creditor, for I take it that that would be quite immaterial. I take it that, if a man came in during the proceedings and said, 'I claim to prove for 1,000*l.*, which has been left out of the list,' and if his proof was admitted, and then he used his power to vote against the composition, being an absolutely dissenting creditor, waiving the condition for his benefit for the very purpose of opposing the resolution, nevertheless, if the resolution was carried by the statutory majority, he would be bound by it. Having waived the condition once he would have waived it altogether, and he would be bound, as Lord Justice Mellish determined. He would have subjected

himself to the jurisdiction of the Court of Bankruptcy, which might, in a summary manner, prevent his suing for the debt if he was offered the composition, and that, not because he was a consenting creditor, but because he had become a party to the proceedings, and consented to the jurisdiction of the Court of Bankruptcy." I confess that, had the matter been free from authority, I should have been disposed to follow the reasoning of this passage and decide against the defendants. The defendants have tendered proof of their debt, and used their power to vote against the composition, and now refuse to be bound. Under these circumstances Lord Blackburn thinks—reasonably, I venture to say—that the defendants are bound. But then the case of *Ex parte Lang* (5), which is no *obiter dictum*, but the direct decision of the Court of Appeal, decides that, with one single exception, the creditor in such case is not bound. That single exception is this, that in *Ex parte Lang* (5) the creditor withdrew his proof, but on consideration I have come to the conclusion that this is a circumstance which does not appear to me to be sufficient to distinguish the case. It appears to me I am bound by that decision, and consequently I hold that the defendants are not bound by the composition, but are now entitled to set up their debt of 1,100*l.*, as they have done.

I leave it to counsel to say what the exact sum is, for the exact figures are not before me, and possibly will have to be decided elsewhere. The principle on which I decide is that, except as to the debt which appears opposite their own names, the creditors of a debtor are not bound by a composition.

*Judgment for defendants.*


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Solicitors—William Crump & Son, for plaintiff  
John Rae, for defendants.

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Collins v. Welch 49 L.J. 261  
Myers v. Defries 49 L.J. 267.  
Hobbs v. Bayly 49 L.J. 268.  
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QUEEN'S BENCH, COMMON PLEAS AND EXCHEQUER.

[N. S.]

Mandamus 2 Hy. Ry. 50 L.J. 319

Duke of Norfolk v. Arbutnot 50 L.J. 384.

[IN THE COURT OF APPEAL.]

13 a. d. laug (Appeal from the Exchequer and Queen's Bench Divisions.)

Clark 54  
28 B. 2507

1879. } MYERS v. DEFRIES AND OTHERS.  
May 1, 2. } SIDDONS v. LAWRENCE.\*

*Practice—Costs—Order LV., rule 1—Order depriving successful Party of Costs—Divisional Court, Jurisdiction of—Appellate Jurisdiction Act, 39 & 40 Vict. c. 59. s. 17—Judicature Act, 1873, s. 49—Appeal.*

Under Order LV., rule 1, where an action or issue has been tried by a jury, the Divisional Courts have a separate independent power, co-ordinate with that of the Judge at the trial, in their discretion to make an order to deprive a successful party of his costs, and no appeal lies from their order by reason of the Judicature Act, 1873, s. 49.

This power has not been transferred to a single Judge by section 17 of the Appellate Jurisdiction Act, 1876, which is directory only and not mandatory, so far as relates to the transaction of business before a single Judge.

MYERS v. DEFRIES AND OTHERS.

This action was brought to recover damages for maliciously and without probable cause presenting a bankruptcy petition against the plaintiff, and obtaining the appointment for a receiver, and for libel.

The action was tried on the 16th, 17th and 18th of May, 1878, in Middlesex, before Baron Huddleston, with a jury, when a verdict was given for the plaintiff on the libel for one farthing damages, and for the defendants on the residue of the claim, and judgment was entered accordingly. No order was made as to costs at the trial, and no further proceedings were taken till after the decision in the House of Lords in the case of *Garnett v. Bradley* (1), which was pronounced on the 6th of June, 1878. On the 30th of June the plaintiff submitted his bill of costs to the Master for taxation, the defendant obtained an adjournment till the 6th of

\* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Thesiger, L.J.

(1) 48 Law J. Rep. Exch. 186; s. c. Law Rep. 3 App. Cas. 944.

August, and then gave notice of motion in the Exchequer Division for an order that the plaintiff should pay his own and the defendants' costs of the action. The Master thereupon suspended taxation until the motion should have been disposed of.

The motion was heard on the 17th of March, 1879, when the Court followed the decision of the Divisional Court in *Bowey v. Bell* (2), holding that the Court had jurisdiction to entertain the application, under Order LV., rule 1 (3), of the rules of the Supreme Court, and made an order depriving the plaintiff of his costs. Against this decision the present appeal was brought.

SIDDONS v. LAWRENCE.

This was an appeal from a decision of the Queen's Bench Division in an action for malicious prosecution, tried before Cleasby, B., with a jury, at Oakham, in which the plaintiff recovered one farthing damages. The case is reported in the Court below, together with that of *Bowey v. Bell* (2).

The course of proceedings was substantially the same as in the case of *Myers v. Defries*, except that at the trial the plaintiff applied for a certificate for his costs which the Judge refused to grant, whilst the defendant made no application as to costs, and that the Master had taxed the costs and issued his *allocatur* and judgment had been finally signed before the application to the Divisional Court. The same point was raised in each appeal, namely, whether under Order LV., rule 1, of the rules of the Supreme Court, a Divisional Court has original jurisdiction to grant an order depriving the successful party of his costs

(2) 48 Law J. Rep. Q.B. 161; s. c. Law Rep. 4 Q.B. D. 95.

(3) By Order LV., rule 1, of the rules of the Supreme Court, "subject to the provisions of the Act the costs of and incidental to all proceedings in the High Court shall be in the discretion of the Court . . . . Provided that where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial for good cause shewn the Judge before whom such action or issue is tried or the Court shall otherwise order."



*Myers v. Defries (App.), Exch.*

in an action tried before a Judge with a jury.

*Murphy and Olay*, for the plaintiff *Myers*, and *W. Graham*, for the plaintiff *Siddons*.—Under Order LV. it was intended that where the "event" of the action was determined at the trial before the Judge, the Judge should have power to deprive the successful party of costs for good cause shewn at the trial, but that where the "event" was determined not at the trial, but afterwards on application to the Court, the Court should have discretionary power over the costs. Possibly the Court may exercise such jurisdiction by way of appeal from the Judge on the question of the good cause shewn; but no independent and original power was given to the Court to make an order depriving the successful party of costs where the event had been decided at the trial by Judge and jury. If, however, the latter was the original intention of Order LV., the jurisdiction of the Divisional Courts has been taken away and vested in the Judge who tried the case by the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 39), s. 17 (4).

They cited *Baker v. Oakes* (5); *The General Steam Navigation Company v. The London and Edinburgh Shipping Company* (6); *Kynaston v. Mackinder* (7).

*Gates* (Sir H. James with him), for the defendant *Defries*; and *Cripps*, for the defendant *Lawrence*.—According to the natural meaning of the words of Order LV., the Divisional Courts have a con-

current and independent jurisdiction with respect to costs in actions tried by a Judge and jury. The Judge has power to make an order depriving the successful party of costs for good cause shewn; but the Court (i.e. the Divisional Court) has an absolute discretion.

It cannot be intended to give a merely appellate jurisdiction to the Court. The words "Judge or Court" frequently occur in the rules, but never in that sense. The expression can only signify an alternative.

As to the Appellate Jurisdiction Act, section 17 is merely directory and not mandatory. And the jurisdiction of the Divisional Courts is only transferred to a single Judge "so far as is practicable and inconvenient." Here it would be inconvenient, for it would give the Judge a limited discretion at the trial and an unlimited discretion afterwards.

BRAMWELL, L.J.—I am of opinion that this appeal should be dismissed. A meaning must be given to all the words of Order LV., rule 1, and the substantial question here is whether the words of the proviso, "Unless the Court shall otherwise order," mean that the Court is to have a jurisdiction only by way of appeal from the Judge at the trial, or in cases where the "event" is dependent not on the decision of the Judge at the trial, but on the decision of the Court in some subsequent proceeding, or whether those words give a separate independent power to the Divisional Court, co-ordinate with that of the Judge, to deprive the successful party of costs? I am of opinion that the latter is the true meaning of the order, and I think it can be shewn that it was necessary that the words "or the Court" should be inserted. The words of the proviso are, "Where any action or issue is tried by a jury the costs shall follow the event, unless upon application made at the trial, for good cause shewn, the Judge before whom such action or issue is tried, or the Court, shall otherwise order."

What can that mean? I do not think "the event" can mean the event of the verdict, because sometimes on the only question there may be for the jury to try,

(4) By 39 & 40 Vict. c. 59. s. 17.—"Every action and proceeding in the High Court of Justice, and all business arising out of the same, except as hereinafter provided, shall, so far as is practicable and convenient, be heard, determined and disposed of before a single Judge, and all proceedings in an action subsequent to the hearing or trial and down to and including the final order, except as aforesaid, and always excepting any proceedings on appeal before the Court of Appeal, shall, so far as is practicable or convenient, be had and taken before the Judge before whom the trial and hearing of the cause took place."

(5) 46 Law J. Rep. Q.B. 246; s. c. Law Rep. 2 Q.B. D. 171.

(6) 47 Law J. Rep. Exch. 77; s. c. Law Rep. 2 Ex. D. 467.

(7) 47 Law J. Rep. Exch. 76.

*Myers v. Defries (App.), Exch.*

their verdict may be for the defendant, and yet judgment may be given by the Judge at the trial for the plaintiff. It cannot be that the event which the costs in the ordinary course are to follow is to be in favour of one party, and the judgment in favour of the other. The "event" cannot, therefore, be the verdict, for if it were, an unjust result might follow. It therefore must mean that where the action or issue has been tried by a jury (an inaccurate expression, for the jury does not "try" the action) the costs of the cause are to follow the event of the cause. If so, it seems to me impossible to doubt that in some cases the Court must have power to "otherwise order," for the Judge at the trial may not be able to tell what the event will be; for instance, where a particular issue is sent down for trial. I think, therefore, that the words "unless the Court shall otherwise order" were inserted of necessity.

Another possible state of things points to the same conclusion. I do not like to use an illustration, for fear it should be cited hereafter as a decision; but suppose fresh facts were presented to the Court which could not be produced before the Judge at the trial; and suppose the Court were of opinion that if the circumstances had been known to the Judge, he would have made an order depriving the successful party of costs; taking, for instance, the case of an action against a newspaper for libel, where the plaintiff recovers forty shillings, which is not a merely nominal verdict, and the Judge says, "You had a good cause of action and you have established your character and you are entitled to your costs. I shall make no order against you." Then suppose it is shewn to the Court, that the plaintiff had already established his character in another action for the same libel, and that this last action was merely a vexatious one, brought for the purpose of worrying the defendant. Could not the Court then make an order depriving the plaintiff of his costs? I do not say that they should; but suppose they did, or, if the illustration is imperfect, let us suppose some better one were found. What ought to be done in such a case?

It may be said that it was the fault of the defendant that the Judge did not know the circumstances at the trial. But it must be remembered that the Judge decides on matters relevant to the cause. Perhaps he retires at the end of the case: then when he comes back there is no one to tell him the further circumstances which were not admissible as evidence, and he makes no order. It is impossible to say that it would not be reasonable for the Court to make the order, and that they ought not to have jurisdiction.

Therefore there are two cases in which the Court ought to have the jurisdiction: first, where the event is not known to the Judge at the trial; and, secondly, cases where the event may be known, but where there may be collateral circumstances which would, if the Judge had known them, have altered his opinion as to the "good cause shewn," and would have entitled the unsuccessful party to an order depriving the successful party of costs. It seems to me, therefore, that the words were necessary to make the order complete. Then, as a matter of construction, it is manifest that the words give a power larger than that which was contended for by Mr. Murphy.

I do not think myself that it could have been the intention of the Legislature that the Court should order the successful party to be deprived of his costs upon the same materials as would have entitled the Judge to do so, if he had considered them good cause; e.g., that the action was one for slander, and the verdict for a farthing: I do not think the Court was intended to act on the same grounds; but the Court was given an independent power in words sufficiently large to give the Court jurisdiction to act in cases where the Judge might have acted but did not, and thus to create an indirect form of appeal. I agree that no Court acting on that power ought to do otherwise than to consider the matter *prima facie* in favour of the party in whose favour the event has been determined. But it seems to me that the general result of the legislation is this:—First, the Court has a discretionary power over the costs. Then there is a general direction that the costs are to follow the event

*Myers v. Defries (App.), Exch.*

where the trial has been by a jury, unless the Judge at the trial for good cause shewn, shall otherwise order; the effect of which is to transfer the power to the discretion to the Judge who must not "otherwise order," unless for good cause shewn at the trial. Then there is a general renewal of the discretionary power of the Court by the words "or the Court shall otherwise order," subject to this, that the Court must not "otherwise order" except on the consideration that some fact exists to induce them to supersede the general presumption in favour of the successful party. The words we have to construe are there for a purpose; and I think that their natural construction is in favour of the defendants. As to the Appellate Jurisdiction Act, I think that is directory and not prohibitory. If not, the effect might be that the Judge at the trial must act for good cause shewn, but afterwards would have a general discretion unfettered by such considerations.

BAGGALLAY, L.J.—Lord Justice Thesiger concurs with my Lord, and therefore any doubt I may entertain on this question becomes immaterial. I have had doubts, which have not been altogether removed, as to the jurisdiction of the divisional Court. But the great concurrence of opinion expressed in cases not differing in principle from the case before us, by a number of learned Judges, goes far to make me feel that my doubts must be unfounded.

THESIGER, L.J.—We are called upon to decide two appeals from two divisional Courts, both of which have held that they have original jurisdiction as to the costs of a cause tried by a jury, and have exercised that jurisdiction to deprive the plaintiff in each case of his costs. I am of opinion that they had an original jurisdiction in the matter, and that the power they exercised was discretionary, and one with which we have no power to interfere. The question depends on rule 1 of Order LV. It is not altogether free from doubt, and I admit that I have had doubts. At present, however, I have no such doubt, and I concur with the judg-

ment of Lord Justice Bramwell. The matter may be put in this way. The rule commences by making an alteration as to the costs of causes in the Common Law Divisions of the High Court of Justice. It begins with a general provision that the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court.

So far there is no exception, and to such cases section 49 of the Act of 1873 is applicable, which provides that "no order made by the High Court of Justice, or any Judge thereof, by consent of the parties, or as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court, or Judge making such order." *Prima facie* then the costs are in the discretion of the Court, or Judge, and there is no appeal. But then certain exceptions are contained in the rule. The first is one which relates to the rule acted on by the Courts of Equity, under which a right is reserved to trustees to have their costs paid out of particular estates and funds. The next exception is one which has reference to the Common Law Divisions of the High Court of Justice: "Provided that when any action or issue is tried by a jury the costs shall follow the event, unless upon application made at the trial for good cause shewn the Judge before whom such action or issue is tried, or the Court, shall otherwise order."

It is contended that this proviso does not constitute two tribunals with primary jurisdiction, but gives a primary jurisdiction to the Judge, with an appeal to the Court. I am of opinion that that contention is not maintainable. There are several reasons against it, but I prefer to rely on the simple construction of the words. I cannot see how they can have been intended to mean anything else than to create two alternative tribunals with original jurisdiction, and not one with a primary and another with appellate jurisdiction. If the latter were the meaning, it would do violence to the literal construction of the words, which is that the application may be made either to the Judge or to the Court, and would also involve the addition of the words, "by

*Myers v. Defries (App.), Exch.*

way of appeal." Another thing that shews that this is not the true construction is, that there are cases in which the "event" is not decided by the Judge but by the Court. Then the appellants argue that both the Court and the Judge are bound by particular conditions—that the words "on application at the trial for good cause shewn," are applicable not only to the Judge at the trial, but to the Court. That contention, I think, is not maintainable. Grammatically, it must be admitted, the words are applicable to both rather than to one; but if they were so applied the result would be an absurdity, for the Court need not be "at the trial" at all, and therefore could not hear an application at the trial. Therefore it appears to me that the real and proper reading of the words is this, "unless either (on application at the trial for good cause shewn) the Judge, or the Court, shall otherwise order."

But then it is said, if so, the Court can only have jurisdiction where the Court has seisin of the action, and is the tribunal before which the event is determined. But I cannot think that argument ought to prevail, for it would involve the addition of some such words as, "the Court which finally determines the event." The framers of the rule evidently had such matters before their minds, for they say, "the Judge before whom the action is tried," which makes me think that if such words as I have suggested had been meant they would have been put in. But there are no such words; and the legislature, whilst putting into the rule an exception as to jury cases, has also given a discretion of some kind to the Judge at the trial, who may deprive the successful party of costs upon good cause shewn; but they have left the general jurisdiction of the High Court in the matter of costs untouched, and have said that where the Judge has not exercised his discretion the High Court may deal with the matter; and, dealing with it, they have a discretion which may not be reviewed by us. So much for the aspect of the question if the matter had been new. But then there are authorities. No doubt *Baker v. Oakes* (5) did not decide the question, but Lord

Justice Brett in his judgment expressed a decided opinion in favour of our view; and in *The General Steam Navigation Company v. The London and Edinburgh Shipping Company* (6) the point was actually raised, and Baron Huddleston expressed an opinion upon it, and the Lord Chief Baron in a later case has given an opinion to the like effect, as well as in one of the cases under appeal. Finally, we have the opinion of the Judges in the Court below in the case of *Myers v. Defries*, giving their considered views; though the grounds for those views were not reasoned out. So much as to the main question. As to the Appellate Jurisdiction Act, it is clear that the Legislature did not intend to bind the Court by any hard and fast rule, though it gives a strong direction. The rule would be the same here; but it is to take effect only where it is practicable and convenient. And it seems to me, as has been pointed out by Lord Justice Bramwell, that, looking to the different nature of the discretion allowed to the Judge and to the Court, it would not be expedient that the Judge should act as the Court in these cases.

Lastly, it is said that in the case of *Siddons v. Lawrence* there had been a final judgment, and the Master had issued his *allocatur*, after taxing the costs. That may be so, and it may be that would have been a good reason for not interfering; but, at the same time, if we are right in holding that the discretion of the Court is absolute, and the Court has made the order, we have no right to alter their decision. I do not say that the Court below were not right, but only that even if they were not, we have no jurisdiction to interfere.

*Appeal dismissed.*

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Solicitors—G. S. & H. Brandon, for appellant; Jno. Hands, for respondents; Beaumont & Warren, agents for Atter & Brown, Peterborough, for the plaintiff Siddons; P. Toynbee, agent for Toynbee, Larken & Co., Lincoln, for the defendant Lawrence.

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[IN THE COMMON PLEAS DIVISION.]  
 1879. } WARBURTON v. THE HASLINGDEN  
 April 30. } LOCAL BOARD.\*

*Arbitration—Remitting back Award for Reconsideration—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 180—Common Law Procedure Act, 1854 (17 & 18 Vict. 125), s. 8—Discretion of Court.*

*The reference to arbitration of a question of disputed compensation, pursuant to section 180 of the Public Health Act, 1875, is a submission to arbitration by consent, within the meaning of the Common Law Procedure Act, 1854, and the Court has a discretionary power, under section 8 of that Act, "at any time" to remit the award back to the reconsideration of the arbitrator.*

*The Court, however, in the exercise of its discretion, took into consideration the lapse of time between the making of the award and the application to remit, and refused the order to remit on the ground, amongst others, that it was too late.*

*Kellett v. The Local Board of Tranmere (34 Law J. Rep. Q.B. 87), dissented from.*

*Rule calling on the local board to shew cause why an award should not be remitted back to the arbitrator for reconsideration.*

By an award dated the 24th of February, 1878, an umpire appointed under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 180, made his award, whereby he gave to the claimant 450*l.* and "the costs of and consequent of this award" (1). The award was taken up by the claimant in December, 1878. On the 2nd of January, 1879, the claimant issued a writ on the award as it stood, and delivered statement of claim, including in his claim the costs of the re-

ference. The local board pleaded to this action by bringing into Court the amount awarded and the costs of the award only. The claimant took the money out of Court, and on the 21st of March, on an affidavit of the umpire that the umpire intended to give the claimant the costs of the reference, applied to the Court of Queen's Bench, and obtained a rule *nisi* to remit the award back to the umpire for reconsideration under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 8 (2), against which

*J. W. Mellor and Channell* (on the 30th of April) shewed cause.—An arbitration under the Public Health Act, 1875, is not within the Common Law Procedure Act, 1854. Before that Act, according to the old practice, a motion to refer back an award must be made within the same time as a motion to set it aside—*Doe d. Banks v. Holmes* (3). The scheme of the Public Health Act, 1875, is to ensure speedy decision, in addition to which arbitration is compulsory. It is not like the Lands Clauses Act, where the claimant can either go to arbitration or a jury. *Kellett v. The Local Board of Tranmere* (4) decides that arbitrators, under the old Public Health Act of 1848, are not within the Common Law Procedure Act, 1854. The provisions relating to arbitration in the Public Health Act, 1848, are re-enacted in the Public Health Act, 1875, but curing one of the difficulties of *Kellett v. The Local Board of Tranmere* (4), by enacting, in section 180, sub-sec. 9, that "in no case" shall the time for making an award be ex-

(2) Section 8.—"In any case where reference shall be made to arbitration as aforesaid, the Court or a Judge shall have power at any time, and from time to time, to remit the matters referred, or any or either of them, to the reconsideration or re-determination of the said arbitrator, upon such terms, as to costs and otherwise, as to the said Court or Judge may seem proper."

Section 9.—"All applications to set aside an award made on a compulsory reference under this Act shall and may be made within the first seven days of the term next following the publication of the award to the parties, whether made in vacation or term."

(3) 12 Q.B. Rep. 961.

(4) 34 Law J. Rep. Q.B. 87.

\* This case was argued in the Common Pleas Division, as at this time the Common Pleas Division were taking motions from the Queen's Bench Division.

(1) By the Public Health Act, 1875, section 180, sub-sec. 13, "The costs of and consequent upon the reference shall be in the discretion of the arbitrator or arbitrators, or (in case the matters referred are determined by an umpire) of the umpire."

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tended beyond two months. This case has always been regarded as an authority, and is so treated in the text-books.

It is true *The Dare Valley Railway Company v. Rhys* (5) is an authority which shows that, under the Lands Clauses Act, arbitrations are within the Common Law Procedure Act, 1854, but nowhere is it decided that an application to refer back an award can be made later than the term after its publication. The other side will rely upon *Oswell v. Groucutt* (6) and *Harland v. The Mayor of Newcastle-upon-Tyne* (7); but those two cases are easily distinguishable. In *Oswell v. Groucutt* (6) the Court, in giving judgment, do not notice the point as to the application not being made within the seven days, and the application was made within the term. In *Harland v. The Mayor of Newcastle-upon-Tyne* (7) the point was not taken.

At all events, if the Court have the power the Court will not exercise it, as the claimant has brought an action setting up the award, and has taken money out of Court paid in by the local board.

*Herschell and Crompton*, for the claimant, in support of the rule.—The arbitration is within the Common Law Procedure Act, 1854. It has been contended on the other side that the decisions on the Lands Clauses Act are no authorities in the present case, because the claimant can either go to arbitration or a jury; but arbitration is compulsory on the railway company if the claimant wishes, therefore it cannot be said to be altogether matter of consent. The decisions really proceed on the ground that the arbitration sections of the Common Law Procedure Act are remedial. In *Rhodes v. The Airedale Drainage Commissioners* (8) the Master of the Rolls, in the Court of Appeal, gave judgment on this principle, and the same reasoning governed *The Dare Valley Case* (5).

By section 8 of the Common Law Pro-

cedure Act, 1854, the Court has given to it power "at any time" to remit the matters referred, shewing that, if justice requires it, the time is unlimited, while an application to set aside the award must be made within a limited time (section 9). The application here is to remit, and the present case is one in which the power to remit may properly be exercised. There has simply been a blunder on the part of the person to whom the matter was entrusted, and section 8 was intended to remedy mistakes of this sort.

DENMAN, J.—On the best consideration I can give I am inclined to agree with the counsel for the claimant, that an arbitration under the Public Health Act, 1875, is within the terms of the Common Law Procedure Act, 1854, and that it is so upon the authority of *Rhodes v. The Airedale Drainage Commissioners* (8) and other cases cited. The point is not free from difficulty, and if free from authority, I am not sure I should come to the same conclusion; but those decisions seem clearly to shew that, where an Act of Parliament contains enactments which say that upon the one party doing certain acts the other party may drive them to arbitration, then the arbitration is by consent within the Common Law Procedure Act, 1854.

Then arises the question, Is section 8 of the Common Law Procedure Act applicable to the present case? It is contended on behalf of the local board that, although this clause contains general words, yet it must be considered to be limited either by clause 9 or else by the general law which existed before the Common Law Procedure Act, 1854, by which such an application as the present must be made during term next following the publication. Here, again, I agree with the counsel for the claimant that section 9 applies only to setting aside an award, while the wide words of section 8, "at any time," apply to the present case, which is an application to remit the award for reconsideration only. To set aside an award is a serious matter, for thereby all former proceedings are rendered void, while to remit an award back

(5) 38 Law J. Rep. Chanc. 417; s. c. Law Rep. 4 Ch. App. 554.

(6) 31 Law J. Rep. Exch. 361.

(7) 39 Law J. Rep. Q.B. 67; s. c. Law Rep. 5 Q.B. 47.

(8) 45 Law J. Rep. C.P. 361; s. c. Law Rep. 1 C.P. D. 380.

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for reconsideration is a very different matter, and involves no such serious consequences. I am of opinion, therefore, that the rigid words of section 9 are not applicable to this application, but that it is within section 8, and that we can entertain the application.

Ought we, then, in this particular case, to refer the award back for consideration? Though I hold there is no absolute limit of time wherein the application should be made, yet I consider some regard should be paid to the limit of time, and where the application is made several terms after the publication of the award, the application should be viewed with a certain amount of jealousy, and all the circumstances of the case looked at, to see whether justice requires such an application to be entertained.

In the present case the award is made in February, 1878, but it is not taken up until the following December. It was, then, plain the plaintiff knew that, by the ambiguous terms used in the award, it was doubtful whether he had the costs of reference, and with this before him he brings an action placing his own construction on the award. The defendants pay the money into Court, the plaintiff takes the money out of Court, and now asks us to remit the award to the arbitrator for reconsideration. It appears to me to be too late to do this, and that it cannot be done without the greatest inconvenience. The plaintiff has brought it on himself by his conduct, and in the exercise of our discretion we must hold this to be a case in which we ought not to exercise the power vested in us by section 8 of the Common Law Procedure Act, 1854, and we therefore dismiss the application.

LINDLEY, J.—I am of the same opinion. In my judgment an arbitration under section 180 of the Public Health Act, 1875, is equivalent to a submission to arbitration under the Common Law Procedure Act, 1854. The language of that Act has been recently construed in *Rhodes v. The Airedale Drainage Commissioners* (8) to apply not only to arbitrations by agreement, but generally to all arbitrations, which are equivalent to submis-

sions to arbitration. Therefore, although *Kellett v. The Local Board of Trammere* (4) seems to be a decision the other way, yet the present arbitration seems to me to be within the Common Law Procedure Act, 1854.

Then, ought we to exercise the power conferred on us by section 8? Before doing so the Court must see whether it is a case which with fairness can be sent back. Considering all the circumstances that have taken place I do not see on what terms we could do so short of undoing all that has been done. In my opinion it would be unfair to accede to the application, and I therefore agree it should be refused.

*Application refused with costs.*

Solicitors—Shaw & Tremellen, agents for John H. Tattershall, Blackburn, for claimant; Milne, Riddle & Mellor, agents for Woodcock & Sons, Haslingden, for local board.

[IN THE COURT OF APPEAL.]

(*Appeal from the Exchequer Division.*)

1879. } TOMLINE v. THE QUEEN.\*  
May 19. }

*Petition of Right—Practice—Right of Crown to Discovery of Documents by Suppliant—Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), s. 7—Rules of Court, 1875, Order XXXI. rule 12.*

*The Crown is entitled, under the provisions of the Petitions of Right Act, 1860, and the Rules of Court, 1875, to discovery of documents by a suppliant in a petition of right.*

Appeal by the Crown from the judgment of the Exchequer Division.

This was a petition of right, alleging an agreement between one of Her Majesty's officers and the suppliant, whereby the suppliant was to receive the sum of 1s. per ton for all materials carried over a pier on the land of the suppliant, and stating that the suppliant, who had received toll on 12,360 tons, sought to be paid toll on 116,000 tons, the quantity

\* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Thesiger, L.J.

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alleged by him to have been carried over the pier.

The Crown took out a summons for an order for discovery by the suppliant of documents; the Master made the order, whereupon the suppliant appealed to the Judge at Chambers, who referred the matter to the Court. The Exchequer Division rescinded the order of the Master, and refused the discovery. The Crown now appealed.

*O. Bowen (the Attorney-General, Sir J. Holker, with him), for the Crown.*—The question is whether the Crown is entitled to ask for discovery against a suppliant in a petition of right. The proceedings in petitions of right are governed by 23 & 24 Vict. c. 34, and that Act was passed for the purpose, not of extending the rights of a suppliant, but of assimilating, as nearly as may be, the proceedings in petitions of right to those in actions between subject and subject, and suppliants do not, by virtue of that Act, acquire any rights against the Crown which they did not possess before it was passed—*Tobin v. The Queen* (1). The effect of section 7 of that Act (2) is to apply to the proceedings in a petition of right all the procedure of ordinary suits, so far as that procedure is applicable: discovery by the suppliant is applicable, and it is therefore applied. The discovery sought for by the Crown is the ordinary discovery given under

(1) 14 Com. B. Rep. N.S. 505; s. c. 32 Law J. Rep. C.P. 216.

(2) The Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), s. 7:—"So far as the same may be applicable, and except in so far as may be inconsistent with this Act, the laws and statutes in force as to pleading, evidence, hearing, and trial, security for costs, amendment, arbitration, special cases, the means of procuring and taking evidence, set-off, appeal, and proceedings in error in suits in equity, and personal actions between subject and subject, and the practice and course of procedure of the said Courts of law and equity respectively for the time being in reference to such suits and personal actions, shall, unless the Court in which the petition is prosecuted shall otherwise order, be applicable and apply and extend to such petition of right. Provided always that nothing in this statute shall be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of this Act."

Order XXXI. rule 12 (3). It is objected that the Crown cannot ask for discovery by a suppliant, because a suppliant is not entitled to have discovery from the Crown—*Thomas v. The Queen* (4); but that is not a valid objection. There are practical and technical difficulties in the way of enforcing an order for discovery against the Crown, and there is no ground for supposing that the rights and privileges of the Crown and of a subject were intended to be made equal and reciprocal by the Petitions of Right Act. The Crown has certain privileges which the suppliant has not; the Crown is not liable to answer interrogatories; the Crown can plead double, and can plead and demur without leave—*Tobin v. The Queen* (1). Discovery, when sought for against the Crown, is not a part of the procedure applicable to petitions of right, and therefore it is not embodied in the procedure adopted by the Act regulating such petitions. A suppliant had no right to discovery before the Act, and he does not get it by that Act, for it is not given by special enactment; nor are there any express words which would in this matter bind the Crown; but none of these considerations apply to a summons for discovery, when taken out by the Crown against a suppliant.

*E. Harrison (Herschell with him), for the suppliant.*—The question in this petition is one of amount—discovery by the Crown would settle this question; but it is refused. The statutes relating to this matter must affect both parties alike, and if the Crown is not a party to a petition of right so as to be compellable to give discovery, then it cannot be a party so as to be able to apply for discovery. The practical difficulties are not material, as the Crown is a corporation (*Bacon's Abridgement*, vol. ii., p. 253), and therefore it can give discovery by means of an officer appointed for the purpose.

(3) Rules of Court, 1875, Order XXXI. rule 12:—"Any party may, without filing any affidavit, apply to a Judge for an order directing any other party to the action to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question in the action."

(4) 44 Law J. Rep. Q.B. 17; s. c. Law Rep. 10 Q.B. 44.



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Further, this is an application to the judicial discretion of the Court, and it is submitted that it would be reasonable that the Crown should not have discovery, without some terms being imposed, as to its giving in turn some facilities for discovery to the suppliant.

BRAMWELL, L.J.—I am of opinion that this appeal must be allowed. The 7th section of the Petitions of Right Act, 1860 (2), enacts that the practice and procedure in force as to pleading and evidence between subject and subject shall apply to petitions of right, "so far as the same may be applicable." Now discovery of documents is part of this practice and procedure, and discovery by the suppliant in this petition is clearly part of that procedure which is applicable to a petition of right. We need not and we do not say whether the suppliant could successfully apply for a similar order against the Crown; but, assuming that he could not, I do not think that affects this question. The power to order discovery of documents is none the less applicable to a petitioner, because there may be technical difficulties which would prevent such an order from being made upon and against the Crown. The appeal must be allowed, and the order for discovery must be restored.

BAGGALLAY, L.J., and THESIGER, L.J., concurred.

*Appeal allowed.*

Solicitors—F. Stokes, for suppliant; W. Tindal Perkins, agent for the Solicitor to the Treasury, for the Crown.

[IN THE QUEEN'S BENCH DIVISION.]

1879. } STACEY (*appellant*) v. LINTELL  
March 28. } (*respondent*).

*Bastardy*—35 & 36 Vict. c. 65 (*Bastardy Law Amendment Act, 1872*), s. 3—"Single Woman"—*Marriage of Mother after Birth of Child*.

[For the report of the above case, see 48 Law J. Rep. M.C. 108.]

[IN THE EXCHEQUER DIVISION.]

1879. { THE ATTORNEY-GENERAL AND  
May 26. { THE CORPORATION OF HULL  
v. CONSTABLE AND ANOTHER.

*Crown—Prerogative—Right to bring Proceedings into the Exchequer—Restraining Actions—Judicature Acts.*

*The prerogative of the Sovereign to bring proceedings in which Crown property is involved into the Exchequer by information filed by the Attorney-General, and to restrain proceedings pending elsewhere, is not affected by the Judicature Acts.*

This was a motion in one of three English informations which were brought by the Attorney-General on behalf of Her Majesty, claiming that certain foreshore might be declared the property of the Crown, and that three actions brought in the Chancery Division by Sir Frederick Constable and Thomas Constable against the Corporation of Hull, the Humber Commissioners and the Withernsea Pier Company respectively might be restrained.

Sir John Holker (*Attorney-General*), Sir H. Giffard (*Solicitor-General*) (W. W. Karlake and C. Bowen with them), moved for an order to restrain the action.—It is a prerogative of the Crown to take part in proceedings involving its property, and to bring those proceedings into the Exchequer for decision—*The Attorney-General v. St. Aubyn* (1); *The Attorney-General v. Barker* (2); *The Attorney-General v. Hallett* (3); *The Attorney-General v. Reveley* (4); *Anon.* (5). This prerogative is not affected by the Judicature Acts because the Crown is not expressly named.

A. Wills and Nalder, for Sir Frederick and Thomas Constable, defendants in the information, opposed the motion.—The fifth sub-section of section 24 provides that "no cause or proceeding at any time pending in the High Court of Justice shall be restrained by prohibi-

(1) Wightw. 204.

(2) 41 Law J. Rep. Exch. 57.

(3) 15 Mee. & W. 97; s. c. 15 Law J. Rep. Exch. 246.

(4) Karlake's Report.

(5) 1 Anst. 205.

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tion or injunction." The action in the Chancery Division is a cause pending in the High Court, and this division is asked to restrain it by injunction. The only way in which the cause can be tried in this Court is by transfer under section 36 of the Judicature Act, 1873, and the rules made thereunder (Order LI. rules 1 and 2). There ought to be provision made for the consolidation of these actions, otherwise the result will be oppressive on Sir F. Constable.

KELLY, C.B.—I must repeat what I said in *The Attorney-General v. Barker* (2). If I had any doubt I should take time to consider in such a case as this, but my mind is free from doubt. Before the Judicature Acts the law was completely settled. The prerogative of the Crown was clear, absolute and indubitable, as laid down in *The Attorney-General v. Barker* (2) and several previous cases, and the proper mode of asserting it was by the proceeding which has been taken in this case. The question is whether the prerogative of the Crown has been taken away by the Judicature Acts. It has been argued that the effect of those Acts is to leave the intervention of the Crown when its interests are concerned to the discretion of a Judge. The result might be to annihilate the prerogative. There has been a hardship insisted upon in this case if we allow the motion of the Attorney-General, and it might be if the transfer lay with the Judge of the Division that the Judge in whom the discretion is vested might be influenced by such considerations and refuse the transfer.

The language of the Judicature Acts goes to shew the exclusion of this Division sitting as a Court of Revenue from their operation. Order LXII. says that "nothing in the rules shall affect the practice or procedure in any proceedings on the revenue side of the Court of Exchequer," and section 34 of the Judicature Act, 1873, assigns to the Exchequer Division "all causes and matters which would have been within the exclusive cognizance of the Court of Exchequer either as a Court of Revenue or as a Common Law Court if this Act had not

passed." In what other Court than the Exchequer could a cause involving the Queen's prerogative or property have been decided? These provisions are not conclusive; but there is another consideration which is conclusive. The prerogative of the Sovereign cannot be taken away or impaired except by express words. There are no such express words in the Judicature Acts. There are provisions as to transfer of actions, but they cannot limit the prerogative. I am therefore of opinion that this motion must be allowed.

HUDDLESTON, B., concurred.

*Injunction granted.*

Solicitors—The Solicitor to the Board of Trade for the Crown; Collyer-Bristow & Co., agents for Stamp, Jackson & Birks, Hull, for defendants.

[IN THE EXCHEQUER DIVISION.]

1879. }  
May 16. } DONOVAN v. BROWN.

*Practice—Appeals from Inferior Courts*  
— *Setting down for Hearing* — *Time* —  
Order LVIII. rule 19.

*A rule nisi to reverse a judgment of an inferior Court was obtained on the 5th of November, calling upon the opposite party to shew cause at the expiration of eight days, or so soon after as the case could be heard. The rule was not set down at the Crown Office for hearing, in the list, under Order LVIII. rule 19, of appeals from inferior Courts before the day named in the rule nor until the following 3rd of February:—Held, that the appellant had lost his right to be heard.*

Rule nisi to set aside a nonsuit in an action in the Lord Mayor's Court.

The rule was obtained on the 5th of November, 1878, and called upon the defendant to shew cause, at the expiration of eight days from the date thereof, or so soon after as the case could be heard. The rule was served upon the defendant within a day or two after the obtaining

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of the rule, but was not set down at the Crown Office for hearing, in the list under Order LVIII. rule 19 (1) of appeals from inferior Courts, until the 3rd of February, 1879. The rule now came on for argument.

*Firth*, for the defendant, objected that the plaintiff having, notwithstanding that the rule was granted on the 5th of November, 1878, omitted to set it down at the Crown Office, under Order LVIII. rule 19, until the 3rd of February, 1879, was out of time. Order LVIII. rule 19 is no doubt silent as to time, but so also is the analogous provision of Order LVIII. rule 8; and *In re National Funds Assurance Company* (2), decided upon the latter rule, applies.

*Dunlop Hill*, for the plaintiff, appeared in support of the rule.

**PER CURIAM** (3).—The case cited is conclusive to shew that, although Order LVIII. rule 19 is silent as to time, the plaintiff's delay in setting down the case for argument—a delay for which he has shewn no sufficient excuse—disentitles him to be heard.

*Rule discharged, with costs* (4).

Solicitors—James Chapman & Co., for plaintiff;  
Duffield & Bruty, for defendant.

(1) Order LVIII. rule 19 (rules of December, 1876, repealing the like-numbered rule of December, 1875), provides, "Every Judge of the High Court . . . shall be a Judge to hear . . . appeals from inferior Courts under section 45 of the . . . Judicature Act, 1873. *All such appeals* (except Admiralty appeals . . .) *shall be entered in one list by the officers of the Crown Office of the Queen's Bench Division*; and shall be heard by such Divisional Court of the Queen's Bench, Common Pleas or Exchequer Division as the Presidents of those Divisions shall from time to time direct. . . ."

(2) 46 Law J. Rep. Chanc. 183; s. c. Law Rep. 4 Ch. D. 305.

(3) Kelly, C.B.; and Huddleston, B.

(4) The Court of Appeal have upheld *In re National Funds Assurance Co. in In re Mansel*, 47 Law J. Rep. Chanc. 870.

VOL. 48.—Q.B., C.P. & EXCH.

[IN THE QUEEN'S BENCH DIVISION.]

1879. } FOWLER v. THE MONMOUTHSHIRE  
May 15. } RAILWAY AND CANAL COMPANY.

*Costs—Solicitor and Client—Attorneys and Solicitors Act, 1874* (37 & 38 Vict. c. 68), s. 12—*Uncertificated Solicitor—Costs not recoverable by Client.*

*By the 12th section of 37 & 38 Vict. c. 68, "no costs . . . or disbursements on account of or in relation to any act or proceeding done or taken by any person who acts as an attorney or solicitor without being duly qualified so to act, shall be recoverable in any action, suit or matter, by any person or persons whomsoever."*

*Where the solicitor acting for a claimant in an arbitration for the assessment of compensation for land compulsorily taken by a railway company under the Lands Clauses Act had omitted to take out his certificate,—Held, that the client as well as the solicitor was precluded by section 12 of 37 & 38 Vict. c. 68 (The Attorneys and Solicitors Act, 1874), from recovering his costs against the company notwithstanding that the award had been in his favour, and he had been ignorant of the disqualification of his solicitor.*

This was a rule for a mandamus to a Master of the Queen's Bench Division, commanding him to tax the costs of one Fowler in the matter of an arbitration under the Lands Clauses Consolidation Acts, 1845 and 1869. The Monmouth Canal Company had compulsorily taken some of Fowler's land, and an award had been duly made in his favour of an amount larger than that offered by the company, and so entitling him to all his costs of and incident to the arbitration. The Master, however, refused to tax, on the ground that Fowler's solicitor, though on the Rolls, was uncertificated.

*A. T. Lawrence* shewed cause.—The Master was right in refusing to tax these costs, as the Attorneys and Solicitors Act, 1874, is express in preventing any person from recovering costs or disbursements in relation to any proceeding taken by an unqualified person acting as solicitor.

The tendency of legislation has been to render more stringent the provisions

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*Fowler v. Monmouthshire Rail. Co., Q.B.*

against unqualified persons acting as solicitors. Thus 6 & 7 Vict. c. 73, and 23 & 24 Vict. c. 127, extend the restrictions imposed by 37 Geo. 3. c. 90. So that a solicitor is disqualified from recovering for work done, not only in actions or writs, but in any other way as a solicitor. Then, after the decision *In re Hope* (1), the Act of 37 & 38 Vict. c. 68 was passed, and section 12, which says, that "no disbursement shall be recoverable by any person whomsoever," seems to meet that case and the present, and disentitle the client from recovering.

The Court then called on

*B. Francis Williams*, to support his rule.—It cannot be intended to throw upon a person employing a solicitor the onus of discovering whether he has taken out his certificate. If there were any collusion between the client and the solicitor, or if even the former knew of the want of the certificate, the Court might interfere; but where the client employs an apparently respectable man, and knows nothing, the Act cannot be meant to punish him in the way suggested.

[COCKBURN, L.C.J.—The statute is to be a protection against unqualified persons, and we cannot look at individual cases of hardship.]

The solicitor is merely the agent of the client, and an action will lie by witnesses against the client for their expenses if sub-poenaed by his solicitor. *E converso*, he should be able to recover his costs where his right to them is undoubted both morally and legally, as in the present case, where his land has been taken compulsorily.

COCKBURN, L.C.J.—I think that this rule must be discharged. There is no doubt that under the first Act an attorney or solicitor was held disentitled to any costs for work and labour done as an attorney or solicitor where he had conducted a cause without having a certificate, and yet held entitled to recover the costs of disbursements. Then came an Act of Parliament, in which entirely new words were used, after the judgment of the Court

in which it was held that the client in such a case was entitled to recover on taxation, though not his fees, yet his disbursements. Then the Act of 1874, enlarging the language of the former Acts, provides that no disbursement shall be recoverable—not by any solicitor merely, but by any person whomsoever. That enactment is, I think, not only large enough to include, but was expressly intended to include, not only the solicitor, but also his client.

There may be individual cases where the provision will operate harshly, but the Legislature meant to prevent the possibility of a person not certificated acting as a solicitor in any matter where a solicitor ought to act. We may regret the result of what may here have arisen purely from an oversight, but the Act is imperative, and this rule must be discharged.

MELLOR, J.—I am of the same opinion. I come to the conclusion with regret in this case, where Mr. Fowler was not aware of the circumstances in which the person who acted for him was placed; but the policy of the Act is clear, and we ought not, by any forced effort, to allow it to be evaded.

LUSH, J.—No doubt the application of the statute in question in given cases may work hardship, but we can look only at the plain meaning of the Act, and I think, on comparing it with the previous Acts and decisions, that the matter is beyond a doubt.

The 6 & 7 Vict. c. 73, enacted that "No person who, as an attorney or solicitor, shall sue, prosecute, defend or carry on any action or suit, or any proceedings in any of the Courts aforesaid without a certificate, should recover his costs or disbursements." That applied, therefore, only to proceedings in Court.

Then 23 & 24 Vict. c. 127, carries the matter further. That says in section 26, "Every person who acts as an attorney or solicitor contrary," &c., "shall be incapable of maintaining any action or suit for any fee or reward, for or in respect of anything done, or any disbursements made by him in the course of so

(1) Law Rep. 7 Ch. 766.

*Fowler v. Monmouthshire Rail. Co., Q.B.*

doing." That applied to proceedings out of Court as well as in, but it was confined to acts done or disbursements made by the solicitor.

Then came the decision, *In re Hope* (1), under that later Act, and subsequently the Act under which we must determine this case. The words are as wide as they can be. "No costs, fee, reward or disbursement . . . shall be recoverable in any action, suit or matter, by any person or persons whomsoever." It does not say by whom the disbursements must have been made; and the enactment is clearly applicable to the client as well as to the solicitor.

*Rule discharged.*

Solicitors—Schultz & Son, agents for Arthur Morgan, Pontypool, for Fowler; T. White & Sons, agents for H. S. Gustard, Newport, for the company.

[IN THE EXCHEQUER DIVISION.]

1879. }  
March 24, 31. } DAVEY v. SHANNON.

*Statute of Frauds, s. 4—Contract not to be performed within a Year—Agreement on Termination of Employment.*

*Where a servant contracts to serve his master in the way of his trade, and if he should leave the service not to engage in a like service or trade within a certain area, the contract not to trade being for an indefinite period during the joint lives of the master and servant is a contract prima facie not to be performed within a year within the Statute of Frauds, and must be in writing.*

Demurrer to part of statement of defence.

The statement of claim alleged—

1. The plaintiff is an outfitter and tailor, carrying on business at 47, Fore Street, Devonport.

2. In or about the month of October, 1868, the defendant entered into the

employment of the plaintiff as a foreman tailor for a term of three years, on the terms, amongst others, that if he should leave the plaintiff's employment, he should not engage in the service of anyone carrying on, or himself carry on, the business of a tailor or outfitter, within five miles of Devonport aforesaid.

3. The defendant, on the expiration of the said period of three years, continued in the employment of the plaintiff on the like terms, except as to the period of employment, until the end of October, 1877.

4. At or about the end of October, 1877, the defendant left the plaintiff's employment, and shortly afterwards commenced to carry on business as a tailor and outfitter in Fore Street, Devonport, being the same street in which the plaintiff carries on his said business, and he has since continued, and still continues, to carry on such business at the place aforesaid, contrary to the terms of his said contract, by reason whereof the plaintiff has been and will be injured in his said business, and deprived of custom and profit which he would otherwise have obtained.

The defendant, among other things, pleaded that the alleged contract was not in writing and relied on the Statute of Frauds.

The plaintiff demurred to this part of the defence.

*A. Charles* (Ringwood with him), for the defendant, was called upon to argue.—This is a contract to continue during the whole of the defendant's life, and is therefore *prima facie* not to be performed within a year. It may be performed within the year, but such a possible contingency does not the less make it within the statute. The present contract is the same in principle as the general retainer of a solicitor by a company, as alleged in *Eley v. The Positive Assurance Company* (1), in which case the Exchequer Division held that the Statute of Frauds applied. In the Court of Appeal the decision turned on another ground. [He cited

(1) 45 Law J. Rep. Exch. 58.

*Davy v. Shannon, Exch.*

also *Dobson v. Collis* (2) and *Roberts v. Tucker* (3), and distinguished *Knowlman v. Bluett* (4).]

*Anstie*, for the plaintiff.—The presumption is against the defendant who has to bring the contract within the statute. He must shew either that the parties meant that it should not be performed within a year, or that it is incapable of being performed within a year. There is nothing in the contract to shew that the parties meant it not to be performed within the year, and it is capable of being so performed. The cases cited in the notes to *Peter v. Compton* (5) shew that there must either be an intention of the parties to prolong the contract beyond a year, or an incapability in the contract itself to be performed within it. He cited *Sweet v. Lee* (6); *Farrington v. Donohoe* (7); *Fenton v. Emblers* (8); and *Souch v. Strawbridge* (9). There was no intention of the parties to prolong this contract beyond the year. There is no presumption as to the length of future life. *Eley v. The Positive Assurance Company* (1) was not argued as a case under the Statute of Frauds.

*Our. adv. vult.*

The following judgment was, on the 31st of March, delivered by

HAWKINS, J.—The question raised by this demurrer is whether the contracts set forth in the 2nd and 3rd paragraphs of the statement of claim fall within the 4th section of the Statute of Frauds. The 2nd paragraph alleges that "in or about the month of October, 1866, the defendant entered into the employment of the plaintiff as a foreman tailor for a term of three years, on the terms, amongst others, that if he should leave the plaintiff's employment, he should not engage in the service of anyone carrying on, or himself carry on, the business of a tailor

(2) 1 Hurl. & N. 81; s. c. 25 Law J. Rep. Exch. 267.

(3) 3 Exch. Rep. 632.

(4) 43 Law J. Rep. Exch. 29; s. c. Law Rep. 9 Exch. 1.

(5) 1 Smith's Leading Cases, 5th ed., p. 283.

(6) 3 M. & G. 452.

(7) Ir. Rep. 1 C.L. 675.

(8) 3 Burr. 1,278.

(9) 2 Com. B. Rep. 808; s. c. 15 Law J. Rep. C.P. 170.

or outfitter within five miles of Devonport." The 3rd paragraph alleges that "the defendant, on the expiration of the first period of three years, continued in the employment of plaintiff on the like terms, except as to the period of employment, until the end of October, 1877." The breach alleged was that, having, at the end of October, 1877, left the plaintiff's employment, he did set up in business, &c.

I am of opinion that the contracts fall within the 4th section of the Statute of Frauds, as agreements not to be performed within the space of one year from the making thereof. Upon the first contract for three years it is impossible to raise a doubt. The case, however, has been argued as though it rested upon a new contract of employment for an indefinite period after the expiration of the three years, and an agreement on defendant's part never, after that employment should cease, to set up business as a tailor or outfitter within five miles of Devonport. As thus presented I have considered the case. The law upon the subject is now well established. A contract which, according to its terms, is *prima facie* not to be performed within a year is not the less within the statute, because it is made defeasible by a contingency which may occur within that period. Thus a contract of service for two years is none the less within the statute because it is made terminable by the death of either of the parties, or by notice, or by the misconduct of the servant at any period of the service. *Dobson v. Collis* (2) is an express authority to this effect. *Roberts v. Tucker* (3) is a striking authority in support of the same doctrine. That was an action by a stipendiary curate against the incumbent of a parish, founded upon an alleged promise made by the defendant to the plaintiff to take all necessary measures for obtaining the payment of an annual grant from the Society for Promoting the Employment of Additional Curates in each and every year, &c. At the trial, Coltman, J., non-suited the plaintiff upon the ground that the contract fell within the 4th section of the Statute of Frauds. On motion to set aside that

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nonsuit, Parke, B., and Alderson, B., upheld that ruling, the latter saying, "The case of a defeasible contract, where the contract may be defeated or put an end to within the year, is not for that reason taken out of the operation of the Statute of Frauds." *Sweet v. Lee* (6) further illustrates the same now well-recognised proposition. There the contract was for an annuity for life, and the Court held it to be within the 4th section, though it might, by the death of the annuitant, be terminated at any time. Upon the same principle, in *Farrington v. Donohoe* (7), it was decided that a verbal agreement to maintain a child, aged five years, till she was able to do for herself, was within the statute, although the child might die within a year; for it was clear that, if she lived, the contract was not to be, i.e., could not be, in the contemplation of anybody, performed within that period. The same view was taken by this Court in *Eley v. The Positive Assurance Company* (1), where it was held that the engagement of the plaintiff as solicitor to the company during his whole professional life, and so long as the defendants continued a company, was a contract not to be performed within a year, though it might be determined by the death or resignation of the plaintiff himself, or by his dismissal for misconduct, within that period. On the other hand, a contract which, *prima facie*, and from its terms may be performed within a year, however improbable that it will be so, and even though the parties to it at the time of making it expected its endurance beyond that period, does not fall within the statute, and it is immaterial that the performance of it is, by the natural course of events, delayed for a much longer period. The most familiar illustration of this proposition is the case of a servant hired generally, whose service may be determined by reasonable notice at any time. Such a contract does not fall within the operation of the statute, though the service may continue and the contract remain untermiated for many years—*Beeston v. Collyer* (10).

*Fenton v. Emblers* (8) well illustrates the law in this respect. That was an action brought against the executor of a person named May, upon a promise of May, by his last will and testament, to give and bequeath to the plaintiff a legacy or annuity of 16*l.* by the year, to be paid and payable to her yearly and every year from the day of the decease of the said May, for and during the term of her natural life. It was objected that this agreement was within the 4th section of the statute, and ought to have been in writing, for that it was not to be performed within a year, since a whole year from May's death was to elapse before the annuity would become payable. It was answered, however, that the action was brought for May's not having done what he ought to have done in his lifetime, namely, made his will, which might have been done within the year. Denison, J., said: "The statute does not extend to cases where the thing may be performed within the year;" and Wilmot, J., said: "The statute only extends to such promises when, by the express appointment of the party, the thing is not to be performed within a year." See also *Ridley v. Ridley* (11).

*Souch v. Strawbridge* (9) was an action for the maintenance of a child placed by the defendant, in 1842, under the care of the plaintiff, upon an agreement by the defendant to pay 5*s.* per week, or one guinea per month, until the defendant gave notice, or as long as the defendant should think proper. The child remained with the plaintiff till 1845. The Court of Common Pleas held that the case was not within the statute, for there was no certain time fixed for the duration of the contract; but it was to endure for an indefinite period, subject to be put an end to at any time at the option of the defendant; and that contingency might defeat the contract within a year.

Upon the same principle *Knowlman v. Bluett* (4) was decided in this Court. There the contract was that the plaintiff should take charge of the seven illegitimate children of which the defendant was

(10) 4 Bing. 309.

(11) 34 Law J. Rep. Chanc. 462.

*Davey v. Shannon, Exch.*

the father, and that the defendant should give her 800*l.* a year, payable quarterly, to keep them. The Court held the case not to be within the statute, for the reason given by Bramwell, B., namely, that the sum may be called an annuity; but really the engagement was not binding on either party for any definite space of time, and that the defendant might, at the end of any quarter, have refused to provide for the maintenance of the child any longer, and in like manner the plaintiff might have declined to continue to take charge of them. The contract might have been performed within the year, though no doubt both parties expected it would last longer. This judgment was appealed against (43 Law J. Rep. Exch. 151; s. c. Law Rep. 9 Exch. 307), but the appeal was disposed of upon another ground. In the case now before me the contract set out in the statement of claim amounts to an agreement on the defendant's part not to set up the trade of a tailor or outfitter within five miles of Devonport during the joint lives of himself and the plaintiff. *Prima facie*, therefore, it was not to be performed within a year, and therefore fell within the operation of the 4th section of the Statute of Frauds. My judgment, therefore, is for the defendant.

*Judgment for the defendant.*

Solicitors—Crowder, Antie & Vizard, agents for T. O. Brian, Plymouth, for plaintiff; Gush & Phillips, agents for J. P. Pearce, Plymouth, for defendant.

*Wadevorth v. Pickles 49 L. J. 455.*

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1878. } ELMSLIE AND OTHERS v.  
Dec. 6, 7. } CORRIE.\*

*Bankruptcy—Liquidation by Arrangement—Discharge, Effect of—Creditor omitted from Statement of Debtor—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 49, 125, 127—Bankruptcy Rules, 1870, Rule 289.*

*A certificate of discharge obtained by a debtor whose affairs have been liquidated by*

\*Coram Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

*arrangement under section 125 of the Bankruptcy Act, 1869, is a good bar to an action by a creditor whose name and address have been omitted from the list of creditors delivered to the registrar, and who has had no notice of the proceedings, and is distinguishable in this respect from a composition with creditors under section 126.*

*Such defence is pleadable and cannot be made the subject of an application to the Court of Bankruptcy to restrain the action under rule 289 of the Bankruptcy Rules, 1870.*

*Heather v. Webb (46 Law J. Rep. C.P. 89; s. c. Law Rep. 2 C.P.D. 1) approved.*

This was an action for work done and money expended by the plaintiffs as solicitors for the defendant.

The writ was specially indorsed, and notice was given in lieu of a statement of claim.

Defence—That on the 9th of December, 1876, the defendant filed his petition in the Bankruptcy Court of Hampshire, holden at Newport and Ryde, for a liquidation of his affairs by arrangement or composition, and thereupon a special resolution was passed by which it was resolved that the defendant's affairs should be liquidated by arrangement; that a certain person therein mentioned should be appointed trustee of the defendant's estate; that this resolution was duly registered. And on the 2nd of March, 1877, the defendant duly obtained his certificate of discharge from the Registrar of the said County Court.

Reply—That the plaintiffs' names were not included in the list of creditors delivered by the defendant to the Registrar of the County Court pursuant to the provisions of the Bankruptcy Act, 1869, and that no notice of the first meeting of the creditors of the defendant under the proceedings in liquidation was given to the plaintiffs pursuant to the provisions of the said Act; that the plaintiffs did not vote at the meeting of the creditors, nor did they prove their debt nor receive a dividend thereon under the said liquidation, of which proceedings they have been always altogether ignorant.

At the trial before Lord Coleridge, C.J., the facts alleged in the statement of defence and reply were proved, and his



*Elmslie v. Corrie (App.), Q.B.*

Lordship on the authority of *Heather v. Webb* (1) directed a verdict and gave judgment for the defendant.

On appeal,

*Herschell and Crump*, for the plaintiffs, admitted that the case of *Heather v. Webb* (1) was in favour of the defendant; but asked the Court to review that decision, and to assimilate the rule with regard to liquidations by arrangement to that in force with regard to compositions, as laid down in *Breslauer v. Brown* (2). They argued that sub-section 10 of section 125 gave a certificate of discharge in the case of liquidation by arrangement, the force of a discharge in bankruptcy only so far as concerned the creditors who had had an opportunity of inspecting the statement of debts and taking part in the proceedings.

They further contended that if the defendant was entitled to the benefit of his discharge, he can only avail himself of it by applying to the Court of Bankruptcy, under rule 289, to restrain the action.

*W. G. Harrison and Petheram*, for the defendant, were not called upon.

BRAMWELL, L.J.—This is a very plain case. The Act provides (section 125, sub-section 10) that a discharge in liquidation by arrangement is to have the same effect as a discharge in Bankruptcy; and the registration of the resolution as to the discharge is, under section 127, conclusive proof that everything has been done requisite to make the discharge valid. Then it is said that there is an implied exception to this rule, and that the discharge is not valid as against a creditor who had no notice of the proceedings, and whose name is not in the list of creditors. But if such a creditor is within the terms of the Act, nothing but the most cogent necessity would induce us to import such an exception; and I do not see why the creditor whose name is left out of the schedule may not yet come in and prove his debt, and get the benefit of the liquidation.

Suppose the debtor disputes the lia-

bility? It may be said he ought to put the debt in his statement of affairs as a disputed liability. But the statute only requires a list of those whom the debtor recognises as his creditors. Though it may be hard that the creditor should have had no notice of the proceedings, and should be deprived of the advantages possessed by other creditors, his case is no harder than that of a creditor in a like position in Bankruptcy.

It is true that the discharge in liquidation by arrangement depends on a vote of the creditors, and that in Bankruptcy does not. That is a reason why every creditor ought to be summoned to the meetings, but not for the implied exception which is suggested, and I cannot see why the summoning of the creditor should be a condition precedent to the discharge. If it were so, it would follow that if the creditor had notice of the proceedings *aliunde*, and actually attended the meetings, he might afterwards be heard to say that a condition precedent had not been performed, and that the discharge was invalid. But the words of the Act are that the discharge is to be a discharge from "all debts" which includes the debt claimed by the plaintiffs in the present case.

That being so the plaintiffs are driven to rely on the second point, namely, that if the discharge is valid, it ought not to have been pleaded, but that the defendant should have made an application to the Court of Bankruptcy under rule 289, and that justice will then be done and the plaintiffs will get their share of the undistributed assets. But rule 289 has no application to a case like the present, but is directed to cases where the action has been brought after the resolution and before the discharge, and applies to all cases whether the creditor has attended the meetings and voted or not. This is apparent, when we consider that the defendant might have been plaintiff, and the plaintiffs' claim might have been raised by way of counter-claim. Then clearly rule 289 would not have been applicable. I think, therefore, that both the reason of the thing and the language of the statute are against the plaintiffs' contention.

(1) 46 Law J. Rep. C.P. 89; s.c. Law Rep. 2 C.P. D. 1.

(2) 46 Law J. Rep. C.P. 593, and 47 Law J. Rep. C.P. 729; s.c. Law Rep. 2 C.P. D. 314, and Law Rep. 3 App. Cas. 672.

*Elmalie v. Corrie (App.), Q.B.*

BRETT, L.J.—I am of the same opinion. I do not think there is anything in our decision to prevent the Court from acting as it thinks fit in any case where there was fraud on the part of the debtor or the creditors who were summoned to the meeting. There is nothing to prevent the proceedings being set aside in such a case, and I do not say that if a creditor were fraudulently left out of the statement of affairs he could not sue. But here there was no fraud. The omission was *bona fide* or accidental. The words of section 125 are general, and it is suggested that we ought to read into them an implied exception. But there is a clear answer to this. In the very next section, where the Legislature wish to put in an exception, they do so in express terms. But it is a canon of construction that where the Legislature deal with a point in one place and omit it in another, the omission must be regarded as intentional. The words of section 125 must, therefore, be understood as general, and consequently applicable to the present case. As to rule 289, I agree that it applies only to claims made between the resolution for a liquidation and the discharge.

COTTON, L.J.—The question here is whether proceedings under section 125 of the Bankruptcy Act, 1869, are pleadable in bar to the claim of a creditor whose name was not included in the list of creditors given by the debtor when he applied for a liquidation. It is conceded that the omission was not fraudulent. I quite agree that in construing an Act of Parliament, and in giving effect to what has been done under it, we are bound to see that the provisions of the Act have been in all cases substantially followed. What then are the provisions applicable to the present case? Section 127 enacts "that the registration by the registrar of a special resolution of the creditors on the occasion of a liquidation by arrangement under part 6 of this Act . . . shall in the absence of fraud be conclusive evidence that such resolutions were duly passed, and all the requisitions of the Act in respect of such resolutions have been complied with." Here there is an

absence of fraud; therefore we must consider the resolutions as duly passed. There has been a resolution discharging the debtor, and a certificate of such discharge has been given by the registrar. By sub-section 10 of section 125 "a certificate of such discharge given by the registrar shall have the same effect as an order of discharge given to a bankrupt under this Act." A discharge in bankruptcy would unquestionably have been a bar to this action. What then is to prevent the discharge in liquidation acting as a bar also? Nothing, unless we set aside the clear words of the Act.

Rule 289 does not derogate from the effect of the discharge in any way. It is as follows. [His Lordship read the rule.] The proper construction of that rule is clearly that it applies to proceedings taken after the resolution and before the discharge. I am therefore of opinion that a discharge in liquidation is pleadable against every creditor.

It is otherwise in the case of compositions with creditors. By section 126 it is specially enacted that the provisions of the composition are to be binding only on those creditors who are named in the debtor's statement. This is very reasonable when we consider the power wielded by the majority of creditors in a composition. But a liquidation by arrangement is substantially only a machinery for bringing about by arrangement the same results as are effected in Bankruptcy. There being then no exception in favour of the creditors not named in the statement, I am of opinion that this defence is a good bar to the action.

*Judgment affirmed (3).*

Solicitors—Elmalie, Forsyth & Sedgwick, for plaintiffs; Ley & Mould, agents for Richard Urry, Ryde, for defendant.

(3) As to the similar provisions under section 126 relating to compositions, see *Oppenheim v. Jackson*, *ante*, p. 441.

[IN THE QUEEN'S BENCH DIVISION.]

1879.

March 4. } ATTWOOD AND OTHERS v. SELMAR.  
 May 17. }

*Ship and Shipping—General Average Contribution—Practice of Average Adjusters inconsistent with Law.*

The plaintiffs' ship sailed from S. in America to L. in England with a general cargo, and encountered severe weather, in consequence of which a general average sacrifice was made by cutting away the fore topmast, the fall of which occasioned further damage to the vessel, which was thereby compelled to put into O. to repair, in order to enable her to prosecute the voyage. To repair the vessel it became necessary to unship a portion of the cargo, and expenses were incurred in landing, warehousing and re-shipping it. Further expenses were also incurred on account of pilotage and other charges on the ship leaving the port in order to proceed on her voyage. The vessel completed her voyage and discharged her cargo at L. The plaintiffs, as shipowners, claimed contribution according to English law by way of general average, from the defendants, the owners of the cargo, in respect not only of the expense of entering the port and of discharging the cargo, but also that of warehousing and re-shipping the latter, as well as in respect of expenses incurred in the way of port charges and pilotage on the occasion of the vessel again putting to sea. The defendants admitted their liability to contribute up to the discharge of the cargo, but denied any liability beyond that stage, relying on what was admitted to have been the practice, for from seventy to eighty years, of British average adjusters in adjusting losses, according to which the expense of warehousing the cargo had been treated as particular average on the cargo, and the expense of the re-shipment, pilotage, port charges and other expenses incurred, to enable the ship to proceed on her voyage, as particular average on the freight. The charter-party and bill of lading were silent on the subject:—

Held (by COCKBURN, L.C.J., and MELLOB, J., dissentiente MANISTY, J.), that the plaintiffs were entitled to have brought into general average the expense incurred in the

warehousing and re-shipment of the cargo, and the pilotage, port charges, and other expenses, on the ship leaving the port in order to proceed on her voyage to L.; also that the usage of the average adjusters, being inconsistent with law, could not prevail, the parties not having expressly agreed to make such usage a part of the contract.

SPECIAL CASE stated in an action by the plaintiffs, as owners of the *Sullivan Sawin*, to recover 13l. 14s. 9d. in respect of a general average contribution from the defendants as owners of certain goods on board the said vessel.

1. The plaintiffs are the owners of the ship *Sullivan Sawin*, and the defendants are owners and consignees of goods shipped on board the said vessel.

2. The vessel sailed from Savannah for Liverpool on the 10th of February, 1877, and encountered severe weather, in consequence of which a general average sacrifice became necessary and was made, the master being compelled to cut away the fore topmast, the fall of which occasioned further damage to the vessel, which was thereby compelled to put into Charleston on the 21st of February, 1877, to repair the said damage.

3. In order to effect the repairs and to enable the vessel to proceed on her voyage, it was necessary to discharge a portion of the cargo, and expenses were incurred in landing, warehousing and re-shipping the same, and further expenses were incurred at Charleston for pilotage and other charges paid in respect of the ship leaving port and proceeding upon her voyage. The vessel completed her voyage and discharged her cargo at Liverpool.

4. It is, and for from seventy to eighty years past has been, the practice of British average adjusters, in adjusting losses in cases where ships have put into port to refit, whether such putting into port has been occasioned by a general average sacrifice or a particular average loss, to treat the expense of discharging the cargo as general average, the expense of warehousing it as particular average on the cargo, and the expense of the re-shipment of the cargo, pilotage, port

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charges and other expenses incurred to enable the ship to proceed on her voyage, as particular average upon the freight. Cases of putting into port in consequence of general average sacrifice only, and where there is no particular average loss at all, are not of frequent occurrence; but such cases, and cases where the substantial cause of the putting into port is a general average sacrifice, are sufficiently common to establish a regular practice of treating the expenses, in case of a general average sacrifice, in the way above described.

5. Average adjusters regulate their rules of practice in accordance with what they consider are the legal principles applicable to the subject. There is an Association of Average Adjusters, which holds meetings from time to time, at which the rules of practice are discussed and altered or modified with reference to legal decisions.

6. In March, 1876, one eminent average adjuster formed the opinion that the practice as above described was wrong, and that all such expenses as hereinbefore described, up to the time when the ship was again at sea and had resumed her voyage, ought to be charged to general average; and since March, 1876, the said average adjuster has made up adjustments in two or three cases of the kind in accordance with his said opinion; but the practice of British average adjusters, as above described, has remained unaltered.

7. The case of the said ship, the *Sullivan Sawin*, was put into the hands of the said average adjuster to prepare the adjustment, which he did in accordance with his said opinion, charging the whole of the said expenses to general average, and the plaintiffs have brought this action against the defendants to recover the contribution appearing to be due from them in respect of their goods upon the footing of the said adjustment. The defendants have always been willing to pay a general average contribution upon the footing of an adjustment made up in accordance with the practice of British average adjusters as above described, but deny their liability to pay upon the footing of the said

average adjustment which has been so prepared as aforesaid, and this action was brought for the purpose of determining whether or not they are so liable.

8. The plaintiffs contend that, notwithstanding the said practice of British average adjusters, they are entitled to have the whole of the said expenses brought into general average, and to receive a contribution from the defendants accordingly; and the defendants contend, firstly, that, apart from the said practice, general average expenditure ceases in such cases when the cargo has been discharged from the ship, and, secondly, that the said practice of average adjusters is a valid and binding custom, regulating the treatment of the said expenses and the contribution to be paid by the defendants.

Either party is to be at liberty to refer to the average adjustment.

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover against the defendants a contribution in excess of what would be payable according to the said practice of average adjusters, as stated in this case.

*A. Cohen (J. O. Matthew with him)*, for the plaintiffs.

*Webster (Fullerton with him)*, for the defendants.

The following authorities were referred to during the arguments, the nature of which are sufficiently dealt with in the judgments of the Court:—*Plummer v. Wildman* (1); *Hallett v. Wigram* (2); *Power v. Whitmore* (3); *Abbott on Shipping*, 3rd ed., p. 335; *Badiker's Principles of Indemnity*, p. 191; *Stewart v. The West Indian and Pacific Steamship Company* (4); *Hall v. Jansen* (5); *Job v. Langton* (6); *Moran v. Jones* (7); *Walthew v.*

(1) 3 M. & S. 482.

(2) 9 Com. B. Rep. 580; s. c. 19 Law J. Rep. C.P. 281.

(3) 4 M. & S. 141.

(4) 42 Law J. Rep. Q.B. 84, 191; s. c. Law Rep. 8 Q.B. 88, 362.

(5) 4 E. & B. 500; s. c. 24 Law J. Rep. Q.B. 97.

(6) 6 E. & B. 770; s. c. 26 Law J. Rep. Q.B. 97.

(7) 7 E. & B. 523; s. c. 26 Law J. Rep. Q.B. 187.

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*Macrojani* (8); *Kirchner v. Venus* (9); *The Steamship Company Norden v. Dempsey* (10); *Duer on Insurance*, p. 179; *Park on Insurance*, p. 291; *Simonds v. White* (11); and *Lowndes' Law of General Average*, pp. 280, 316, 374.

*Our. adv. vult.*

The following judgment was (on the 16th of May) delivered by

MANISTY, J. — This was an action brought by the plaintiffs, as owners of the American ship *Sullivan Sawin*, to recover from the defendants, as owners and shippers of goods on board that vessel at Savannah, a small sum of money (13*l.* 14*s.* 9*d.*), as a general average contribution under the following circumstances.

The ship sailed from Savannah for Liverpool on the 10th of February, 1877, and encountered severe weather, in consequence of which a general average sacrifice became necessary, and was made by cutting away the foretopmast, the fall of which occasioned further damage to the vessel, which was thereby compelled to put into Charleston to repair.

In order to effect the repairs and to enable the vessel to proceed on her voyage, it was necessary to discharge a portion of the cargo, and expenses were incurred in landing, warehousing and re-shipping it. Further expenses were also incurred at Charleston for pilotage and other charges in respect of the ship leaving Charleston and proceeding on her voyage.

The vessel completed her voyage and discharged her cargo at Liverpool.

The facts are more fully stated in the Special Case, and the question to be decided is, whether the plaintiffs are entitled to have the expense of warehousing that portion of the cargo which was discharged at Charleston, and the expense of re-shipment of it and the pilotage, port charges and other expenses incurred at Charleston, in respect of the

ship on leaving that port and proceeding on her voyage to Liverpool, or any, and if so which, of such expenses brought into general average.

The plaintiffs contend that they are entitled to have them all brought into general average. The defendants contend that by the law and usage in England, none of the expenses in question are the subject of general average, but are particular average, the expense of warehousing being particular average on cargo, and the expense of re-shipment of the cargo and pilotage, port charges and other expenses incurred to enable the ship to proceed upon her voyage being particular average on freight.

It is found as a fact in the case that it is, and for from seventy to eighty years has been, the practice of British average adjusters in adjusting losses in cases where ships have put into port to refit, whether such putting into port has been occasioned by a general average sacrifice or a particular average loss, to treat the expense of discharging the cargo as general average, but the expense of warehousing it as particular average on the cargo and the expense of the re-shipment of the cargo, and the pilotage, port charges and other expenses incurred to enable the ship to proceed on her voyage as particular average upon the freight.

Recently, according to the statement in the Special Case, one eminent average adjuster formed the opinion that this practice is wrong, and this action is brought to have the matter judicially decided. It is necessary, therefore, to consider what is the law of England with respect to the adjustment of the loss in question, it being admitted that the loss must be adjusted according to that law.

The principle of general average, or general contribution, is, as is well known, derived from the ancient laws of the Rhodian Republic. It was imported into the Roman law and forms a head (12) in the Digest of Justinian, with an express recognition of its origin. It has since been adopted by all commercial nations, but with so many variations, in different nations, as to the application of the

(8) 39 Law J. Rep. Exch. 81; s. c. Law Rep. 5 Exch. 116.

(9) 12 Moore P.C. 361.

(10) 45 Law J. Rep. C.P. 764; s. c. Law Rep. 1 O.P. D. 654.

(11) 2 B. & C. 805.

(12) De lege Rhodiâ de jactu.

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principle, that, as has often been remarked both by Judges and text writers, no principle of maritime law has been followed by more variations in practice. In one point it would seem that all nations agree, namely, that in the absence of any particular instrument or contract the place at which the average is (as between owner of ship and owner of goods) to be adjusted is the place of the ship's destination or delivery of her cargo. As regards the law of England, it was laid down in the year 1824 in the considered judgment of the Court of King's Bench, delivered by Abbott, C.J., in the case of *Simonds v. White* (11) that "the shipper of goods tacitly, if not expressly, assents to general average as a known maritime usage which may, according to the events of the voyage, be either beneficial or disadvantageous to him; and by assenting to general average he must be understood also to assent to its adjustment, and to its adjustment at the usual and proper place, and to all this it seems to us to be only an obvious consequence to add that he must be understood to consent also to its adjustment according to the usage and law of the place at which the adjustment is to be made."

Assuming this to be, as I think it is, a correct exposition of the law of England, it seems to me to go far towards deciding this case in favour of the defendant.

But it is said on the part of the plaintiffs that the Special Case does not find what has been the usage and practice of shippers and shipowners in England, but only what has been the practice of British average adjusters.

I am of opinion that, in the absence of any evidence to the contrary, the usage and practice of average adjusters for so great a length of time must be deemed and taken to have existed from all time, and to have been acquiesced in, and so to have become the usage and practice of shippers and shipowners.—See *Stewart v. The West India Pacific Steam Ship Company* (4).

I am at a loss to comprehend how the law of any particular nation as to general average can be arrived at except by ascertaining what has been, as a matter

of fact, the usage and practice in such particular nation with regard to it.

A great many cases were cited in the course of the argument, commencing with *Plummer v. Wildman* (1), which was decided in the year 1815, and ending with *Stewart v. The West India Pacific Steam Ship Company* (4), decided in 1873. I do not propose to notice many of those cases. Some have been expressly or impliedly overruled; some were actions on policies of insurance or bills of lading containing special provisions, others contain dicta not altogether consistent with the usage found by the case. But it seems to me that *Simonds v. White* (11), *Job v. Langton* (6) and *Walthew v. Mavrojani* (8), coupled with the finding in the present case as to what has hitherto been the usage and practice of British average adjusters, are very strong if not conclusive authorities in favour of the defendants. I have already adverted at some length to the judgment in *Simonds v. White* (11). In *Job v. Langton* (6) it was held that expenses incurred, after the cargo was in safety, in getting off the ship and towing her to Liverpool for repair were not chargeable to general average but to ship alone. I notice this case not only because it is an authority in favour of the present defendant, so far as general principles are concerned, but also because Lord Campbell, C.J., in delivering the considered judgment of the Court (consisting of himself, Coleridge, J., Erle, J., and Crompton, J.), says, "*There is no mercantile usage stated to guide us. We must therefore resort to the general principles on which this head of insurance law rests;*" from which I infer that if a mercantile usage had been stated the Court would have been guided by it.

In *Walthew v. Mavrojani* (8) (which was decided in the Exchequer Chamber in the year 1870 by six eminent Judges, affirming a judgment of the Court of Exchequer) the question was, whether the expense of getting a ship off a bank on which she had been stranded by a storm was general average, seeing that before the expense was incurred the cargo had been discharged and ware-

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housed. The Court held that it was not general average, inasmuch as although the expense was incurred with the view and for the purpose of prosecuting the voyage, it was incurred after the cargo was in a place of safety, and when the ship only was in peril. Bovill, C.J., says, "The American Courts have enlarged the limit of general average, and have included within the description of extraordinary expenses incurred for the common benefit the expenses of repairs rendered necessary by extraordinary perils, and made at an intermediate port for the purpose of prosecuting the voyage, and have in some other respects deviated from what we consider the strict rule, but the English Courts have held strictly that unless there be a common risk and a voluntary sacrifice, or an extraordinary expenditure incurred for the joint benefit of a ship and cargo, a claim to general average is not established." And a little further on the same learned Judge says, "To ground a claim for general average there must be a danger, actual or impending, common to both ship and cargo; here the cargo was safe and the ship only in peril; it was indifferent to the owners of the cargo whether the ship floated or not, and there was therefore no sacrifice made or extraordinary expense incurred to save both ship and cargo or for the common benefit of both."

In the same case the same learned Judge says, "The claim has been put on the ground that the adventure was not complete, and that until it was terminated there was a common interest that it should be carried out; but that argument is in direct contradiction to the principle laid down with respect to repairs which are equally necessary to enable the ship to complete the adventure, but which are not matters for general average."

In these observations, which are very pertinent to the present case, I entirely agree.

Mr. Cohen, in his able argument, says these are cases in which the cause of the extraordinary expenditure was an ordinary peril of the sea unaccompanied by a general average cause, such as the cutting

away of the mast, and he says that the existence of a general average cause in this case distinguishes those cases from the present.

Let us consider that proposition practically. One ship meets with a storm so severe that it is deemed necessary for the safety of ship and cargo to run for an intermediate port, and it succeeds in reaching it without any voluntary sacrifice of any part of the ship or cargo. Another ship meets with a similar storm, and finds it necessary to run for an intermediate port, but, in order to reach it, is obliged to make a voluntary sacrifice of part of the ship, say, a mainmast or part of the cargo. Why should there be any distinction in the two cases with respect to what is to be deemed general and what is to be deemed particular average after the cargo is landed in a place of safety? The cases are identical, save and except as regards the loss caused by the voluntary sacrifice of part of the ship or cargo. I am unable to see any principle upon which to rest the distinction suggested by Mr. Cohen; and it is, so far as I know, unsupported by authority. Certainly none has been cited in support of it.

Mr. Cohen further contended that it ought not to be presumed that foreigners contract with reference to the custom and practice of England in regard to general and particular average, and that inasmuch as the *Sullivan Sawin* was an American ship, and the cargo was shipped at Savannah, the shippers were not bound by the usage in England. That contention is in direct contradiction to the law as laid down in *Simonds v. White* (11), which, so far as I know, has never been questioned.

There is only one other argument put forward on behalf of the plaintiffs which I think it necessary to advert to. It is said that the Court ought to adopt the principle contended for by the plaintiffs, in order that the law of England may be conformable to foreign law. The answer to this argument is that the adoption of the principle contended for would unsettle the usage and practice which has hitherto existed and been acted upon in England, while it would still leave the

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usage and practice of many other nations at variance with that of England and of each other.

I think it is much safer to adhere to a usage which has been acted upon, for aught that appears to the contrary, ever since England adopted the law of general average, than to introduce a new usage for no other reason, that I can perceive, than that such new usage would be more consonant with strictly logical principles. Such an alteration ought, in my opinion, to be effected, if at all, by legislation, and not by a decision of a Court of law. Moreover, it is very immaterial what usage any particular nation may have adopted with respect to particular or general average, so long as that usage has been uniformly acted upon, and so become well known to all concerned.

For these reasons I am of opinion that the defendants are entitled to judgment.

The judgments of Cockburn, L.C.J., and Mellor, J., were delivered by

COCKBURN, L.C.J.—This was a case of general average, arising under the following circumstances.

The plaintiffs' ship, the *Sullivan Sawin*, sailed from Savannah for Liverpool with a general cargo. Encountering a storm, the master found it necessary to cut away the foretop-mast, and the mast in falling caused such further damage as rendered it necessary to put into Charleston to repair the ship, in order to enable it to prosecute the voyage. To do the repairs it became necessary to unship a portion of the cargo, and to land and warehouse it, and the repairs of the ship having been completed, the goods had to be re-shipped. Expenses were also incurred on account of pilotage and other charges on the ship leaving the port in order to proceed on her voyage. The voyage was completed, and the cargo safely discharged and delivered at Liverpool, its proper destination.

The plaintiffs, the shipowners, claim contribution by way of general average from the defendants, the owners of the cargo, in respect not only of the expense of entering the port and of discharging

the cargo, but also that of warehousing and re-shipping the latter, as well as in respect of expenses incurred in the way of port charges and pilotage on the occasion of the vessel again putting to sea. The defendants, while they admit their liability to contribute to the expenses of entering the port and of the discharge of the cargo, deny any liability beyond that stage, taking their stand on the usage of average adjusters in this country, according to which the expense of entering the port of refuge and discharging the cargo has, under such circumstances, been treated as general average; but the expense of warehousing the cargo has been treated as particular average on the cargo, and that of the re-shipment, pilotage, port charges, and other expenses incurred to enable the ship to proceed on her voyage, as particular average on the freight.

That such has been the practice of average adjusters in this country for from seventy to eighty years is admitted; but the plaintiffs deny the validity of this practice, as being inconsistent with the principles of law relating to average.

Two questions present themselves: first, what, independently of this practice of average adjusters, is the principle or rule of law applicable to the case? Secondly, assuming the practice to be inconsistent with what otherwise should be the law, must it by having subsisted for so long a time, be taken to give the rule properly applicable to such a case?

No claim being made by the plaintiffs of general average in respect of anything expended on the ship itself—the claim as stated in the case being limited to the expense of discharging the cargo, and of warehousing and re-shipping it, and to expenses incurred for pilotage and other charges on the ship leaving port—the question which presented itself in *Power v. Whitmore* (3) and in *Hallett v. Wigram* (2), as to how far repairs done to a ship—even to the extent of such temporary repairs only as would be necessary to enable it to proceed on the voyage—may be the subject of general average, does not arise. We have to deal only with the expenses incurred in entering and



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quitting the port, and in unshipping, warehousing and re-shipping the cargo.

That these expenses which, according to the practice of average adjusters, are thus treated as particular average, should, according to legal principles, be made the subject of general average, appears to me to flow necessarily from the fundamental principle on which the whole doctrine of general average rests, namely, that all loss which arises from extraordinary sacrifices made, or expenses incurred, for the preservation of the ship and cargo must be borne proportionably by all who are interested.

The contract between the goods owner and the shipowner, on a charterparty or a bill of lading, being for the conveyance of the goods to a given port, there occurs in the course of the voyage a state of things which is not provided for by the contract. A storm arises; the vessel is in danger; but a port is within reach, in which, in the common interest of all concerned, it would be prudent to take refuge. Or it becomes necessary to cut away a mast, and, as the consequence of so doing, to seek an intermediate port in order to replace it. Or the ship sustains damage from the violence of winds or waves, which renders it necessary, for the common safety of ship and cargo, and for the further prosecution of the adventure, to seek a port at which repairs which have become necessary for the safe prosecution of the voyage may be effected.

The result is, that in theory at least, a new arrangement not contemplated or provided for by the original contract, takes place between the parties, who in theory, as formerly in fact, must be supposed to be present, each in the practice of modern times represented by the master, to whom the interests of both are committed. If we could suppose both parties to be actually present, and under a sense of imminent danger to concur in the necessity of seeking a port of refuge, but to be discussing the question as to how the expenses incidental to such course should be borne, what arrangement could be more reasonable or just than that these expenses, being extraordinary expenses incurred for the common benefit, should be borne in common on the same

principle as that which has been established from the earliest times in the case of actual jettison?

Applying this principle with reference, in the first place, to the expenses incurred by the ship, it is admitted on all hands that the expenses of entering the port of refuge should be carried to general average. Logically, it would seem to follow that, as the coming out of port is—at least where the common adventure is intended to be, and is afterwards further prosecuted—the necessary consequence of going in, the expenses incidental to the later stage of the proceeding should stand on the same footing as the former. The further prosecution of the voyage was in the contemplation of the parties, or of the master, as representing them, in going in; the coming out, therefore, as essential to the further prosecution of the voyage, must equally have been in view when the resolution to go in was formed. But it is said—and it is upon this ground that the difference between these two sets of expenses is alleged to be founded, first, that it is the shipowner's duty under his contract to keep the ship in a navigable state, and consequently to repair any damage she may have sustained; secondly, that, when the ship has been repaired, it is the owner's duty under his contract to re-ship the goods, and to set forth again on the voyage, and to that end to incur the cost of quitting the port, and of employing a pilot or tug if necessary. The whole of this reasoning appears to me to be based on an assumption altogether fallacious. The shipowner is not bound to repair for the purpose of carrying on the cargo; nor, having repaired, does he become bound to re-ship the cargo and complete the voyage under the original contract, but if bound to do so at all, is bound only under that contract as modified by the altered circumstances of the case.

The contract, it should be remembered, expressly exempts the shipowner from the performance of his obligations under it when performance is prevented by perils of the seas. The ship having become incapacitated from prosecuting the voyage, and performance of the contract having been prevented by the ex-

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cepted cause, the shipowner is under no obligation, so far as the goods owner is concerned, to repair. He cannot, it is true, expose the goods of the freighter to further peril by persisting in carrying them on, if, having the opportunity of putting into a port of refuge, he cannot or will not, when there, repair the ship; but, if he chooses to forego his right to freight, he may repair or not, as may best suit his interest.

"Under a charter-party containing such an exception," says Parke, B., in delivering the judgment of the Court in *Worms v. Storey* (13), "if the vessel sails in a seaworthy state, and in the course of the voyage is damaged by perils of the sea, the owner is not bound to repair it; but if he does not choose to repair it, he ought not to go to sea with the vessel in an unseaworthy state, and so cause a loss of the goods: he ought either to repair or stop." It is true that in *Worms v. Storey* (13) the liability to repair was not the question immediately before the Court, the cause of action stated in the declaration, and on which there was a demurrer, being that the shipowner, after having put into a port where the ship might have been repaired, had put to sea again with the vessel in an unseaworthy state, and had thus occasioned the loss of the plaintiff's goods. The question was, however, one which the Court had incidentally to consider, inasmuch as, if the shipowner had been under an obligation to repair, the proceeding to sea when the ship was unseaworthy would have been, *a fortiori*, actionable. But the view of the Court of Exchequer is supported by other considerations. By the express condition of the contract performance by the shipowner is dispensed with if prevented by perils of the seas. If it were true that under such circumstances he was nevertheless bound to repair, it would follow that he would be bound to do so without regard to the amount of the cost of repair, or to the degree which the expense might involve him in loss. Yet it is well settled that where the cost of

the repairs will exceed the value of the vessel when repaired, together with the freight, the owner is not bound to repair in order to carry on the cargo; and that the master, as his agent, will be justified, as against the goods owner, in abandoning the voyage.—See *De Quadra v. Swanm* (14), where the law on this head was made the subject of learned and elaborate argument.

Some confusion may have arisen from the vague language in which the duty of the master to repair, after having gone into a port of refuge, is spoken of. Thus, in *Benson v. Chapman* (15) it is said in general terms that "the duty of the master, in case of damage to the ship, is to do all that can be done towards bringing the adventure to a successful termination; to repair the ship, if there be a reasonable prospect of doing so at an expense not ruinous, and to bring home the cargo and earn the freight, if possible." But however general the language here used, it is plain, on reference to the facts of the case, that the proposition thus stated related only to the duty of the master towards his owner. In the case of *Benson v. Duncan* (16) in the Exchequer Chamber, Patteson, J., in delivering the judgment of the Court, says, "In ordering the repairs of the ship, the master acts exclusively as agent of the owner of the ship. No other person but the owner of the ship or his agent can have any authority to order the repairs. The owner of the cargo cannot insist on such repairs being made, for the shipowner is absolved from his contract to carry if prevented by the perils of the seas, and he is bound by it if prevented by inherent defects in the ship; in either case, if he does repair, he does so for the sake of earning the freight, which the master is bound to enable him to do if he can." The true rule is correctly stated in *Maunder and Pollock on Shipping*, p. 438: "The owner of the cargo cannot insist on the repairs being done, for the shipowner is absolved from his contract to carry if prevented by the perils of the seas: but, on the

(13) 11 Exch. Rep. 427; s. c. 25 Law J. Rep. Exch. 1.

(14) 16 Com. B. Rep. N.S. 772.

(15) 2 H.L. Cas. 696; s. c. 8 Com. B. Rep. 950.

(16) 3 Exch. Rep. 644; s. c. 18 Law J. Rep. Exch. 169.

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other hand, it is the duty of the master as the agent of the shipowner, to repair the ship, if there be a reasonable prospect of doing so at an expense not ruinous, and to bring home the cargo and earn the freight, if possible."

But does the converse of the proposition equally hold? Though the shipowner or his master is not bound to repair, if he does so is he released from the obligation to carry on the goods, or does the obligation to fulfil the original contract thereupon revive? At first sight it would seem to follow, from the proposition, that the owner is absolved from his contract by the damage to the ship, and therefore is free from any obligation to repair, that he becomes released *in toto*, and therefore would be free, if he chose to sacrifice the freight, to decline to carry on the goods. But, though not arising directly out of the original contract to carry, the obligation presents itself under a different form. In the contract of affreightment there is an implied undertaking on the part of the shipowner, in consideration of his being intrusted with the custody of the goods, that if the further prosecution of the voyage should be interrupted by disaster to the ship, if he cannot, or does not, choose to tranship the cargo and send it on in another vessel in order to earn the freight, he will do his best to protect the interest of the goods owner; and, therefore, if the circumstances will admit of it, must find another vessel and forward the goods to their destination. Upon which assumption it may be contended that as the ship, having been repaired and rendered fit to resume the voyage, is available for the purpose, the master will be bound, as the best course to promote the interest of the goods owner, to reshipe the goods on board his owner's ship.

But the question is by no means free from difficulty. In the first place, it is not settled that the master, though he has the right to tranship, is bound to do so as the agent of his owner. The opinions of the foreign jurists, which will be found collected in *Parsons on Shipping*, in a note at p. 234, are altogether conflicting; and although we learn from the author just referred to that it is now well

settled in the courts of the United States that the master is bound to tranship if there be a vessel or other means of transport to the place to which the cargo should go within reasonable reach, there has been no decision to that effect in a Court of this country. The question presented itself in *Shipton v. Thornton* (17), but it became unnecessary to decide it. But even if we assume that it would be the duty of the master, as becoming *ex necessitate* the agent of the shipper, to tranship the cargo, it must not be forgotten that he continues the agent of his owner; and in the latter capacity, if he can find a more remunerative employment for the ship, or can earn a higher rate of freight, he may be justified in declining to carry on the goods.

But even if this point were, like the foregoing, assumed in favour of the goods owner, the case of the latter in the present instance would be no further advanced. For the whole argument in his favour rests on the fallacious assumption that the rights and obligations of the parties remain as they existed under the original contract. But this is to overlook the fact that by the interruption of the voyage, and the absolution of the shipowner from the further performance of it, and the new arrangement which must be taken to have been come to between the parties on deciding to enter the port of refuge, the original contract has been essentially modified, in fact a new one has been engrafted on it.

Let us see what is involved in the arrangement so made. In legal theory we must suppose the parties to be present. In contemplation of law, the master, as representing both of them, makes for both the agreement which it is reasonable to suppose that, if present, they would have made for themselves. Now the common purpose is twofold. The first and immediate purpose is that of saving ship and cargo, by bringing them both into harbour. The second is that of repairing the ship with a view to the further prosecution of the voyage, if such repairs should prove reasonably practicable, with certain

(17) 9 Ad. & E. 314; s.c. 8 Law J. Rep. Q.B. 73.

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reservations on the part both of the shipowner and the goods owner, which possibly may lead to the abandonment of the further prosecution of the voyage. The latter of these purposes involves several subordinate operations and expenses incidental thereto.

The state of the ship and the degree of damage it has sustained, have first to be ascertained. To effect this, as well as to do the necessary repairs, it may be necessary to unship the cargo. To preserve the goods from harm they will have to be warehoused. The repairs to the vessel having been done, the cargo must be reshipped. Lastly, all things having been completed, the ship will have to leave the port to put to sea. In respect of each of these stages expenses have to be incurred, for which, as being altogether *dehors* the original contract, that contract wholly fails to provide. They are extraordinary expenses incurred for the preservation of ship and cargo, and in furtherance of the common adventure, under circumstances in which the ship and cargo would otherwise have perished, or the common adventure would have been abruptly brought to a termination.

Upon whom should the expenses of these different operations fall? The practice of the average adjusters makes the unloading of the cargo matter of general average; and, as it seems to me, on principle rightly so. On what ground the distinction between the cost of unshipping the cargo, and of warehousing it, which is thrown on it as particular average, and that of reshipping, which is treated as particular average on the freight, is founded, I wholly fail to perceive. Looking to the common purpose for which all these operations are performed, it seems only reasonable and just that the expenses should be borne rateably by all parties concerned—in other words, be treated as general average—so far, at all events, as the common purpose has been effected.

It is true that it not unfrequently happens that, the primary purpose of putting into port having been accomplished, the ulterior purpose, that of further prosecuting the voyage, fails. There may be no means in the port of refuge for repairing the vessel. The cost of repairing may be

so great as not to make it worth the owner's while to repair in order to earn the freight. As regards the alternative of transshipment, there may be no opportunity to tranship; or only at an increased rate of freight, on which account the shipowner may decline to tranship, except on account of the goods owner. On the other hand the cargo may be of a perishable nature, or it may be so damaged that it cannot be carried on further without becoming worthless; or the repairs to be done to the ship will take so long a time that in the interest of the goods owner the master would not be justified in detaining the goods, but acting as the agent of the latter, becomes bound to forego the right of carrying on the goods and so earning the freight, and must deal with them in the interest of their owner alone. In such cases it may well be that only the expense of putting into the port of distress could properly be made matter of general average, and that other expenses incurred, from which no benefit results to the common adventure, should be treated as particular average to ship or goods, as the case may be. But we are here dealing with a case in which every expense has been incurred with a view to, and has resulted in, the further prosecution of the common adventure. The ship and cargo have been saved from destruction by being brought into port; the ship has been repaired, the cargo, having in the meantime been preserved by being warehoused, has been reshipped; the voyage has been resumed, and brought to a safe conclusion, and the goods have been delivered; in a word, the common purpose, the fulfilment of the contract of affreightment, has been effected. But how has this result been brought about? By the series of operations which have taken place from the ship's going into port to her putting to sea again inclusively. But the whole of these operations were necessary to the resumption of the voyage; the expenses of carrying them out were each of them incurred in furtherance of the common purpose. Not being expenses within the scope of the original contract, but extraordinary expenses incurred for the common benefit of ship and cargo, the conclusion appears to me irre-

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sistible that, with the exception of the cost of repairs to the ship, all these expenses should be charged to general average. As regards the cost of unloading and reloading, Lord Campbell, in *Hall v. Janson* (5), says: "The expenses necessarily incurred in unloading and reloading the cargo for the purpose of repairing the ship, that she may be made capable of proceeding on the voyage, have been held to give a claim to general average contribution; for the acts which occasion these expenses become necessary from perils insured against; and they are deliberately done for the joint benefit of those who are interested in the ship, the cargo and the freight."

This reasoning, in which I entirely concur, applies equally to expenses incurred in leaving the port, which, like the expense of unloading, warehousing and reloading, are expenses incurred in furtherance of the common enterprise, and must be taken, like them, to have been contemplated from the moment the resolution was taken to enter the port, as the necessary consequence of doing so. All such expenses, being extraordinary expenses, that is to say, expenses arising out of a state of things not provided for by the original contract, must be matter of general average.

The exclusion of the cost of repairs to the ship from general average will not conflict with this conclusion, as it rests on exceptional grounds, namely, that the benefit of the repair enures to the owner beyond the scope of the voyage, and that it would therefore be unjust to the goods owner, whose interest is limited to the voyage, to make him contribute to such cost. A distinction has, indeed, been taken between general repairs and such temporary repairs as are necessary to enable the ship to complete the voyage. By the American law, as well as by that of many other maritime nations, such temporary repairs have been made the subject of general average, and this—assuming always that such repairs are of a temporary character only, and add nothing to the permanent value of the vessel—would certainly appear to be consistent with principle. It is, however, unnecessary to pronounce any opinion on this

point, since, as has been already observed, no claim is made in this action for repairs. Nor is it necessary to consider whether, as the unseaworthiness of the vessel was caused by the jettison of the mast, and by damage occasioned by its fall—it being an admitted principle that consequential damage immediately caused by jettison is to be treated as jettison—the damage so caused might not have been made the foundation of a claim for general average, as no such claim is here made.

We have next to consider whether the practice of average adjusters in this country, which is said to have existed for seventy or eighty years, if thus found to be at variance with legal principles, shall nevertheless prevail, and must be considered to have settled the law. I am not aware of any principle on which the affirmative of this proposition can be maintained, or of any authority by which it can be upheld. It is not a usage of trade by which the terms of a contract may be interpreted or modified. The practice in question is not a custom which can be presumed to have had a legal origin. It is not the *inveterata praxis* of a Court or Courts having judicial authority, and which must therefore be taken to be the law though inconsistent with general principles. The authority of average adjusters may be said to be of an anomalous character. By the consent of shipowners and merchants they act as a sort of arbitrators in the settlement of matters of average; but they are bound, in the adjustment of such claims, to follow the law, and in the practice they have adopted they have not acted or intended to act on or give effect to any mercantile usage, but have intended to give effect to what they believed to be the law; but they have mistaken it. What was stated by Pollock, C.B., in *Coz v. The Mayor of London* (18), is here in point. In that case a plea had been pleaded to a declaration in prohibition, alleging an immemorial custom, on a plaint being entered in the Lord Mayor's Court, to attach a debt due to the defendant from a third person, upon his being found

(18) 1 Hurl. & C. 338; s.c. 32 Law J. Rep. Exch. 64.

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within the jurisdiction, though none of the parties were citizens or resident in the city, and neither the original debt nor that due from the garnishee had accrued within it. The plea having been demurred to, the Lord Chief Baron in giving judgment says: "In holding this plea bad we neither overrule nor dissent from any former decision, for in no previous instance has the custom here stated been brought before any Court by plea or certificate, and held to be good. The Superior Courts have at all times investigated the customs under which justice has been administered by local jurisdictions, and unless they are found consonant to reason and in harmony with the principles of law, they have always been rejected as illegal."

The terms in which the Chief Baron thus stated the law were expressly approved of by Lord Cranworth in giving judgment in the House of Lords on appeal. The law so stated appears to me to be *a fortiori* applicable to the present case. If a custom prevailing in a Court, which, though an inferior Court, is still a Court of law, if inconsistent with law cannot prevail, surely the same rule must apply to a practice of average adjusters. When a practice of this kind is brought to the test of legal decision and is found to be erroneous and inconsistent in law, it cannot be permitted to override the law and acquire the force of law.

Three cases are relied on in opposition to the view expounded in the foregoing reasoning, and on which it may be desirable to make one or two observations, namely, *Simonds v. White* (11), *Stewart v. The Pacific Steamship Company* (4), and *Walthev v. Mavrojani* (8). Neither of these cases appear to me to be in point to the one before us. The point to be decided in the first of them was, whether the average which had to be adjusted should be determined according to the law of Russia or that of this country. Lord Ellenborough, C.J., after stating that this was the question, says that the shipper must be taken to assent to the adjustment "according to the usage and law of the place at which the adjustment is to be made."

So far as relates to the place of adjust-

ment, we are of course bound by this decision, and are therefore not at liberty to give effect to Mr. Cohen's argument that the rights of the parties must be determined according to the law of the place where the average expense occurred, even if otherwise disposed to do so. But if any stress is sought to be laid on what Lord Ellenborough says as to "usage," it is to be observed that he is speaking (as is manifest from the language of the judgment throughout), of a usage consensual with the law. It would be to give a mistaken effect to his language to suppose he was referring to a usage at variance with the law.

The case of *Stewart v. The Pacific Steamship Company* (4), far from supporting the defendants' case, appears to me a strong authority the other way. There, by the terms of the bill of lading, average, if any, was "to be adjusted according to British usage." A fire having broken out in the ship, water was poured in to extinguish it, and bark shipped on board by the plaintiffs was seriously damaged thereby. The plaintiffs claimed as for general average, but it appeared that it was the practice of average adjusters in this country to treat such damage as particular average. The Court expressly declared the practice to be at variance with the law applicable to such a case, and would assuredly have given judgment in favour of the plaintiffs, had not the latter by the terms of the bill of lading expressly agreed to make the usage a part of the contract. "If," says Mr. Justice Quain, in delivering the judgment of the Court, "the present case depended wholly on the common law applicable to general average, we think the plaintiffs would be entitled to recover." But, "as the parties have agreed to make the custom a part of their contract, the case must be decided according to the custom, and the result is that our judgment must be for the defendant." To which the learned Judge added: "It is to be hoped, however, that in future there will be no difference between law and justice on this point, and that average adjusters will act on the law as now declared, and that bills of lading will also be framed in accordance with it." There being no such term

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in the present contract, I see no reason for treating the practice with which we have to deal with more consideration than the practice then before the Court received at its hands in that case.

*Wallthew v. Mavrojan* (8) was a case altogether differing from the present. It was a case of stranding; and the question was whether expenses incurred for the purpose of getting the ship off, after the goods had been taken out of her and removed to a place of safety, could be made the subject of general average, and it was held that they could not. But of the six Judges who so held in the Exchequer Chamber, Bovill, C.J., Mellor, J., Montague Smith, J., Lush, J., and Hannen, J., base their judgment on the ground that, while it was essential to the owner of the ship to get his ship off, so as to be able to resume the voyage and earn the freight, it was indifferent to the goods owners, the goods being in safety, whether they were carried on in the same ship or in another. "It is not shewn," says the Chief Justice, "that any advantage resulted to the goods from their being carried on in that ship rather than any other." "It was indifferent to the owners of the cargo whether the ship floated or not, and there was therefore no sacrifice made, or extraordinary expense incurred, to save both ship and cargo, or for the common benefit of both." "I draw the inference," says Mr. Justice Montague Smith, "that it was indifferent to the owner whether the goods went forward to England in the *Southern Belle*—the ship in question—or any other." Mr. Justice Hannen says: "It is unjust that expenses incurred by the owner of the ship for the benefit of all should be borne by him alone. But the expenses in question were not such, for it is indifferent to the owner of goods whether his goods are taken on by the same ship, except where they would not otherwise be carried on at all, or only at a greater expense." Even Mr. Justice Brett, who appears to have been disposed to lay down the rule more generally, treats these expenses as incurred solely for the benefit of the shipowner.

In like manner, in the earlier case of *Hallett v. Wigram* (2), in which a claim for contribution had been made where

part of the cargo had been sold to raise money for the repair of the ship, which had put back by reason of damage sustained by ordinary perils of the sea, Wilde, C.J., in giving judgment, says: "It is in respect only of the incapacity of the particular ship to carry the goods forward to their destination that the pleas shew that the cargo was in danger of being wholly lost. It is difficult to see how the repair of the ship could be for the benefit and advantage of the plaintiffs. The plaintiffs' goods were of a description not to be deteriorated to any great extent."

These two decisions are no doubt sufficient authority for saying that, according to English law, expenses incurred for the benefit of the ship alone, without any concomitant benefit to the cargo—such as the expense of getting off a stranded vessel after the goods have been discharged, or of repairing a vessel in a port of refuge—in the absence of special circumstances such as were referred to in *Wallthew v. Mavrojan* (8), will not give a claim to general average. But they are inapplicable to a case like the present. There is nothing here to shew that the goods could have been sent on in another vessel; and, what is of more importance, the expenses were all incurred in furtherance of the common purpose, and for the benefit of the cargo as well as the ship; of the ship, as an opportunity was thus afforded of repairing it and enabling it to take on the cargo; of the cargo, as it was thus enabled to be carried on to its destination.

I am therefore of opinion that our judgment must be for the plaintiffs; and as my brother Mellor concurs in this view and in the reasons on which it is founded, there will be judgment for the plaintiffs.

*Judgment for plaintiffs.*

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Solicitors—Field, Roscoe & Co., agents for Bateson & Co., Liverpool, for plaintiffs; Parker & Clarke, agents for Stone & Fletcher, Liverpool, for defendants.

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[IN THE COMMON PLEAS DIVISION.]  
 1879. } SCARAMANGA AND COMPANY v.  
 May 3. } STAMP AND ANOTHER.

*Shipping—Charter-party—Perils of the Seas—Deviation to save Property—Liability of Shipowner.*

The owners of cargo are entitled to recover against the shipowners the value of the cargo under a charter-party which contained the usual exception in case of accident from "perils of the seas," where the cargo had been lost at sea in consequence of the ship stranding after deviating from her proper and usual course in the endeavour to save another ship and cargo in imminent danger from perils of the sea, inasmuch as the exception did not extend to such a case.

There is an implied contract in all charter-parties which have no express stipulation on the subject that the master of the ship will not deviate unnecessarily from the usual and proper course, but that he may do so when it is reasonably necessary in order to save human life, but this last exception does not allow of a deviation to save a cargo and ship in imminent danger where the saving of life does not require it, and does not, therefore, exonerate the owner of such ship from liability to the owner of cargo carried by such ship for a loss subsequent to such deviation, though there was no negligence in the master, and the loss was not caused by the deviation.

CASE reserved by Lindley, J., for further consideration, the nature of which is fully stated in the judgment.

Herschell, Cohen and Crump argued for the defendants.

Butt, J. C. Mathew and Lodge appeared for the plaintiffs, but, without calling upon them,

LINDLEY, J., gave judgment as follows:—This was an action brought on a charter-party by the freighters of a cargo of wheat against the owners of the steamship *Olympias*, for the loss of the cargo. By the terms of the charter-party the *Olympias* was to proceed with the wheat on board from Cronstadt to the Mediterranean. The excepted perils were the

usual perils of the sea. The *Olympias* left Cronstadt on the 21st of November, 1877; she passed the Skager Rak on the 28th; on the 30th, whilst in her proper course, she sighted and went to the assistance of another ship in distress, called the *Arion*; and on the same day the master of the *Olympias* entered into an agreement to tow the *Arion* to the Texel for a sum of 1,000*l*. In pursuance of this agreement the *Olympias* took the *Arion* in tow, and proceeded with her towards the Dutch coast. On the night of the 2nd of December, 1877, the *Olympias* got ashore near the Terschelling Light, and she and her cargo were ultimately lost; and it is for this loss of cargo that the plaintiffs sue the defendants.

Inasmuch as the loss was caused proximately by perils of the sea, and by the terms of the charter-party the defendants are exempted from liability for loss occasioned by such perils, it was incumbent on the plaintiffs to prove the existence of circumstances which deprive the defendants of the benefit of this exemption. The plaintiffs accordingly relied on two grounds as sufficient for this purpose.

First, they contended that the loss of the ship and cargo was really attributable to the negligence of the master of the *Olympias*. If this proposition had been established the plaintiffs would have been entitled to succeed; for it is settled that, as between a freighter of cargo and the owner of the ship, the latter is liable for losses really attributable to the negligence of the master, although immediately caused by perils of the sea—*Grill v. The General Iron Screw Collier Company* (1), and *The Chasca* (2). The jury, however, have decided this point in favour of the defendants, and for the present, at all events, the verdict must be treated as conclusive.

Secondly, the plaintiffs contended that the *Olympias* deviated from her course, and that, as the loss occurred after such deviation, the plaintiffs were entitled to

(1) 35 Law J. Rep. C.P. 321; s. c. Law Rep. 1 C.P. 600; and on appeal, 37 Law J. Rep. C.P. 205; s. c. Law Rep. 3 C.P. 476.

(2) 44 Law J. Rep. Adm. 17; s. c. Law Rep. 4 Ad. & Ec. 446.



*Soaramanga v. Stamp, C.P.*

recover, whether there was negligence on the part of the master or not, and whether the deviation was or was not the cause of the loss of the cargo.

The fact of deviation was hardly open to serious controversy, in the face of the evidence adduced at the trial, and especially of the captain's agreement of the 30th of November, and his own letter of the 4th of December, 1877, in which he said, in effect, that he should not have been where he was had it not been for the agreement. It is true that there was great conflict of testimony as to the proper course of the *Olympias* from the Hohlmen Light, on the Danish coast, to the English Channel, one set of witnesses saying that she ought not to have gone near the Texel, but should have made for Orfordness Light; and the other set saying that she should have sighted the Texel Light, and then made for the channel between the Hinder and Galloper Light-ships. But, notwithstanding this difference of opinion, none of the defendants' witnesses went the length of saying that there was no deviation on the part of the *Olympias*; and it appeared to me that there was so little real controversy on this point that I did not think it necessary to frame a distinct question as to the fact of deviation, to be answered by the jury.

The fact of deviation, therefore, being established, it follows that the plaintiffs are entitled to succeed, unless the deviation took place under such circumstances as rendered it justifiable—see *Davis v. Garrett* (3), which shews that the plaintiffs need not prove that the deviation caused the loss.

The defendants, however, contended that the *Olympias* was justified in deviating, inasmuch as she deviated solely in order to assist a ship in distress, and what she did was reasonable to save life. That the *Arion* was in distress, and in fact in imminent danger, was hardly, if at all, disputed; but, in answer to questions put by me to the jury, they found, first, that it was not reasonably necessary to take the *Arion* to the Texel, in order to save the lives of those on board her;

but, secondly, that it was reasonably necessary so to do in order to save her and her cargo. Upon these findings the plaintiffs claim to be entitled to the judgment of the Court; and I am of opinion that they are so entitled.

On grounds of humanity, it may be taken as established that a master of a ship is at liberty to deviate from his course in order to save, and so far as may be necessary to save, persons found by him, when prosecuting his voyage, to be in danger of their lives. There is no temptation to abuse this liberty; for salvage is not payable for the mere preservation of life; and owners of ships, owners of cargo, and insurers may well be treated as impliedly assenting to a departure for such a purpose from the contract not to deviate, which, although not expressed, is always implied in contracts of affreightment and insurance. The reasons for holding the master justified in deviating to save life are overwhelming. To deny him this liberty would be to shock the moral sense of every right-minded person, and to ignore the clear moral duty of assisting fellow creatures in distress.

But, the jury having negatived the necessity for deviating in order to save life, the defendants are driven to contend that the deviation of the *Olympias* was justifiable, inasmuch as it was necessary to save the *Arion* and her cargo. No authority was cited, nor indeed is any to be found, in support of this contention; but general principles of expediency were appealed to, and I therefore will shortly state why, in my opinion, the liberty to deviate ought not to be extended to cases such as I am now considering.

The reasons in favour of an extension of the liberty are as follows:—First. It is for the benefit not only of uninsured owners of ships and cargoes in peril, but also of insurers of ships and cargoes, that they shall be saved, and that no obstacle shall be thrown by judicial decision in the way of those who are ready and willing to save them. Second. The interest of owners of ships and cargoes and their insurers is in fact the interest of the public, and therefore it is for the interest

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of maritime commerce in general, and of the public in general, that the masters of ships should be at liberty to succour other ships in distress, without fear of loss of freight or liability for loss of cargo or loss of claims on insurers. Up to a certain point, the principles here suggested may be conceded. Indeed, they are recognized by the laws of all civilized countries. The whole law of salvage is based upon them; for salvage is awarded to those who, being under no obligation to exert themselves to save ships and cargoes in peril, do so exert themselves successfully. The question I have to decide is, whether by the law of this country the owner of a ship deviating to save property is exonerated from the ordinary consequences of deviation.

In order to answer this question it will be convenient to consider the interests of the various parties immediately affected by such a deviation. First, as regards the mariners—their right to salvage is a sufficient inducement to them to succour ships in distress. Second, the owner of the succouring ship shares the salvage, and the salvage is always proportionate to the risk run; and one of the risks run by the owner of the succouring ship is possible loss of freight, loss of benefit of insurance, and possible liability for loss of cargo. His remuneration, therefore, in the shape of salvage (if any is earned) indemnifies him against all risks incurred by him by the deviation of his ship. Third, the owner of cargo, if the cargo be lost after a deviation, has his remedy against the shipowner. The owner of cargo has, therefore, really no interest in the question under discussion, unless the shipowner be insolvent, which is too rare an event to influence a general rule, and which, when it occurs, may be exceptionally dealt with. Fourth, unless under very special circumstances, the owner of cargo on board the saving ship does not share salvage; and it would be most unjust to hold that the risk to his cargo might be increased by salvage services, when he obtains no benefit whatever from the salvage awarded for them. Fifth, the same observation applies to the underwriters of the saving ship and her cargo. Their risk is in-

creased by the supposed deviation, but they do not share the salvage awarded for it. Sixth, the interests of the owners of the saved ship and cargo, and of the respective underwriters thereof, are protected by the inducement afforded by salvage to those who hazard their lives and ships to save ships and cargoes in peril of destruction.

The above considerations shew that the owner of the deviating ship is only exposed to risk without remuneration when no salvage is earned; but, to protect him in such case at the expense of owners of cargo and underwriters, i.e., by increasing their risks without even the hope of remuneration, would be in the highest degree unjust to them. Moreover, it would be most dangerous to hold that masters of ships may for reward or the hope of reward deviate with impunity in order to save property. Such a doctrine would open wide the door for the entrance of fraud, and would tempt masters to enter into secret agreements for their own benefit, and to conceal them if all went well, and, if not, then to set up as an excuse for their conduct a deviation to save the property of others.

The reasons against an extension of the doctrine of permitted deviation to save property appear to me far to outweigh the reasons in its favour. To permit deviation to save life is an anomaly, justified by reasons which have no application whatever to deviation to save property; and on principle, therefore, I decline to extend the doctrine as desired by the defendants. I do this the more readily as the propriety of so extending it has been considered before now, and been uniformly negatived by those who have had to consider it. I have, in order to decide this case, availed myself of every assistance within my reach. Every text-writer I have consulted, including Arnould, Phillips, Kent and Parsons, is in favour of the conclusion at which I have arrived; and the reasoning of Mr. Justice Washington, in *Bond v. The Brig Cora* (4), in support of the same view, appears to me unanswerable. Still, as this is the first case in this country in

(4) 2 Wash. C.C. 80.

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which the point I have to decide has arisen, and required a distinct decision, I have thought it desirable to give the reasons for my opinion at greater length than I should otherwise have done.

I was informed at the trial that this was in substance an action by underwriters against underwriters, and that the particular underwriters who bring this action are acting contrary to the views and wishes of other persons in the same interest as themselves. Be it so: it is nevertheless plain that all I have to deal with are the rights of the plaintiffs as owners of cargo against the defendants as owners of the ship *Olympias*. Those rights depend on the charter-party; for the bills of lading do not vary from it, and are to the same effect. I have nothing to do with any policies, and know nothing of their language. By the charter-party the defendants became liable to the plaintiffs for the loss of their cargo, unless such loss was within one of the excepted perils. The excepted perils, although covering perils of the sea, did not cover such perils, if subsequent to an unauthorised deviation—*Davis v. Garrett* (3). The deviation in this case was in my opinion unauthorised; and I therefore give judgment for the plaintiffs for such a sum as may be found to be due by a referee, it having been arranged that the actual figures shall be referred to a gentleman to be agreed upon. The costs of the action must be borne by the defendants.

*Judgment for the plaintiffs.*

Solicitors—Waltons, Bubb & Walton, for plaintiffs; W. A. Crump & Son, for defendants.

[IN THE HOUSE OF LORDS.]

1879. }  
April 29. } TURNER v. CRUSH.

*Inclosure—General Inclosure Act, 1845 (8 & 9 Vict. c. 118)—Award—Private Roads—Vendor and Purchaser.*

*H. sold Whiteacre to the defendant, reserving all rights to an allotment in respect thereto under a pending inclosure. The conveyance was made with all ways "to the said lands appertaining, or held, or used, or occupied therewith." At the time of the conveyance there were certain trackways across Blackacre (then part of the waste awaiting inclosure), which had been used with Whiteacre for more than forty years. Blackacre was subsequently allotted to H., and by him before the award sold to C., who devised it to the plaintiff. The trackways were not set out in the award:—*

*Held, that upon the making of the award the trackways were stopped up and extinguished by 8 & 9 Vict. c. 118. s. 68, in favour of H. and all claiming through him, notwithstanding the terms of the conveyance to the defendant.*

This was an appeal from a judgment of the Court of Appeal (reported 47 Law J. Rep. Exch. 639; s. c. Law Rep. 3 Ex. D. 303), affirming one of the Exchequer Division.

In the year 1869, a Mr. Hardcastle was seised of lands in the parishes of Writtle and Roxwell, in the county of Essex. Proceedings were at that time pending for the inclosure of certain waste lands in those parishes under the General Inclosure Act (8 & 9 Vict. c. 118), and it was expected that Hardcastle would receive an allotment in respect of his lands. Under those circumstances Hardcastle sold some of his lands to Turner reserving his right to any allotments to be made to him. The lands so sold were conveyed to Turner by two deeds, dated the 29th of September, 1869, each of which, after setting out the parcels, continued as follows:—"Together with all lands, buildings, yards, gardens, orchards, walls, fences, hedges, ditches, timber and timberlike trees, woods, underwoods, ways, paths, passages, drains, watercourses, lights, easements, privileges and appur-

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*Turner v. Crush, H.L.*

tenances to the said farm, lands and hereditaments hereby conveyed, or any of them belonging or in anywise appertaining or held, used or occupied therewith, or known, accepted or reputed as part parcel or member thereof." There were between the lands sold to Turner and the high road to Roxwell some strips of waste, over which were certain trackways, which had been used with the said lands for upwards of forty years. They were, however, not ways of necessity. The Inclosure Commissioners sent due notices of their meetings to Turner, who took no steps to have the trackways set out in the award. The award, provisionally made on the 5th, and confirmed on the 21st of July, 1879, allotted the strips of waste to Hardcastle, and did not set out any way over them. Hardcastle in the meantime on the 14th of July, 1870, had sold these allotments to Robert Crush, to whom they were conveyed on the 29th of November, 1871.

Turner continued to use the trackways, claiming that notwithstanding section 68 of the General Inclosure Act, his right of way was preserved against Hardcastle and his assigns by the words above quoted in the conveyances made in 1869.

The respondents, who were the devisees of Robert Crush, brought an action of trespass against Turner in the County Court, where judgment was given in their favour, subject to a Special Case. On the hearing of the Special Case the Exchequer Division were equally divided. Turner appealed, and the Court of Appeal affirmed the judgment of the County Court.

This appeal was then brought.

*Philbrick* and *T. Atkinson* appeared for the appellant.

*Grantham* and *Oroome*, for the respondent.

THE LORD CHANCELLOR (EARL CAIRNS).—It is necessary in this case to observe what exactly it was which happened in the year 1869, when Mr. Hardcastle sold these lands, which were purchased by Mr. Turner, the appellant. At that time Mr. Hardcastle was the owner of these lands and others in the same neighbour-

hood. He was not the lord of the manor, but in the neighbourhood of these lands were the wastes of the manor, and among others was the waste along the side of the road in the vicinity of Mr. Hardcastle's land. In that state of things Mr. Hardcastle put up the lands, subsequently brought by Mr. Turner, for sale by auction, but he reserved to himself expressly the allotments, which were to be made of the waste lands under the proceedings then going on for the purpose of inclosure. Notice therefore was, on the face of the sale, taken of these proceedings, and the purchaser was warned that allotments were expected, and that therefore if allotments came to be made in respect of the lands offered for sale, these allotments would not pass to the purchaser, but be retained by the vendor.

Now that was all authorised by the General Inclosure Act. That Act enables persons who expect allotments to be made to them to sell their lands, reserving to themselves the right to the allotments when they come to be made. The purchaser, therefore, was warned that the allotment was in progress, and was put on his guard to be vigilant as to any rights in which he might be interested in respect of that allotment. In that state of things Mr. Turner bought the lands to which I have referred, and subsequently, the allotment having been completed, an award of the pieces of land, the wastes of the manor, intervening between the road and the lands thus sold, was made to persons who claimed under Mr. Hardcastle, and who are the present respondents.

But before I refer to the allotment I must direct your Lordships' attention to the form of conveyance made to the present appellant. That conveyance passed to the appellant the property sold to him with the general words: [His Lordship read the words quoted above.]

The County Court Judge finds in the Special Case that, at the time when the conveyance which contained these words was executed, there were, over a piece of waste to which I have referred, intervening between the road and the lands sold to the appellant, trackways or private

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roads used for the purposes of this land; and he finds that these trackways had been so used for upwards of forty years. I think it therefore better to take it that these were valid private rights of way at the time of the conveyance. Beyond all doubt, therefore, as it seems to me, the conveyance carried to Mr. Turner the land which he purchased and the ways appurtenant to that land, and among other ways those private ways over this waste piece of ground. But then it did that subject to whatever might be the legal consequences of the inclosure then in progress. If that inclosure went off, if it came to nothing, or if the piece of land to which I have referred was not inclosed, then of course the right of Mr. Turner to his private ways would remain unaffected. But if it came to pass that these pieces of waste were inclosed, as happened under the allotment, then it appears to me that both Mr. Turner and Mr. Hardcastle, or any person claiming under them, must be bound by whatever is the legitimate consequence of the inclosure which was then proceeding under the provisions of the Act of Parliament.

Now, what says the Act of Parliament on the subject? The Act of Parliament says that it is to be the duty of those who are making an inclosure to take up the question of private roads over the lands which they are inclosing; and the valuer is to "set out such private or occupation roads and ways through the land to be inclosed, as he shall think requisite for the use of the persons interested in such lands, or any of them." And if there be any question whether these words extend to other lands, that seems to be removed by another enactment. Then it provides for the expenses of setting out those private ways. And it provides that "after such setting out as aforesaid all private or occupation roads or ways, over, through and upon the lands to be inclosed which shall not be set out as aforesaid, shall be for ever stopped up and extinguished."

These words are the words of the legislature, and are as clear and distinct as any words can be; and unless there was some special contract between Mr.

Hardcastle and the appellant, at the time that he purchased, which bound Mr. Hardcastle not to take advantage of the provisions in this Act of Parliament, or not to allow the title which this Act would give him to be set up as against Mr. Turner, then it appears to me that the operation of the Act of Parliament is absolutely unfettered so far as Mr. Hardcastle is concerned, and that Mr. Turner has no right to complain of any consequences of the operation of the Act of Parliament. It was for him, knowing that the inclosure was in progress, to set up any case he could before the valuer and commissioners as to the necessity of private roads across these pieces of waste in question. He took no such proceeding, and therefore must, as it seems to me, be held to have remained content with the other means of access he possessed to the land he bought. I can find nothing whatever in the transaction which took place which binds Mr. Hardcastle, or which can be said to bind the respondents taking under Mr. Hardcastle, not to avail themselves of whatever are the legal consequences from the proceedings in the matter of the inclosure.

That is the whole case. I must say that I think the judgment of the Court of Appeal is entirely right, and I therefore move your Lordships that the appeal be dismissed with costs.

LORD SELBORNE.—I agree, and for the reasons given by Baron Huddleston in the Exchequer, and by Lord Justice Thesiger in the Court of Appeal.

The words, "all ways," are ordinary, general words; and as soon as the deed of 1869 was executed, these particular rights of way passed to the appellant, as legally appurtenant to the land conveyed, and not otherwise; exactly in the same way as such rights of common, over the part of the waste now in question, or over any other parts of the wastes to be inclosed, also passed to him thereby.

Now as to all these other rights over the surface of the wastes, it would be inconsistent with the very nature and object of the proceedings under the Inclosure Act to suppose that the reservation, between these parties, of the allotments to be

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made under these proceedings to the vendor, could possibly have the effect intended by it if all these rights were to remain in the purchaser's favour, as if there had been no inclosure. If so, I cannot see any ground whatever for making a distinction as to rights of way which were equally liable to be extinguished by the process of allotment. The appellant obtained, at the time of the conveyance, and by virtue thereof, everything which then belonged to the land; but he did so subject to the pending inclosure and to the rights which Mr. Hardcastle might acquire in respect of any allotments, wheresoever situate, which might be made to him. If he desired to save the rights of way over this part of the waste, which passed to him by the conveyance, against any title which either Mr. Hardcastle or anyone else might acquire thereto by allotment, it was for him to take the necessary steps for his own protection, as much as if he had been the original owner of the purchased land, and not a purchaser from Mr. Hardcastle. The appellant's argument treats the general words in the deed of conveyance as if they had been a contract or covenant by Mr. Hardcastle to grant new easements over any land which he might acquire by allotment under the Inclosure Act. But for such a construction there is, in my opinion, no ground.

LORD GORDON concurred.

*Order appealed from affirmed; and appeal dismissed with costs.*

Solicitors—James Scarlett, agent for Scarlett & Suthery, Chelmsford, for appellant; Duffield & Bruty, London and Chelmsford, for respondents.

*Payer & Sons, D. 296551  
327922 363*

[IN THE QUEEN'S BENCH DIVISION.]

1879. } KING v. HAWKSWORTH.  
May 15. }

*Costs—Liverpool Court of Passage—16 Vict. c. 121. sects. 53 and 54—Action for Slander—Judicature Act, 1873, sect. 91—Judicature Act, 1875, Order LV. rule 1—Mandamus—Registrar.*

*Section 91 of the Judicature Act, 1873, which provides that "The several rules of law enacted and declared by this Act shall be in force and receive effect in all Courts whatsoever in England, so far as the matters to which such rules relate shall be respectively cognizable by such Courts," extends Order LV. in the first schedule of the Judicature Act, 1875, to the Liverpool Court of Passage, so that a plaintiff in an action of slander, who has recovered 1s. damages, is entitled to his costs in the absence of any order depriving him of them.*

*The Registrar of the Court of Passage is the proper person to whom to direct a rule for a writ of mandamus to tax costs.*

This was a rule calling on the Registrar of the Court of Passage and the defendant to shew cause why the plaintiffs' costs in the action should not be taxed by the Registrar.

The action was for slander, and the plaintiff had obtained a verdict, with damages one shilling. The Registrar refused, on application made to him, to tax plaintiff's costs at a larger amount than one shilling.

*M'Connell and Byrth shewed cause.—*The plaintiff has no certificate, and is not entitled to his costs. The Act of James is still in force in the Court of Passage, to which the Judicature Act and Rules have been applied only so far as they are applicable. The Assessor has, under the powers of 16 Vict. c. 121, sect. 54, adopted the rules and orders of the Judicature Act so far as they may regulate the practice, not otherwise expressly regulated by the Court of Passage Procedure Act, but it is now sought to apply what is a rule of law and not of practice. Order LV. is confined to proceedings in the High Court, and is a rule of law and not of practice. Then the mandamus

*King v. Hawksworth, Q.B.*

ought not to be directed to the Registrar but to the Court or Judge.—*Tapping*, p. 109.

*French*, in support of his rule.—By section 33 of the Judicature Act, 1875, all enactments inconsistent with it are repealed, therefore the Act of James is repealed, as was said by Lord Hatherley in *Garnet v. Bradley* (1). Then section 91 of the 1873 Act makes all the rules of law in the Judicature Acts in force in all Courts in England: therefore Order LV. is in force in the Passage Court, and the plaintiff is entitled to his costs, as following on the event of the trial, there having been no order to deprive him of them.

COCKBURN, L.C.J.—The rule for this mandamus must be made absolute. It is very lamentable that a man who brings an action and recovers 1s. only, an amount which shews that in the opinion of the jury the action should never have been brought, should get his costs. But the Judicature Act applies, in my opinion, to the Court of Passage in this matter; and the 91st section of the Act of 1873 is directly in point.

Now there is a rule enacting and declaring that costs shall follow the event where an action is tried by a jury, and full effect to that rule has been given by the House of Lords in *Garnet v. Bradley* (1), and that rule, so interpreted, is applicable here. The plaintiff who recovers a verdict gets his costs, unless the Judge interferes to prevent him; there must be a positive act by the Judge to deprive, otherwise the rule takes effect. Here the Judge is content to let the law take its course, having said that he should do nothing.

On the other point, a question has been raised whether the mandamus was properly addressed to the Registrar. As to that, I see no one else to whom it could be addressed; and though the constitution of the Court seems anomalous the Registrar, at all events, forms part of it, and he is the proper person to carry a taxing order into effect.

MELLOR, J.—I am of the same opinion. I share altogether the regret that the verdict with 1s. damages should give a man his costs. But as that is the necessary effect of the law we are bound to uphold it, and section 91 of the 1873 Act enacts that what is the law under the Rules and Orders made under that Act shall have force and effect in the Court of Passage. In the superior Courts it has been held that if the Judge at the trial do not certify to deprive of costs, a separate motion for the purpose may be made to the Divisional Court; but the assessor, who was the person who ought here to have deprived the plaintiff of costs, has declined to interfere. The rule must be made absolute.

LUSH, J.—I am of the same opinion on both points. I cannot limit the construction of section 91, as has been contended for, as applying only to the rules of law thereinbefore enacted. No such words are to be found in the section, and I think the rules and orders afterwards framed draw after them the full effect of section 91.

*Rule absolute.*

Solicitors—Sydney Mayhew, agent for Blackhurst & Fretson, Liverpool, for plaintiff; Venn & Son, agents for Joseph Rayner, Liverpool, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1879. { THE GUARDIANS OF THE HEREFORD UNION (*appellants*) v.  
March 1. { THE GUARDIANS OF THE WARWICK UNION (*respondents*).

*Poor Law—Divided Parishes Act* (39 & 40 Vict. c. 61), s. 35—*Derivative Settlement of Pauper Lunatic—Order of Removal.*

[For the Report of the above case, see 48 Law J. Rep. M.C. 111.]

(1) 48 Law J. Rep. Exch. 186; s. c. Law Rep. 3 App. Ca. 944.

[IN THE EXCHEQUER DIVISION.]

1879. { JONES (appellant) v. THE  
March 5. { CWMORTHIN SLATE COMPANY  
(LIMITED) (respondents).

*Income-Tax — Quarries — Mines — Assessing Annual Value*—5 & 6 Vict. c. 35. Schedule A.

*A property in which slate is gotten by levels driven underground into the mountain, is a quarry and not a mine for the purposes of the rules for assessing income-tax, and its annual value is the profits for the preceding year, and not the average profits for the five preceding years.*

CASE stated by Commissioners of Income Tax.

The respondents appealed to the Commissioners against an assessment of 6,373*l.*, made under Schedule D. for the year 1877–78, in respect of their profits as a slate company, calculated according to rule 1 of No. 3 of Schedule A. of 5 & 6 Vict. c. 35.

They contended that the property was a mine, and claimed to be assessed on the average profits of the five preceding years, under rule 2 of No. 3 of Schedule A. of 5 & 6 Vict. c. 35.

Originally the property was worked in the open, but for some years the slates had been gotten by means of levels driven into the mountain to a distance of about 250 or 300 yards. The levels were about five feet wide and seven feet high, and the whole process was carried on underground.

The Commissioners were of opinion that the property was a mine, and ought to be assessed as such, but stated this Case for the Court.

*Dicey*, for the Crown.—The Act 5 & 6 Vict. c. 35. Schedule A. assesses such properties either as “quarries of stone, slate, limestone or chalk on the amount of profits in the preceding year,” or as “mines of coal, tin, lead, copper, mundic, iron and other mines on an average of the five preceding years.” The distinction drawn is between workings of stone and workings of more precious material, the former being assessed as quarries and the latter as mines.

*A. L. Smith*, for the respondents.—This property is included in the words “other mines” in the rule. The criterion is not the material gained, but the mode of gaining it. This was laid down by *Malins, V.C.*, in *The Duchess of Cleveland v. Meyrick* (1), where shares in underground slate workings were held to pass in a will as shares in mines. In *Sims v. Evans* (2) this very property was held by the Queen’s Bench to be a mine within the Metalliferous Mines Act, 1872 (35 & 36 Vict. c. 77).

*KELLY, C.B.*—Our judgment in this case must be for the Crown. The words of this Act of Parliament must be construed in their popular sense, unless there is something to shew that another sense was given to them. In ordinary parlance we speak of slate quarries, not slate mines. If the Legislature had meant to apply the word mine to slate workings they would have done so expressly. The case which has been cited arose out of an Act of Parliament with an entirely different object. It was to protect the lives and limbs of the Queen’s subjects and called for a liberal construction. This is a taxing statute, and must be strictly construed according to its precise words. Quarries of stone, slate and so on are to be taxed in one way; mines of coal and iron in another: this property falls within the first rule.

*POLLOCK, B.*—I am of the same opinion. In *The Duchess of Cleveland v. Meyrick* (1) there was no antithesis between mines and quarries. A similar question to the present would only have arisen if the testator had given his mine shares to one and his quarry shares to another. We must look at the object of the Act where the words we have to construe may admit of two interpretations. In *Sims v. Evans* (2) the object of the Act was to protect the public from such things as sunken shafts, and the mode of working was, therefore, the proper test. The word “minerals” is by the interpretation clause of that Act used in its widest sense. This statute is for the

(1) 37 Law J. Rep. Chanc. 125.

(2) Not reported.



*Jones v. Cwmorthin Slate Co., Exch.*

taxation of the subject where we have two rules of taxation laid down, the distinction between which is the product. Moreover, if the distinction be the mode of working, the property is worked not by shafts but by adits, which is a process consistent with the idea of a quarry.

*Judgment for the Crown.*

Solicitors—The Solicitor for the Inland Revenue, for the Crown; Gregory, Rowcliffes & Rawle, agents for Jones & Jones, Portmadoc, for respondents.

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1878.

Nov. 29.

Dec. 21.

NUTTER v. THE ACCRINGTON  
LOCAL BOARD OF HEALTH.\*

*Highway—Street—Turnpike Road—  
Alteration in Level of by Local Board—  
Compensation—Award—Public Health  
Act, 1848 (11 & 12 Vict. c. 63), ss. 2, 68,  
144—Amendment Act, 1852 (15 & 16 Vict.  
c. 42), s. 13—Local Government Act, 1858  
(21 & 22 Vict. c. 98), s. 41.*

The Public Health Act, 1848, vests by section 68 all streets, being highways, in local boards of health, authorises them to alter or raise the level of such streets, and directs by section 144 that compensation shall be made out of the rates to all persons damaged by the exercise of the powers of the Act; the amount, in case of dispute, to be settled by arbitration. By section 2 the word street is to apply to and include any highway not being a turnpike road, and any road, footway, &c., and the parts of such highway, road, footway, &c., within the district, and by an amending Act the word highway is defined to mean any highway repairable by the inhabitants.

The Local Government Act, 1858, authorised local boards to take on themselves by agreement with turnpike trustees the main-

tenance and repair of a turnpike road within their district.

A local board, through whose district a turnpike road and footpath alongside passed, agreed with the turnpike trustees to repair and to raise the footpath, the trustees agreeing to raise the road at the same place. The necessary result of thus raising the footpath was to damage the house of the plaintiff, who thereupon claimed compensation from the board under section 144 of the Public Health Act, 1848.

Held (by BRETT, L.J., COTTON, L.J., dissentiente BRAMWELL, L.J., reversing the judgment of the Queen's Bench Division), that the road in question was, although a turnpike road, a street within section 68 of the Act, and was vested in the local board by virtue of that section, and that the plaintiff was therefore entitled to compensation from the local board for the damage caused by the alteration made by them in the exercise of their statutory powers, and an award made against the board under section 144 was enforceable.

Action on an award.

Appeal by the plaintiff from the judgment of the Queen's Bench Division in favour of the defendants on a Special Case.

The case is set out in the report in the Court below (47 Law J. Rep. Q.B. 521).

The plaintiff was in 1864 and still is the owner of a house and land adjacent to a turnpike road and a footpath within the district of the Accrington Local Board of Health, the urban sanitary authority for the town and district of Accrington under the provisions of the Public Health Act of 1848, and the other Acts therewith incorporated.

The turnpike trust expired in 1874.

In 1865 the local board agreed to repair such parts of the turnpike road as were pitched with stone, and such parts of the footpath as were or should be flagged with stone, as was the footpath in question.

The rest of the road and footpath continued to be repaired, as was the case before this arrangement, by the turnpike trustees.

In May, 1871, in pursuance of a further arrangement, the trustees raised the carriage road opposite to the plain-

\* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

*Nutter v. Accrington Local Board (App.). Q.B.*

tiff's house, and the local board raised the footpath in the same place to a corresponding height.

The execution of these works, though done without negligence, caused damage to the plaintiff, for which he proceeded in October, 1874, to claim compensation under the Public Health Act, 1848. The defendants maintained that the remedy of the plaintiff, if any, was by action, and refused to take part in the proceedings for compensation, and an award having been made in favour of the plaintiff in their absence, they refused to pay the amount awarded. The plaintiff then brought an action on the award, when it was agreed that a Special Case should be stated. The Queen's Bench Division gave judgment in favour of the defendants.

The plaintiff appealed.

*Gully and Forbes*, for the appellant.—The plaintiff claimed compensation under section 144 of the Act of 1848, and an award having been made in his favour he brought his action on the award. It is submitted that he was right in so doing, for the injury to his premises has been caused by the execution of works done by the local board under the Act of 1848 (1).

(1) Public Health Act, 1848, 11 & 12 Vict. c. 63.

Section 2.—“The word street shall apply to and include any highway (not being a turnpike road) and any road, public bridge (not being a county bridge), lane, footway, square, court, alley, passage, whether a thoroughfare or not, and the parts of any such highway, road, bridge, lane, footway, square, court, alley or passage within the limits of any district.”

Section 68.—“That all present and future streets being, or which at any time become, highways within any district, and the pavements, stones and other materials thereof, and all buildings, implements and other things provided for the purposes thereof by any surveyor of highways or by any person serving the office of surveyor of highways, shall vest in and be under the management and control of the said local board of health. And the said local board shall, from time to time, cause all such streets to be levelled, paved, flagged, channelled, altered and repaired, as and when occasion may require; and they may, from time to time, cause the soil of any such street to be raised, lowered or altered as they may think fit, and place and keep in repair fences and posts for the safety of foot passengers.”

Section 144.—“That full compensation shall

The road which the board has raised is a street within section 68 (1), and it is therefore vested in the board by that section; the turnpike trustees retained the right to collect tolls, but all other rights and powers passed to the board. It will be suggested that this road cannot be a street, because the interpretation clause excludes it; but that clause only adds meanings to those ordinarily in use; it does not limit the meaning of the word “street;” a turnpike road running through a town may be a street in one part, whilst the same road in another part might not be a street—*The Queen v. Fullford* (2). In the Metropolitan Management Act the word street retains its primary meaning in addition to those it acquires by that Act. The word highway is explained by section 13 of 15 & 16 Vict. c. 42 (3), to be a highway repairable by the inhabitants at large; now all roads not being private roads and not having peculiar rights and claims are *prima facie* repairable by the inhabitants at large, who would have in a case such as this a right to call on the turnpike trustees for contribution—*The Queen v. Oxford* (4).

Moreover, even if this road did not become vested in the board by the operation of section 68 (1) still the defendants are liable, because they agreed with the turnpike trustees to raise the road, and this agreement was made under section 41 of the Local Government Act of 1858 (5),

be made out of the general or special district rates, to be levied under this Act, to all persons sustaining any damage by reason of the exercise of any of the powers of this Act; and in case of dispute as to amount, the same shall be settled by arbitration in the manner provided by this Act.”

(2) 1 L. & C. 403; s.c. 33 Law J. Rep. M.C. 122.

(3) 15 & 16 Vict. c. 42.

Section 13.—“That the term highway in the sections of the Public Health Act, 1848, numbered respectively 68 and 69 in the copies of the Act printed by the Queen's printers, shall mean any highway repairable by the inhabitants at large.”

(4) 12 Ad. & E. 427.

(5) Local Government Act, 1858, 21 & 22 Vict. c. 98.

Sect. 41. “It shall be lawful for any local board by agreement with the trustees of any turnpike road or with any corporation or person liable to repair any street or road or any part thereof, or with surveyors of any bridge repaired by any county,

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so that the powers of the trustees were transferred to the local board, and the board can do what the trustees could have done, and the remedy for damage caused by such works is not by an ordinary action but is by a claim for compensation.—*Boulton v. Crowthor* (6). That liability depends upon whether the words "maintenance and repair" include the alteration of the level of this road.

The consequence of the transfer to the board of the management of this road is that it became in fact repairable by the inhabitants at large, so that the works done were done under the powers of the Act of 1848, under which the plaintiff claims to recover compensation.

*Crompton* (with him *O. Russell*), for the respondents.—The local board are liable, if at all, only in an action. These works have not been done in pursuance of the powers given by any of these statutes. This road was not vested in the local board by section 68 (1), for it was a turnpike road, and so was excluded by the definition in section 2 (1). The word "street" includes highways not being turnpike roads, and this definition is further explained by section 13 of 15 & 16 Vict. c. 42 (3), where "highway" is said to mean a "highway repairable by the inhabitants at large," words which are not applicable to turnpike roads. If this road did vest in the local board then they would have power to do everything to the road that was necessary, and the provisions of section 41 of the Act of 1858 (5) would not be required; there is a difference between the powers given by section 68 of the Act of 1848 (1) and those given by the Act of 1858 (5); the powers given by the former are more extensive than those given by the latter; by the former the local board can alter the level of the roads vested in them,

riding or division, to take upon themselves the maintenance, repair, cleansing or watering of any such street or road or any part thereof, or of any road over any country bridge and the approaches thereto, or of any part of the said roads within their district . . . on such terms as the local board and the trustees or corporation or person or surveyor aforesaid may agree upon between themselves."

(6) 2 B. & C. 708.

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but by an agreement made under the latter they can only maintain and repair a road.

The agreement made under section 41 (5) does not oust the authority of the turnpike trustees; the board do not by that agreement get complete management of the road; moreover that section only empowers the board to take a complete portion of the whole road, it does not enable them to divide the road longitudinally, so that what was done here was not done under the powers of any statute. Whatever the board did, they did as agents for the turnpike trustees, and as the trustees could have done these works without making compensation, so can the local board.

*Gully*, in reply.

*Our. adv. vult.*

The following judgments were delivered on the 21st of December:—

*COTTON, L.J.*—This is an action to enforce an award ascertaining the amount of compensation payable to the plaintiff in consequence of certain alterations made in a road near his house by the Acorington Local Board of Health, and the question raised on this appeal is, whether or no the matters in respect of which the plaintiff complains were done under the powers of the local board so as to entitle the plaintiff to compensation under section 144 of the Public Health Act of 1848.

The facts are these. An arrangement was made between the local board and the trustees of the turnpike road, in a part of which was the place where the act complained of was done, that the control of the road should be divided between them longitudinally; that is to say, that one body should repair the footpath and the other the carriage-way; and the local board altered the level of that part of the road of which they took the charge. I may at once here dispose of a question which appears to have been raised in the Court below, that although there was power, given by an Act of Parliament (21 & 22 Vict. c. 98. s. 41) to the local board to make arrangements with turnpike trustees to take charge of a definite portion of the turnpike road, this could not be exercised by one body taking the

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centre of the road and the other keeping the side of it, but that it must be exercised by one party taking a portion of the road up to a particular point and the other taking the remainder. I cannot accede to this objection, for in my opinion it is not necessary that the local board and the turnpike trustees should divide the road by a line drawn at right angles to the centre line. In my opinion they may divide it in any reasonable way which they think fit to adopt. The real question is whether or no the place where the alterations were made by the Accrington Local Board was part of a street vested in them under section 68 of the Public Health Act of 1848, by which "all present and future streets being or which at any time become highways within any district, and the pavements, stones and other materials thereof, and all buildings, implements and other things shall vest in and be under the management and control of the said local board; and the said local board shall from time to time cause all such streets to be levelled, paved, flagged, channelled, altered and repaired, as occasion may require." The local board did, in fact, alter this street in front of the plaintiff's house by altering the level. It was argued that although in other respects the place where this was done was a street, yet it was not a "street" within the meaning of section 68, on the ground that nothing is a street within that section if it is part of a turnpike road, and for that purpose reference was made to the interpretation clause which provides as follows: "The word 'street' shall apply to and include any highway (not being a turnpike road), and any road, public bridge (not being a county bridge), lane, footway, square, court, alley, passage, whether a thoroughfare or not; and the parts of any such highway road, bridge, lane, footway, square, court, alley or passage within the limits of any district." It was argued that, looking to the terms of this enactment, even if the place in question were a street, it is part of a turnpike road, and therefore is not a street within section 68. My opinion is the contrary. The interpretation clause is not restrictive. It does not say that the word "street" shall be confined to

any highway not being a turnpike road, but that it shall "apply to and include any highway not being a turnpike road," &c. That is enlarging, not restricting the meaning of "street," and in my opinion, as I read these words, the place in question is a street; that is to say, that which, independently of the Act of Parliament, in ordinary language is properly a street does not cease to be so because it is part of a turnpike road. It is very true that independently of the interpretation clause there may be sufficient in the Act to shew that its provisions relative to streets cannot apply to what is part of a turnpike road even though it is a street. But in my opinion there is nothing in the Act sufficient thus to restrict the effect of its enactments as to streets. There may be some little difficulty in consequence of the street or a portion of the street, over which the turnpike trustees have certainly some powers, being vested in the local board under the powers given by the Act of Parliament; but that is not, in my opinion, a sufficient inconvenience to prevent what would otherwise be their meaning being given to the words. It must be remembered that a subsequent Act of Parliament was passed, to which I have already referred (21 & 22 Vict. c. 48, s. 41), enabling the trustees of the turnpike road and the local board to make arrangements as to the management and care of particular parts of the street, and in my opinion that Act of Parliament was passed for the express purpose of preventing any difficulty which might arise under this Act of Parliament in consequence of a street, being part of a turnpike road, being vested in the local board for certain purposes; while the turnpike trustees still had under their Act certain powers over the street. It gives, therefore, a right to the turnpike trustees and the local board to make arrangements by which the local board shall undertake the entire charge of the management of the street, including that which the turnpike trustees formerly had. In my opinion, therefore, this was a street within the meaning of section 68 of the Public Health Act, 1848, and the plaintiff is entitled to compensation.

It was suggested that the amount

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awarded was excessive. We have nothing to do with the amount, whatever it is. We have only to give our opinion whether the act complained of was done under the powers given by the Act to the local board, and in my opinion it was.

BRETT, L.J.—If this way had not been a turnpike road the facts would have brought it within the definition of "street;" and I think the fact of this being a turnpike road does not prevent it being a street. There seems to me to be no inconsistency in saying that a turnpike road is a street, either independently of the statute or within the terms of the statute; and this road, therefore, being a street, was vested in the local authorities to the extent we stated in the recently decided case of *Coverdale v. Charlton* (7). Whatever might be the obligation of the turnpike trustees to keep the roadway in repair, the local board might alter it. They did alter it, and in so doing they were assuming to exercise, and I think they were exercising, the powers of the Act. I think, therefore, that any injury done to the plaintiff was the subject-matter of compensation, and that compensation was rightly awarded for it.

I therefore agree that the judgment of the Court below ought to be reversed, and with costs.

BRAMWELL, L.J.—The question in this case turns upon section 68 of the Public Health Act, 1848, which says, "that all present and future streets" may be altered by the local board; then it is said that the word "street" in the interpretation clause (section 2), includes not only the things there enumerated but everything which is a street. It enacts that "the word 'street' shall apply to and include any highway (not being a turnpike road) and any road, public bridge (not being a county bridge), lane, footway, square, court, alley, passage, whether a thoroughfare or not, and the parts of any such highway, bridge, lane, footway, square, court, alley or passage, within the limits of any district." It is said that this

interpretation does not necessarily exclude a turnpike road; that the word "street" means what is actually a street; that the interpretation clause does not contain the whole of the meaning of the word "street." I agree that this may be so and that we are not obliged to hold that this interpretation clause is exclusive. There is an interpretation Act (8) which says, "that in all acts, words importing the singular shall be deemed and taken to include the plural, and the plural the singular." Now if that clause were construed in an exclusive sense, the words in the singular would never mean the singular, and the words in the plural would never mean the plural, so that it is, I think, clear that an interpretation clause may contain additional meanings and need not be exclusive.

The section now before us provides that the word "street" shall include any highway not being a turnpike road. Then it is said that this is a street. So it is. But it is also a turnpike road. The arguments upon the interpretation clause are equally good for either party. Therefore I must consider if there is anything in section 68 which will enable me to decide what the Legislature intended. With great respect to those who are of a different opinion, I cannot but think the clause means, as the Court below held, that a street which is a turnpike road should not be included. The words are: "All present and future streets being, or which at any time become highways within any district, and the pavements, stones and other materials thereof, and all buildings, implements and other things shall vest in and be under the management and control of the said local board, and the said local board shall from time to time cause all such streets to be levelled, paved, flagged, channelled, altered and repaired as occasion may require." Has that section taken away the management of the turnpike road from the turnpike trustees? I think not, for it seems to me, that it is speaking of those roads the management of which is transferred to the local board, and if so, then these words shew that a street, which is

(7) 48 Law J. Rep. Q.B. 128; s. c. Law Rep. 4 Q.B. D. 104.

(8) 13 & 14 Vict. c. 21. s. 4.

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a turnpike road, is not within the provisions of section 68. As to expressing an opinion upon such a case as this with confidence, I do not think it is a case upon which one can be confident, especially when one hears the contrary opinions that have been expressed.

I think, too, that the provisions of section 117, which says that the local board are to be surveyors of the highways, strengthens this view, for it is, I think, clear that that section does not include a turnpike road.

I am, therefore, of opinion that upon the questions mainly argued before us, the judgment was right and should be affirmed.

But some other points remain. I will just refer to one, because I think it is of some consequence. I am not quite sure that this is not a more substantial question than the Court below thought it. If the acts were done, as indeed they were, and the alteration was made under the powers of the turnpike trustees, I cannot see that any action would be maintainable against the turnpike trustees or those who acted on their behalf. The trustees are empowered under their Act of Parliament, to raise the levels of the road, and it has been held in *Boulton v. Crowther* (6), that no action lies against the trustees of a turnpike road for acts done *bona fide* and within their jurisdiction. But I am inclined to look upon it as a principle that no action ought to be maintainable. Usually, a person cannot raise or lower a road in front of another man's park-gate, and so leave the park-gate high up in the air or below the level of the road; because the person having the right is not likely so to interfere with the road. But supposing that the owner of property adjoining a highway is not the owner of the soil in the highway, I do not think that he has any right by the law of the land, to have the road continued at a particular level. It may be a great inconvenience to him, no doubt, to have the road altered, if he has built with reference to the level of the road; but it may be inconvenient to the public not to have the level altered, and I do not know that he has any vested right in the road remaining at that level to the inconvenience of all mankind. I

am not clear, therefore, that there was not a more meritorious defence in this case than was supposed by the Court below. If this view be right, then there is no ground for saying that the defendants are continuing and maintaining a nuisance which they have committed. If the turnpike trustees had a right to alter the level of the road they did not create a nuisance in doing so, neither in that case are the defendants continuing a nuisance.

*Judgment reversed.*

Solicitors—Ridsdale, Craddock & Ridsdale, agents for Robinson, Sons & Gill, Blackburn, for plaintiff; Johnson & Weatherall, agents for Hall & Son, Accrington, for defendants.

*Handwritten:* Hanch. Muller 502.162031  
*Message 55 28 C 2 498*  
 [IN THE COURT OF APPEAL.]

1879.

March 6, 7.

April 9.

REUTER, HUFELAND & COMPANY v SALA & COMPANY.\*

*Sale of Goods—Indivisible Contract—Shipment "per Vessel or Vessels"—Part Performance by Vendor—Incurable Failure as to Part—Right of Purchaser to reject the Whole.*

By a contract dated the 29th of December for the sale by the plaintiffs to the defendants of about twenty-five tons, more or less, pepper, October and November shipment, from Penang to London, per sailing vessel or vessels; the name of the vessel or vessels, marks and full particulars were to be declared to the buyers, in writing, within sixty days from date of bill of lading.

The plaintiffs declared on the 19th of January following on one vessel, but in three distinct parcels, and under three different bills of lading, twenty-five tons of pepper, only twenty tons of which satisfied the contract, the other five tons being a December shipment. The defendants refused to accept the whole quantity. The plaintiffs then, but after the expiration of sixty days from the date of the bill of lading, declared other five tons shipped in

\* *Coram* Brett, L.J.; Cotton, L.J.; and Theigier, L.J.

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*November on board the same vessel, in substitution for the five tons of December shipment previously declared. The defendants refused to accept these five tons also. On the arrival of the cargo in England in the following month of June, the plaintiffs formally tendered the samples of the twenty-five tons of November shipment, according to the substituted declaration, when the defendants refused to accept them or any part of them.*

*In an action for damages for non-acceptance, LORD COLERIDGE, C.J., on further consideration, after a trial without a jury, held that the plaintiffs could not recover in respect of any part of the pepper; on appeal,—Held, affirming the judgment (per COTTON, L.J., and THESIGER, L.J., dissentiente BRETT, L.J.), that the plaintiffs could not recover, that the contract was not divisible, that the plaintiffs having declared and tendered as one entire whole a shipment which was in part in accordance with the terms of the contract and in part not, the latter portion exceeding in quantity the margin provided for under the words "about" and "more or less," could not, when it was too late to remedy the defect, divide that shipment, and compel the defendants to accept that part which was good; and that the defendants were entitled to reject the whole.*

*Per BRETT, L.J., that the failure to deliver part of the pepper was only a breach of part of the consideration, that this could be compensated for in damages, and did not relieve the defendants from the duty of accepting that part of the shipment which was in accordance with the contract.*

*Brandt v. Lawrence* (46 Law J. Rep. Q.B. 237; s. c. Law Rep. 1 Q.B. D. 344) discussed and distinguished.

This was an appeal by the plaintiffs from the judgment of Lord Coleridge, C.J., for the defendants, after a trial without a jury and on further consideration.

The action was brought by the plaintiffs, as sellers, against the defendants, as buyers, to recover damages for the non-acceptance, by the defendants, of twenty-five tons of pepper, under a contract made between Messrs. Moon, Bower & Co., as agents for the plaintiffs, and the defendants, for a November shipment,

and a declaration within sixty days from the date of bill of lading. The plaintiffs declared on the 19th of January about twenty-five tons in 500 bags in three separate bills of lading, dated as to 395 bags on the 29th of November, and as to 105 bags on the 11th of December. They afterwards, on the 5th of February, substituted a declaration of 105 bags under a bill of lading dated the 29th of November.

The contract sued on, the documents, and the facts which are material will be found fully set out in the judgments of the Court of Appeal.

*Benjamin, Howard and Pollard*, for the plaintiffs.—The declaration of the plaintiffs on the 19th of January was a good declaration of the whole quantity contracted for, and even if it were not, still the declaration of the 105 bags on the 5th of February would satisfy the contract, for the defendants waived any conditions as to time, or induced the plaintiffs to believe that they had done so. This contract is, moreover, a divisible contract, and therefore there was, at all events, a good tender of twenty tons, for even if the defendants were not bound to accept the five tons declared after the expiration of the sixty days, still they were bound to accept the twenty tons. *Brandt v. Lawrence* (1) decided that where a delivery was to be made by "steamer or steamers," the consignee was bound to accept that part which was shipped in time, although the remainder of the goods was shipped too late. In the present case there were separate and distinct shipments under separate and distinct bills of lading, and the principle of *Brandt v. Lawrence* (1) applies although all these different shipments came by one ship. It is not disputed that a declaration by the plaintiffs was a condition precedent to the defendants' obligation to accept—*Graves v. Legg* (2), but the time of the declaration is not, since the coming into force of the Judicature Act, 1873, section 25, sub-section 7, of the essence of the contract, and a

(1) 46 Law J. Rep. Q.B. 237; s. c. Law Rep. 1 Q.B. D. 344.

(2) 9 Exch. Rep. 709; s. c. 23 Law J. Rep. Exch. 229.

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declaration within a reasonable time will satisfy the contract, for it will do justice between the parties—*Tilley v. Thomas* (3). If the defendants had accepted the twenty tons, they could have recovered damages for the non-delivery of the five tons; but they are not entitled to rescind the contract altogether—*Simpson v. Crippin* (4). *Hochster v. De La Tour* (5), *Frost v. Knight* (6), *Brown v. Muller* (7) and *Roper v. Johnson* (8) were also cited on the question of damages.

*W. Williams and Mathew*, for the defendants.—With regard to the allegation that the defendants so acted as to lead the plaintiffs to suppose that they intended to waive the performance of any condition precedent, that is a new contention; no waiver was pleaded, and if it had been supposed that an estoppel by conduct was to be set up, it would have been impossible to discharge the jury. The substantial contention of the plaintiffs is, that this contract was a contract for several divisible parcels, and that each parcel can be treated as a separate contract. In *Brandt v. Lawrence* (1) there was a power to elect to send the oats by different ships, and the defendants do not impugn that decision, nor is this a severable contract within the class of cases to which *Simpson v. Crippin* (4) belongs. In those cases the vendor agreed to deliver different parcels of goods at different dates, and there was nothing answering to the declaration in the present case, there was no condition which had to be performed first so as to make the delivery good. Under the present contract, however, the defendants are not bound to take any portion unless they can secure the whole of that for which they have contracted. The contract was one entire contract for one entire quantity; but even if it had been

divisible the plaintiffs are in no better position, for they never offered the defendants twenty tons, their only offer and only tender was of twenty-five tons, part of which the defendants were clearly not bound to accept. The vendor cannot throw on the purchaser the duty of severing from a larger amount so much, as being in accordance with the contract will in part satisfy the contract—*Boswell v. Kilburn* (9). The defendants could not accept twenty tons and then refuse the other five, as the contract was one and indivisible; and as the plaintiffs never tendered in accordance with the contract, the defendants could not accept something which was never tendered, and then sue for damages as to the residue—*Bowes v. Shand* (10).

*Pollard*, in reply.

*Our. adv. vult.*

The following judgments were (on the 9th of April), read:—

*THE SIEGE*, L.J.—This is an action brought by the plaintiffs, as sellers, against the defendants, as buyers, for the non-acceptance of about twenty-five tons of black pepper, shipped from Penang to London. The defendants refused to accept any portion of the pepper, while the plaintiffs have contended in this Court that the defendants were bound to accept and take delivery of the whole, or at least were bound to take delivery of a portion, amounting to about twenty out of the twenty-five tons. The contract between the parties was made on the 29th of December, 1876, and was as follows:—

“London, 29th December, 1876.

“Sold for account of Messrs. Reuter, Hufeland & Co. about (25) twenty-five tons (more or less) Penang black pepper, October <sup>and</sup> November shipment, from Penang to London, per sailing vessel or vessels, at  $(4 \frac{3}{8})$  fourpence and three-sixteenths of a penny per lb. for the sound portion thereof, with an allowance of  $\frac{1}{8}$  per lb. for first class sea damaged,  $\frac{1}{8}$  per lb. for second class sea damaged, and  $\frac{1}{8}$  for third class sea damaged, and

(9) 15 Moo. P.C. 309.

(10) 46 Law J. Rep. Q.B. 561; s. c. Law Rep. 2 App. Cas. 456.

(3) Law Rep. 3 Chanc. App. 61.

(4) 42 Law J. Rep. Q.B. 28; s. c. Law Rep. 8 Q.B. 14.

(5) 2 E. & B. 678; s. c. 22 Law J. Rep. Q.B. 456.

(6) 41 Law J. Rep. Exch. 78; s. c. Law Rep. 7 Exch. 111.

(7) 41 Law J. Rep. Exch. 214; s. c. Law Rep. 7 Exch. 319.

(8) 42 Law J. Rep. C.P. 65; s. c. Law Rep. 8 C.P. 167.



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repacked. Guaranteed fair merchantable quality, if inferior fair allowances to be made. To be landed and worked as usual at sellers' expense. The name of the vessel or vessels, marks and full particulars to be declared to the buyer, in writing, within sixty days from date of bill of lading, but should the vessel or vessels which may apply to this contract be lost before declaration, this contract to be cancelled as far as regards such lost vessel or vessels on the production of the bill or bills of lading by sellers as soon as fairly possible after the loss is ascertained. Should the vessel or vessels and the pepper, or any portion thereof, be lost, this contract to be cancelled for the whole or such portion, but should the vessel or vessels be lost and the pepper or any portion thereof be transhipped to some other vessel or vessels, and arrive on account of the original importers, this contract to stand good for the whole or such portion. Customary allowances and conditions. Any dispute arising out of this contract to be settled by arbitration in the usual manner. Prompt three months from final day of landing. Deposit 20% per cent. and difference on presentation of weight notes. No discount. "Moon & Bower."

On the 19th of January, 1877, the plaintiffs, purporting to act in pursuance of the contract, declared by a vessel called the *Borga* 500 bags of black Penang pepper, which would be equal in weight to about twenty-five tons, in three parcels, the subject of separate bills of lading—namely, 285 and 110 bags under bills of lading dated the 29th of November, 1876, and 105 bags under a bill of lading dated the 11th of December, 1876. In answer to the declaration, the defendants by letter requested information as to the date of shipment of the pepper. On the 22nd of January, 1877, they repeated the request; and on the 24th of January, 1877, having in the meanwhile received no information as to the date of shipment, the defendants asked whether the declaration or, as they called it, the tender of the 19th of January was final or not, and were answered on the same day that it was. On the 25th and 26th of

January the defendants again inquired as to the date when the whole of the pepper was shipped; and on the 27th of January Messrs. Moon, Bower & Co., acting for the plaintiffs, wrote to the defendants, "We beg to acknowledge receipt of your memo. of yesterday's date, and are at a loss to know what you want. We have already furnished you with dates of bill of lading, which in declaration is always considered sufficient." To which letter the defendants replied on the same day, "Pepper contract, 29/12/76. We have your memo. of this day. By furnishing us with dates of bill of lading you only fulfil one part of your contract; but the most important for us is the date of shipment, which, according to the contract, ought to have been made at the latest during November. We want then to know if you tender the said 500 bags as being all shipped during November."

Upon the same day an interview took place between the parties, with the object, so far as the plaintiffs were concerned, of learning whether the defendants would accept the declaration, but nothing definite passed. In point of fact, the shipment of the 105 bags under the bill of lading of the 11th of December, 1876, had not been made until the month of December; and on the 30th of January, 1877, the defendants wrote to the effect that they did not accept the declaration, as it was not for the full quantity according to the contract terms. Upon the 31st of January, the plaintiffs, through Messrs. Moon, Bower & Co., proposed by letter an arbitration to decide whether their tender or declaration constituted a fair delivery against the contract; and in answer to that letter the defendants, on the 2nd of February, wrote as follows: "If the pepper you tender is all of November shipment at latest, there is nothing to arbitrate upon, and the contract would be in order so far. If any portion of what you have tendered is not November shipment at latest, we reject said tender entirely, and refuse to arbitrate, as the contract has not been fulfilled by you."

On the 5th of February the plaintiffs substituted for the declaration of the 105 bags by the *Borga* under bill of lading of

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the 11th of December, 1876, a declaration of a similar number of bags by the same vessel under a bill of lading of the 29th of November, 1876; but this declaration being made more than sixty days after the date of the bill of lading to which it referred, the defendants on the same day wrote as follows: "We have your memo. of this date, and do not admit your tender. If even other reasons did not exist, as you will find by previous correspondence, your tender aforesaid would be out of date." Some correspondence then passed between the parties, upon which, coupled with what passed before and at the interview on the 27th of January, the plaintiffs found a contention that either the stipulation as to time of declaration was waived, or the defendants, by their conduct, had misled the plaintiffs into a belief that the breach of the stipulation would not be relied on, and were estopped from setting up such breach. It does not seem to me that this issue, which would be one peculiarly suitable for a jury, was really intended to be tried, or indeed was tried, when the parties dispensed with a jury and took the case before Lord Coleridge, C.J., alone, and it is not mentioned in his judgment. But assuming it to be open to the plaintiffs, I am of opinion that the evidence wholly fails to support their contention. I gather from the evidence that down to the time that the declaration was finally rejected, both the parties were standing upon their strict rights, and the plaintiffs had due warning from the defendants that they at least were doing so; and I can see no ground for the imputation that the defendants wrongfully induced the plaintiffs to believe that time was or would be waived, or did anything which could be construed into a waiver or its equivalent. I revert again to the evidence.

In a letter of the 2nd of June, Moon, Bower & Co., as the plaintiffs' agents, "advise the arrival of the *Borga* from Penang, in which vessel you are interested, as per contract dated 29th of December." To that letter the defendants, on the 7th of June, replied: "*Borga*.—We have your memo. of the 2nd instant advising arrival of the above vessel. By our previous memorandums, which we now con-

firm, you will find that we rejected your tender of pepper by this vessel."

On the 26th of June samples of the pepper which was included in the declaration on the 19th of January, as altered by that of the 5th of February, and all of which was a November shipment, were tendered. The defendants rejected the whole of these samples, and this action was then brought.

I have already stated my opinion that there was no waiver of the time within which the declaration was to be made, and no conduct of the defendants estopping them from setting up the breach of the stipulation in regard to time, and it follows that the declaration not being in time, as regards five tons, the plaintiffs cannot maintain their action for the non-acceptance of the whole twenty-five tons.

The argument before us has, however, been mainly directed to the question whether the plaintiffs can maintain this action in respect of the twenty tons. I am of opinion that they cannot. The subject of the contract is the sale of a specific quantity of a given article with a margin for a moderate excess or diminution of that quantity under the words "about" and "more or less."

The rule applicable to such a contract, if it were not qualified by other provisions, would be that, subject to the moderate margin, the sellers cannot call upon the buyers to accept any greater or less quantity of the article bargained for than the specified quantity.

In the present case if the five tons shipped, or declared too late, be excluded, the diminution in quantity is clearly beyond the margin. But the contract also provides that the shipment is to be "per sailing vessel or vessels, and that the name of the vessel or vessels, &c., is to be declared within sixty days of the bill of lading." Founding their argument on these provisions, the plaintiffs contend that they were entitled to call upon the defendants to accept delivery of any substantial portion of the pepper whatever might be their position or declared intentions as regards the remainder, and they rely upon the decision of *Brandt v. Lawrence* (1) in support of this view. The defendants, on the other hand, contend

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that they were not bound to accept anything less than the whole of the pepper, subject to a moderate margin, except in the case of loss of vessel or vessels and pepper expressly provided for by the contract; or at least, that under the circumstances of this case they were not so bound. I do not accede to the defendants' contention, so far as it rests on the provisions of the contract relating to the loss of vessel or vessels or pepper; for these provisions are in my opinion inserted *alio intuitu*. I think that they were intended to protect the sellers from any action for non-delivery caused by the happening of the contingencies provided for. But I am of opinion that the defendants' contention is otherwise well founded. *Brandt v. Lawrence* (1) was a case where Russian oats were sold under a contract by which the shipment was to be by steamer or steamers in a particular month conditionally upon ice at loading port not preventing it, in which event shipment was to be made immediately after the opening of the navigation. Payment was to be made in respect of any shipment by cash on receipt of, and in exchange for shipping documents. Under this contract a portion of the oats, together with other oats the subject of another contract, was shipped in consequence of ice after the specified month, but immediately after the navigation was opened, and was refused by the defendants on the ground that the shipment had been made too late. At the time of this refusal the sellers were acting in strict accordance with their contract, and there was nothing to indicate that the contract would not be performed by them in its entirety. Afterwards, and beyond the time allowed by the contract, the remainder of the oats were shipped, and were also, but in this case rightly, refused. In an action for non-acceptance of both parcels of oats, the facts were proved as above stated, and a verdict having been found for the plaintiffs in respect of the first shipment, a motion for a new trial was refused both in the Queen's Bench Division and on appeal in this Court.

But in the present case the facts are very different. In the first place, the

declaration of the pepper named but one ship, and the pepper tendered did in fact arrive by one ship. In the second place, there has not been at any time either a declaration or a tender of the twenty tons of pepper which the plaintiffs contend that the defendants are bound to accept, apart from the five tons which, upon this branch of the case, they admit that the defendants were not bound to accept. The matter seems to stand thus: if the declaration of the 19th of January be relied upon, then the plaintiffs indicated by that declaration their intention of calling upon the defendants to accept under the contract of the 29th of December, 1876, twenty-five tons of pepper, five tons of which were not of October or November shipment. If the declaration of the 5th of February be relied upon as severing those five tons from the remainder, and cancelling the previous declaration made of the twenty-five tons, then it is clear that it at the same time added another five tons, which the defendants were equally not bound to accept, inasmuch as the sixty days within which the declaration was to be made had expired, and even if those five tons had not been added, the declaration of the twenty tons as a separate parcel would seem only to date from that day, and would, therefore, also be too late. But the plaintiffs endeavoured to displace these positions by the argument that, as the pepper tendered was shipped under three separate bills of lading, and was so declared, the declaration and tender, although one in fact, may be treated as separable in law, and consequently that the defendants were bound to accept the twenty tons, which, upon this hypothesis, were properly declared and tendered.

I cannot assent to this argument. In mercantile contracts like the present, the making within a given time of a declaration or declarations upon which the buyers may act, is an essential feature of such contracts; and further, although the sellers have an option to ship the article contracted to be sold, either by one or more vessels, and the provision in the contract to that effect may give, as, according to *Brandt v. Lawrence* (1), it does give, the sellers a right to call upon

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the buyers to accept any portion of the quantity contracted to be sold, which has been shipped and declared in accordance with the contract, and, as a step towards its entire performance, it does not appear to me, by any means, to follow that the quantity named in the contract is not still of the essence of the contract, and if it be so, the case is, in this respect, distinguishable from *Simpson v. Orippin* (4), and cases of that class, where each delivery of coal was really like a delivery under a separate contract, to be paid for separately, and in respect of the non-delivery of which the parties might well be assumed to have contemplated a payment in damages rather than a rescission of the whole contract. But, however this may be, the present contract ought to and must, in my opinion, at least, involve this consequence, namely, that where the sellers elect to ship by one vessel the whole quantity contracted to be sold, and declare their election to the buyers, still more when they follow up their election and declaration by tendering the whole quantity pursuant to their declaration, they cannot, after it is discovered that as to a portion of the quantity shipped it was not shipped in accordance with the terms of the contract, and that the buyers are not bound to accept that portion, turn round and call upon them to accept the remaining portion of the quantity shipped, which though physically separable, and the subject of distinct bills of lading, yet had always been treated by the sellers as part of one entire whole, which the buyers by the declaration were told to treat, and by the tender were called upon to accept, as one entire whole.

The matter may be made more plain by reversing the position of the parties, and supposing a declaration such as was made in this case on the 19th of January, and that the fact had been that all the three parcels had been shipped in accordance with the terms of the contract; suppose, also, that under such circumstances the defendants had, either at the time of declaration or when the pepper was tendered, expressed their willingness to take the twenty tons, but had absolutely refused to take the five, the plaintiffs might clearly have said, we make this declaration or tender as a whole, and will

only deliver the pepper comprised in it as a whole. If that be not so, where would the defendants' right of separation cease? They might, of course, take one only of the three parcels, and it is difficult to see on what logical or legal principle they might not demand to have some bags out of the one parcel, and say, "We will pay for the non-acceptance of the remainder in damages." This would reduce the matter to a practical absurdity. But, on the other hand, if the seller's right would, under the circumstances supposed, be such as I have suggested, namely, the right to have the pepper accepted as a whole, and the consequent right of treating the contract at an end if the buyers refuse to accept it as a whole, surely the converse proposition must hold, namely, that where the shipment comprised in one declaration is in part good and in part bad, and although the good and bad parts are separable, yet the sellers adhere to the declaration as a whole and tender the shipment as a whole, the buyers must have a right to reject unconditionally both the declaration and the whole of the goods tendered under it; and, further, that the defendants would not be bound to accept the part of the shipment which in itself complied with the terms of the contract, if after the declaration and tender, and after it was apparent that the sellers' contract could not be performed in its entirety, by delivery of the whole of the goods contracted to be sold, the sellers separated the good portion of the shipment from the bad, and made a fresh tender of the former for acceptance. Looking at the case from this point of view, it is really untouched by either the coal cases to which I have referred, or the decision in *Brandt v. Lawrence* (1), and upon the grounds mentioned I arrive at the conclusion that the plaintiffs cannot maintain their action against the defendants in respect of any portion of the pepper which was the subject of their contract, and that the judgment of Lord Coleridge, C.J., should therefore be affirmed.

COTTON, L.J.—This was an action on a contract dated the 29th of December, 1876, whereby the defendants agreed to

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buy from the plaintiffs twenty-five tons of pepper, more or less, of October or November shipment, from Penang to London, per sailing vessel or vessels, the name of the vessel or vessels, marks, and other particulars, to be declared within sixty days from the date of the bill of lading.

On the 19th of January, 1877, the plaintiffs, by a letter addressed to the defendants, declared twenty-five tons of pepper shipped in several parcels on board the *Borga*. Of these twenty-five tons five had in fact been shipped in December, and were, therefore, not pepper which, according to the contract, the defendants were bound to take; and on the 30th of January the defendants declined to take the twenty-five tons. Afterwards, but after the expiration of the time within which the pepper was under the contract to be declared, the plaintiffs declared other five tons of pepper shipped in November on board the same vessel, in substitution for the five tons previously declared, but which were not shipped till December, and to which the defendants had a right to object. The vessel arrived in this country in June, and the defendants refused to take the pepper, hence the present action, and Lord Coleridge, C.J., decided in favour of the defendants that they were not bound to take the twenty-five tons of pepper, or any part thereof.

The plaintiffs have appealed to this Court. The first point urged by the plaintiffs was, that the defendants, before the expiration of the time within which, under the contract, the plaintiffs were to declare the twenty-five tons, had by their conduct either waived the condition as to time, or induced the plaintiffs to believe that the condition would not be insisted on, until it was too late for them to declare other five tons in substitution for that part of the twenty-five tons which were shipped in December, and, therefore, not in accordance with the contract. In my opinion this contention cannot be supported. It was for the plaintiffs to declare twenty-five tons of pepper of the quality and shipped at time stipulated by the contract, and to do so within a limited time. The defendants were indeed asked, on the 27th of

January, whether they insisted on the objection that five tons were not of October or November shipment, and they did not answer till the 30th of January. But there is really nothing to support the contention that this delay, if any, was intended to mislead the plaintiffs, and in the absence of evidence from which such a conclusion could be arrived at, we cannot relieve the plaintiffs from the stipulation as to time.

It was argued that the rules of Courts of equity are now to be regarded in all Courts, and that equity enforced contracts though the time fixed therein for completion had passed. This was in cases of contracts such as purchases and sales of land, where unless a contrary intention could be collected from the contract, the Court presumed that time was not an essential condition. To apply this to mercantile contracts would be dangerous and unreasonable. We must therefore hold that the time within which the pepper was to be declared was an essential condition of the contract, and in such a case the decisions in equity, on which reliance is placed, do not apply.

But then it was urged, that the contract was divisible, and that the defendants were bound to take the twenty tons, that is to say, that although five tons was a difference which could not be covered, by the words more or less under this contract, the defendants would be bound to take and pay for any substantial portion of the twenty-five tons, which the plaintiffs might be ready and willing to deliver to them; and in support of this contention, reliance was placed on the words "per sailing vessel or vessels;" and it was argued that this shewed that the contract was divisible. In my opinion, it has not this effect. These words did indeed shew that the twenty-five tons might be delivered in several parcels, and possibly might arrive in England at different times. But this is very different from the contention that the defendants having stipulated for twenty-five tons, would be bound to take a small portion, say five tons, when the plaintiffs were unable or unwilling to supply the balance of the stipulated quantity. The contract in this case was in December, after the pepper must, in order to comply with the

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condition of the contract, have been shipped, and I think that the reference in the contract to "vessel or vessels," may well have been intended to obviate any difficulty arising from the circumstance of twenty-five tons, the required quantity of pepper, not having been shipped in one vessel. But I think that to enable the plaintiffs to require the defendants to take and pay for the pepper, there must be the twenty-five tons, though on different vessels. But it is urged that the decision in *Brandt v. Lawrence* (1) had given a judicial interpretation of these words, "per vessel or vessels," in a contract which would be otherwise entire and indivisible. I cannot consider the case of *Brandt v. Lawrence* (1) as laying down a general rule of construction, but merely as deciding that the contract in that case having regard to the words "vessel or vessels," was divisible. The contract is not stated at length in the report, but we have been furnished with a copy of it. There the contract was entered into before the shipment was under the contract to be made; and payment was to be made in cash on receipt of, and in exchange for, shipping documents. In that case the seller shipped in a vessel, a portion of the oats, and tendered it to the buyer with a view to the supply of the entire quantity, and the whole of the oats in that vessel were oats which complied with the conditions of the contract as to quality and time of shipment, and the seller had therefore, under the contract, a right to ask for the price in cash for this part of the entire quantity in exchange for the bill of lading. This is, I think, a substantial difference between the contracts in the two cases, and sufficient to prevent the construction put upon the contract in that case, affording authority for the decision in favour of the plaintiffs in the present contract. There is also a difference in the circumstances under which the plaintiffs in this action make their claim, for in the present case the plaintiffs have not severed or separated the twenty-five tons of pepper, which is the subject of the contract, in the only way contemplated by the contract, namely, by shipping it in different vessels; but have

shipped in one vessel twenty-five tons of which they contended the defendants are bound to take the whole. I am of opinion that the decision of Lord Coleridge, C.J., was correct, and must be affirmed.

BRETT, L.J.—In this case the facts which I consider material are that a contract of purchase and sale was entered into between the plaintiffs and defendants on the 29th of December, 1876. By it the plaintiffs sold to the defendants about twenty-five tons, more or less, Penang black pepper, and October or November shipment, from Penang to London per sailing vessel or vessels, at 4*d.* and 3-16ths of a penny per lb. The name of the vessel or vessels, marks, and full particulars to be declared to the buyers in writing within sixty days from date of bill of lading; but should the vessel or vessels which may apply to this contract be lost before declaration this contract to be cancelled as far as regards such lost vessel; should the vessel or vessels and the pepper, or any portion thereof be lost, this contract to be cancelled for the whole or such portion, &c. Prompt three months from final day of landing. Deposit twenty per cent., and difference on presentation of weight notes. No discount.

In fulfilment of this contract the plaintiffs, on the 19th of January, within sixty days of the dates of three respective bills of lading of pepper shipped on board a vessel called the *Borga*, declared in one declaration three distinct parcels of pepper, all on board the *Borga*.

Thus :—S B

B 285 bags—bill of lading dated 29th November.

C 110 bags—bill of lading dated 29th November.

F 105 bags—bill of lading dated 11th December.

Two of the parcels, which amounted to twenty tons, were shipped and declared in accordance with contract; but the third parcel, although declared within due time after the date of the bill of lading, did not fulfil the contract, because it was not a November shipment.

The plaintiffs were asked whether this declaration, which both parties called a tender, was final, and answered that it was. On the 27th of January the plain-

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tiffs asked whether the defendants would accept the December shipment named in the declaration of the 19th of January. No definite answer was given. But on the 2nd of February the defendants refused the whole on the ground that a part was not a November shipment. It is somewhat difficult to appreciate the legal effect of this refusal. I know of no legal obligation to accept or reject a declaration which is an act to be done solely by the seller, or of any legal effect to be given to an alleged refusal to accept a declaration. The highest effect which can be given to this refusal, at this time, is that it is a notice by the defendants that they do not accept the declaration as good for twenty-five tons.

On the 5th of February the plaintiffs wrote to substitute for the December shipment a November shipment, which was also on board the *Borga*. The date of the bill of lading of this lot was the 29th of November, that is, they offered a November shipment. But they made the offer or declaration more than sixty days after the date of the bill of lading. This was refused by the defendants. The *Borga* arrived in June. The plaintiffs then tendered three parcels of Penang pepper, all of November shipment, and amounting in all to twenty-five tons, being the two parcels of November shipment, declared on the 19th of January, and the one parcel offered or declared on the 5th of February, but which last was not declared within sixty days of the date of the bill of lading relating to it.

The defendants refused to accept any part on the ground, by reference to their former letter as to the declaration, that they would not receive a part if offered, because the whole had not been declared according to contract. Upon this state of facts it is obvious that the declaration of twenty tons per *Borga* made on the 19th of January was a sufficient declaration of twenty tons unless the declaration of so much was rendered nugatory by the wrong declaration of the other five tons, the December shipment. And it is equally obvious that after the 28th of January the plaintiffs could not make a valid declaration of any November shipment, so that on the arrival of the

ship in June the plaintiffs could only tender as well shipped and also well declared twenty tons, and could not by any contrivance tender as well shipped and also well declared the other five tons. The plaintiffs did tender twenty-five tons. If the defendants had refused on the ground of having twenty-five tons offered to them, whereof they were bound to take only twenty tons, so that they left it open to be said that if the twenty tons had been offered to them they might have accepted them, then the tender of the twenty-five tons must have been bad, but the defendants did not take that point, they refused in terms which amounted to saying that they would not take the twenty-five tons, nor the twenty tons if offered, because they could not have the twenty-five shipped and also declared according to contract. This refusal seems to me to have absolved the plaintiffs from the necessity of tendering separately the twenty tons, and to oblige us to treat the case of liability as if the plaintiffs had tendered the twenty tons at the time when they tendered the twenty-five tons. The question is whether if the plaintiffs had tendered the twenty tons only, not being able to tender according to contract any five tons to make up the twenty-five tons, the defendants could have refused to accept the twenty tons. That raises, first, the question what is the proper construction of the contract? In *Jonassohn v. Young* (11), an action was brought for not accepting coals, the contract was that the plaintiff would sell and deliver to the defendant as many coals equal to a former sample cargo as a steamer called the *Great Northern* could fetch in nine months, proceeding to and from Sunderland, from and to London, backwards and forwards in successive voyages. The steamer to be sent by the defendant, and the plaintiff to ship the coals at 5s. 9d. a ton, payment at the beginning of each month for the preceding month's shipments, less 2½ per cent. discount. The defendant pleaded that in the first voyage the plaintiff shipped a cargo not equal to sample,

(11) 4 B. & S. 297; s. c. 32 Law J. Rep. Q.B. 385.

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to this plea there was a demurrer. The failure of the first cargo was therefore admitted. It was impossible that the plaintiff could by any subsequent deliveries satisfy the contract, if it was one and indivisible; but the Court held that the plea was bad because the breach by the plaintiff went only to part of the consideration. Now the consideration for the whole of the defendant's undertaking, which was of course the undertaking to accept and to pay for all which the plaintiff was to deliver, was that the plaintiff undertook to deliver all, and to deliver a cargo each time that the defendant should send the steamer. The judgment is that the failure to deliver the first cargo according to contract, though an incurable failure, did not absolve the defendant from the duty of accepting the subsequent cargoes, because the failure as to the first cargo was only a breach of a part of the consideration moving from the plaintiff.

Apply that case to the question raised in this. Here the whole consideration for the defendants' promise to accept the pepper was the plaintiffs' promise to deliver the whole twenty-five tons. The plaintiffs were ready and willing to deliver twenty tons, but failed by an incurable failure to be able to deliver the other five tons. The case cited answers that the failure of the plaintiffs is a breach of only a part of the consideration, and the defendants are not absolved from the duty of accepting the twenty tons. In *Simpson v. Crippin* (4), the action was for non-delivery of coal, the defendants agreed to supply the plaintiffs with from 6,000 to 8,000 tons of coal, to be delivered into plaintiffs' waggons at defendants' collieries in equal monthly quantities during the period of twelve months from the 1st of July at 5s. 6d. per ton; terms, cash monthly, less 2½ per cent. discount. The plaintiffs failed to send waggons according to the contract in the first month, that was an incurable failure. Their part of the whole contract never could afterwards be fulfilled. The Judge told the jury that, as the plaintiffs did not intend to break the contract month by month, and only broke it for the first month's delivery, that did not justify the

defendants in point of law in cancelling the contract. "It cannot be denied," says Blackburn, J., "that the plaintiffs were bound in every month to send waggons capable of carrying at least 500 tons, and that by failing to perform this term they have committed a breach of the contract, and the question is, whether by this breach the contract was determined. The defendants contend that the sending of a sufficient number of waggons by the plaintiffs to receive the coal was a condition precedent to the continuance of the contract, and they rely on the terms of the letter of the 1st of August. No sufficient reason has been urged why damages would not be a compensation for the breach by the plaintiffs, and why the defendants should be at liberty to annul the contract." Apply that case to the present. The point taken on behalf of the defendants is, that by reason of the incurable breach as to the five tons, the defendants are entitled to rescind the contract as to the twenty tons. The answer is, no sufficient reason has been shewn why damages would not be a compensation for the breach by the plaintiffs as to the five tons. In *Brandt v. Lawrence* (1) the action was for non-acceptance of oats. By the contract the defendant bought of the plaintiff 4,500 quarters of Russian oats, at 23s. per delivered 304 lbs., including freight and insurance to London. Shipment by steamer or steamers during February. Payment by cash on receipt of and in exchange for shipping documents, less interest at 5 per cent. for the unexpired portion of three months from date of bill of lading. In fulfilment the plaintiff tendered 1,139 quarters per *Winsland*. The defendant for a given reason refused to accept them. The plaintiff afterwards tendered the balance of quantity brought by a ship called the *Oxford*, but brought too late. At the time of action brought, therefore, the plaintiff had tendered in good time a part of the oats, but had never tendered, and never could tender, the balance within the terms of the contract, if treated as one and indivisible. It was argued for the defendant that the contract was an entire contract for the delivery of



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4,500 quarters of oats within a specified time; it could not be split into parts; if the whole was not shipped in time, the defendant was entitled to reject the part which was in time. The Queen's Bench Division thought that this was not so, because the contract says, "shipment by steamer or steamers." In the Court of Appeal, Mellish, L.J., said, "I think the legal inference is that it was intended that the shipment should be made (which must mean might be made) in different parcels, and that the purchaser was bound to accept them as they came if they were in time;" and, again, "was the purchaser bound to accept that part of the goods which was shipped in time? I am of opinion that he was, because the contract says that the shipment is to be made by steamer or steamers." That judgment was rested solely on the construction of the contract, no reliance was placed on any power of election by the seller to send by two ships instead of one. As the case stood, it was the same as if he had only shipped a portion by one ship and had never shipped the other portion by any ship. The late shipment was no shipment according to the contract. Apply that case to the present. The contention here is that the defendant was not bound to accept twenty tons, because there was no shipment and declaration of five tons according to contract. The question is, was the defendant, the purchaser, bound to accept that part of the goods which was shipped and declared in time? The answer, according to the Queen's Bench Division, and on appeal in the case cited, is that he was, because the contract says that the shipment is to be—that is, may be—in "sailing vessel or vessels." Mellish, L.J., cited in that case the case of *Simpson v. Orippin* (4). It is obvious to my mind that he considered the case before him to be governed by that case, and that case was in its turn in terms founded on *Jonassohn v. Young* (11). The chief use of authoritative cases is to enable us to deduce, if we can, a general principle applicable to succeeding similar, though not identical cases. It seems to me that the general principle to be deduced from these cases is, that where in a mercantile contract

of purchase and sale of goods to be delivered and accepted, the terms of the contract allow the delivery to be by successive deliveries, the failure of the seller or buyer to fulfil his part in any one or more of those deliveries does not absolve the other party from the duty of tendering or accepting in the case of other subsequent deliveries, although the contract was for the purchase and sale of a specified quantity of goods, and though the failure of the party suing as to one or more deliveries was incurable in the sense that he never could fulfil his undertaking to accept or deliver the whole of the specified quantity. The reasons given are that such a breach by the party suing is a breach of only part of the consideration moving from him; that such a breach can be compensated in damages without any necessity for annulling the whole contract; that the true construction of such contracts is that it is not a condition precedent to the obligation to tender or accept a part; that the other party should have been, or should be always ready, and willing, and able to accept or tender the whole. A consideration of the mercantile consequences of otherwise construing such contracts seems to me to fortify the one construction and to condemn the other. Suppose, in the case of shipments, the seller, to have by contracts made abroad, provided for all the successive shipments, and to have taken up ships to proceed and call for the successive cargoes, and the first seller to him fails to fulfil his contract, so that the first shipment fails, the purchaser under the main contract we are discussing may, upon one construction suggested, throw up the whole contract, although he could be amply recompensed for the partial failure, and throw the loss of all the other purchases and charters upon the seller without any compensation. So if the purchaser has made contracts, and fails to take delivery of one parcel, the seller, although he might be amply compensated for the partial failure, would be entitled to ruin the buyer with regard to his forward contracts without any compensation. Again, suppose any one of the ships lost after a perfectly good shipment by several ships, either buyer or

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seller might at once cancel the whole contract, to the irreparable loss of the other party, although he himself might be amply compensated by a payment in damages; or suppose a seller to send all the stipulated quantity in one ship, and a jettison to have become inevitable on the voyage, he is to have the whole of the remainder of the cargo left on his hands without compensation, although the buyer might easily be compensated for the short delivery. These considerations shew that the rule of construction adopted by the Courts is as sound on mercantile as it is on legal considerations, and all the considerations, both mercantile and legal, apply as much and as fully to the present contract as to those cited. The question as to the time or mode of payment has nothing to do with the reasoning for or against either view; moreover, it is most important, in my opinion, that the construction of mercantile contracts should be broad and large, and should not depend on refined logical deductions, or on slight variations either in the terms or the conditions of each particular contract. The contract, for instance, now before us differs as to the period and conditions of payment from that in *Brandt v. Lawrence* (1), but it differs very little as to the terms of payment from the other cited cases. That difference as to the periods of payment makes no difference in the reasons given for the decisions in those cases in which the stipulation as to the payment was not noticed, and in *Brandt v. Lawrence* (1) it is not even reported.

I am of opinion that the plaintiffs are entitled to recover in respect of twenty tons, leaving the defendants to a cross action in respect of five tons.

*Judgment affirmed.*

Solicitors—John Rae, for plaintiffs; Hollams, Son & Coward, for defendants.

[IN THE COURT OF APPEAL.]

1879. } THE EMMA MINING COMPANY  
May 28. } v. LEWIS AND SON.\*

*Practice—Appeal—Stay of Execution—Notice of Motion—Rules of Court, 1875, Order LVIII. rule 16.*

*Upon an appeal being brought, an original application to the Court of Appeal for a stay of execution upon the decision appealed from is a motion of which notice must be given to the other side, and which cannot be made ex parte.*

In this action the jury found that the defendants were promoters of the Emma Mining Company, and Denman, J., on further consideration, held that there was evidence to support that finding, and gave judgment for the plaintiffs.

The defendants gave notice of appeal from that judgment.

The defendants also obtained in the Common Pleas Division a rule *nisi* for a new trial, on the ground of mis-direction, and that the verdict was against the weight of evidence. This rule was (on May 23rd) discharged, and the defendants gave notice of appeal from that judgment also.

*H. Collins* (on May 28th) moved *ex parte*, on behalf of the defendants, for a stay of execution pending the two appeals, and also asked that the two appeals should be heard together.

[BRAMWELL, L.J.—Can this motion be made *ex parte*? Must you not give notice to the other side?]

It is believed that the application for stay of execution is, if an appeal is being *bona fide* prosecuted, considered formal, and is made without giving notice to the other side.

[BRAMWELL, L.J.—I find an authority on the point—*The Republic of Peru v. Weguelin*, 24 W. R. 297.]

PER CURIAM.—After an appeal has been brought, notice of an original application to this Court for stay of execution must be given to the other side, but in this

\* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Thesiger, L.J.

*Emma Mining Co. v. Lewis, App.*

case, as the present Sittings end on May 30th, short notice of motion may be given for that day (1).

*Foulkes* (on May 30th), on behalf of the plaintiffs, mentioned to the Court that the application for stay of execution had been made to the Common Pleas Division, in accordance with the provisions of Order LVIII., rule 17, of the Rules of Court, 1875. The Court of Appeal thereupon ordered that the two appeals should be argued together.

Solicitors—Burton, Yeates & Hart, agents for Tyrer, Kenion & Co., Liverpool, for applicant; F. W. Snell & Co., for plaintiffs.

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1879. { *Ex parte HUTCHINGS AND*  
June 11. { *ROMER; Re THE SONGS*  
                  { *"KATHLEEN MAYOURNEEN"*  
                  { *AND "DERMOT ASTORE."\**

*Musical Composition—Copyright—Sole Liberty of performing—Entries on Register—Motion to expunge—3 & 4 Will. 4. c. 15—5 & 6 Vict. c. 45. ss. 2, 14, 20, 22.*

*The Statute 5 & 6 Vict. c. 45. s. 20, applies the provisions of 3 & 4 Will. 4. c. 15. s. 1, to musical compositions, and 5 & 6 Vict. c. 45, applies therefore to the right of performing musical compositions published within ten years before the passing of that Act.*

*O. assigned by deed in 1843 to D. his copyright in certain songs which had been composed by him in 1836 and registered in 1841, and also the sole liberty of printing and publishing the same, "together with the sole and exclusive privilege of vending the same and all other his estate, right and title, interest, property, contingent possibility, benefit, claim and demand whatsoever, both at law and in equity," in those compositions:—*

*Held, that after the 5 & 6 Vict. c. 45, the author had two distinct rights in these songs, the copyright and the sole right of representation or performing, and these words in the deed passed both the copyright and the sole liberty of performing the songs.*

*C. afterwards assigned to A. the exclusive right of performing the same songs, and A. made entries on the Register at Stationers' Hall, representing himself as the proprietor, under that assignment, of that right. H., claiming title under the earlier assignment to D., moved to expunge these entries:—*

*Held (affirming the judgment of the Queen's Bench Division), that H. was a person "aggrieved" within the meaning of section 14 of 5 & 6 Vict. c. 45, and that the entries must be expunged.*

Appeal by the defendant from an order of the Queen's Bench Division. The case is reported *ante*, p. 29.

Messrs. Hutchings & Romer applied under section 14 of 5 & 6 Vict. c. 45 (1)

(1) 5 & 6 Vict. c. 45. s. 2.—"In the construction of this Act the word book shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letter press, sheet of music, map, chart or plan separately published."

Section 4.—"And whereas it is just to extend the benefits of this Act to authors of books published before the passing thereof, and in which copyright still subsists, be it enacted That the copyright which at the time of passing this Act shall subsist in any book heretofore published (except as hereinafter mentioned) shall be extended and endure for the full term provided by this Act in cases of books thereafter published, and shall be the property of the person who at the time of the passing of this Act shall be the proprietor of such copyright: Provided always that in all cases in which such copyright shall belong in whole or in part to a publisher or other person who shall have acquired it for other consideration than that of natural love and affection, such copyright shall not be extended by this Act; but shall endure for the term which shall subsist therein at the time of the passing of this Act and no longer, unless the author of such book . . . and the proprietor of such copyright shall, before the expiration of such term, consent and agree to accept the benefits of this Act in respect of such book, and shall cause a minute of such consent . . . to be entered in the book of registry . . . in which case such copyright shall endure for the

(1) *Quere*, as to whether this application ought not in the first instance to have been made in the Court below—see *Goddard v. Thompson*, 47 Law J. Rep. Q.B. 382 (Court of Appeal).

\* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

*Ex parte Hutchings (App.), Q.B.*

to the Queen's Bench Division to order certain entries in the register at Stationers' Hall in reference to two songs called "Kathleen Mavourneen" and "Dermot Astore," of which they were the publishers, to be expunged. It appeared from the affidavits that the music

full term by this Act provided in cases of books to be published after the passing of this Act, and shall be the property of such person or persons as in such minute shall be expressed."

Section 12.—"If any person shall wilfully make or cause to be made any false entry in the registry book of the Stationers' Company . . . he shall be guilty of an indictable misdemeanour."

Section 14. "If any person shall deem himself aggrieved by any entry made under colour of this Act in the said book of registry, it shall be lawful for such person to apply by motion . . . for an order that such entry may be expunged or varied. . . ."

Section 20. "And whereas an Act was passed in the third year of the reign of his late Majesty to amend the law relating to dramatic literary property, and it is expedient to extend the term of the sole liberty of representing dramatic pieces given by that Act to the full time by this Act provided for the continuance of copyright. And whereas it is expedient to extend to musical compositions the benefit of that Act and also of this Act, be it therefore enacted that the provisions of the said Act of his late Majesty and of this Act shall apply to musical compositions, and that the sole liberty of representing or performing or causing or permitting to be represented or performed any dramatic piece or musical composition, shall endure and be the property of the author thereof and his assigns for the term in this Act provided for the duration of copyright in books; and the provisions hereinbefore enacted in respect of the property of such copyright and of registering the same shall apply to the liberty of representing or performing any dramatic piece or musical composition as if the same were herein expressly re-enacted and applied thereto, save and except that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent in the construction of this Act to the first publication of any book."

Section 22. "No assignment of the copyright of any book consisting of or containing a dramatic piece or musical composition shall be holden to convey to the assignee the right of representing or performing such dramatic piece or musical composition, unless an entry in the said registry book shall be made of such assignment, wherein shall be expressed the intention of the parties that such right should pass by such assignment."

Section 28. "Nothing in this Act contained shall affect, alter or vary any right subsisting at the time of the passing of this Act, except as herein expressly enacted. . . ."

of the two songs was composed by one Crouch in England about 1836, and that the copyright was registered by him at Stationers' Hall in 1841. In 1843 a deed was made between Crouch of the one part and D'Almaine & Mackinlay of the other part, which, after reciting that "Crouch had lately written and composed certain books, pieces or compositions of music, and had contracted to sell the said books, pieces or compositions of music, and also his the said Crouch's property and copyright therein and every part thereof," witnessed "that the said Crouch assigned unto D'Almaine & Mackinlay, their executors, administrators and assigns, all the present and future vested and contingent copyright of him Crouch of and in the said books, pieces or compositions of music, and the sole and exclusive liberty of printing and publishing the same and every part thereof, and all and every edition or editions thereof under or by virtue of an Act passed in the 6th year of Victoria, cap. 45, and all preceding Acts, as also by common law or otherwise, together with the sole and exclusive privilege of vending the same compositions of music, and all other the estate, right, title, interest, property, contingent possibility, benefit, claim and demand whatsoever, both at law and in equity, of him the said Crouch of and in the said books, pieces or compositions of music aforesaid, and the copyright and all and singular other the poems thereby assigned with their rights and privileges unto the said D'Almaine & Mackinlay, their executors, administrators and assigns, for their own absolute use and benefit, in as full, ample, exclusive and beneficial a manner to all intents and purposes as the said Crouch could or might have held or enjoyed the same in case that indenture had not been made."

In October, 1867, and January, 1868, the executors of Mackinlay, the surviving partner of D'Almaine & Mackinlay, assigned by deed to Hutchings & Römer their interest, whether copyright or otherwise, in the two songs in question, and the right of representing and performing the same. In August, 1878, Crouch assigned to Adams "the sole

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liberty of performing or singing or causing or permitting to be performed or sung" the two songs, and Adams made six entries on the register at Stationers' Hall. Two entries, dated the 19th of September, 1878, stated that Crouch was the proprietor of the liberty of representing and performing the two songs; two entries dated the 21st of September, 1878, stated the assignment of that right of representation to Adams; and two other entries stated that Crouch and Adams had consented and agreed to accept the benefits of 5 & 6 Vict. c. 45, for the extension of the term of the liberty of performance of these songs.

The Queen's Bench Division ordered all the entries to be expunged.

Adams appealed.

*O. Turner*, for the appellant.—The Court below considered that 5 & 6 Vict. c. 45 (1) did not apply to musical compositions published before the passing of the Act; but the attention of the Court was not then directed to the provisions of 3 & 4 Will. 4. c. 15 (2), which are incorporated into the Act of Victoria, and are by section 20 (1) made applicable to musical compositions published, as these songs were, within ten years before the passing of the Act, so that Crouch had both a copyright and a right of exclusive representation in these songs.

(2) 3 & 4 Will. 4. c. 15. s. 1, enacts that "from and after the passing of this Act the author of any . . . dramatic piece or entertainment composed, and not printed and published by the author thereof or his assignee, or the assignee of such author, shall have as his own property the sole liberty of representing . . . any such production as aforesaid not printed and published by the author thereof or his assignee, and shall be deemed and taken to be the proprietor thereof, and that the author of any such production printed and published within ten years before the passing of this Act by the author thereof or his assignee, or which shall hereafter be so printed and published, or the assignee of such author, shall from the time of the passing of this Act or from the time of such publication respectively until the end of twenty-eight years . . . have as his own property the sole liberty of representing or causing to be represented the same at any such place of dramatic entertainment as aforesaid and shall be deemed and taken to be the proprietor thereof."

The question then becomes one of title. Crouch composed these songs and parted with the copyright in 1843 to D'Almaine; but he did not then transfer the sole liberty of representing or performing the songs; this right he assigned to Adams in 1878, and Adams therefore rightly made the entries on the register at Stationers' Hall, which the Queen's Bench Division has ordered to be expunged.

Hutchings & Romer, who applied to have the entries expunged, claim the sole liberty of representing or performing the songs under the deed of assignment made in 1843 to D'Almaine & Co., their predecessors in title. It is clear that that deed conveys the copyright; but it does not transfer the sole liberty of representing or performing the songs. The effect of 5 & 6 Vict. c. 45 is to create a second right or property in a musical composition, in addition to the copyright which existed before, and the new right thus created is the sole liberty of representation; this deed passes the former but not the latter right, the large words which follow the conveyance of the copyright are general words following particular words, and must, according to the usual rule, only be taken to convey things *ejusdem generis* with and in reference to the same subject matter as that conveyed by the particular words, so that what is here transferred is the copyright alone. It was decided in *Cumberland v. Planché* (3) that when an author assigned the copyright he also parted with the right of representation, and after that decision 5 & 6 Vict. c. 45 was passed with the view of changing the law; and section 22 (1) was intended to meet the difficulty raised by that decision—*Lacy v. Rhys* (4). The earlier part of the deed contains recitals which do not enlarge the meaning of the words of grant, and the general words will not pass any property as distinct from copyright, especially as there is a regular way of passing the right of representation pointed out by section 22 (1) of the Act, and in the

(3) 1 Ad. & E. 580; s. c. 3 Law J. Rep. K.B. 194.

(4) 4 B. & S. 873; s. c. 33 Law J. Rep. Q.B. 157.

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present case no entry has been made in the register in accordance with that section.

Even if the first and second entries be expunged, the third, which refers to the agreement made between Crouch and Adams under section 4 (1) as to the extension of time should remain, as it secures Adams certain benefits in case of the death of the author.

*F. Raikes*, for *Hutchings & Romer*.—Before the passing of the Act of Victoria these songs were in a sense public property; there was a copyright in them; but any person could perform them: the right of exclusive performance was created by 5 & 6 Vict. c. 45, and it is expressly enacted in section 28 (1) that nothing in the Act shall "vary any right subsisting at the time of passing this Act," except by express enactment, as in the case in section 4 (1), where the term of copyright is expressly extended. It is, moreover, not probable that this Act was intended to be retrospective, for it might cause persons who had innocently performed songs before this new right was created to be subjected to heavy penalties. There was in 3 & 4 Will. 4. c. 15, a retrospective provision in section 1, but there is no similar provision in 5 & 6 Vict. c. 45.

The appellant is estopped from denying the respondents' right, for Crouch assigned his alleged right to him after a judgment of the Queen's Bench Division ordering an entry similar to those the subject of this appeal to be expunged, and pending his appeal from that order; he failed to give security for costs as ordered, and his appeal has consequently been struck out, so that the judgment of the Queen's Bench Division stands, and that judgment being a judgment in favour of *Hutchings & Romer* binds Crouch and his privies, of whom Adams, a direct assignee from Crouch, is one—*The Queen v. Hartington* (5); *Huffer v. Allen* (6). This is important because Crouch, not being now resident in England, cannot be prevented in any other way from

making fresh assignments, and thus causing fresh entries to be made, as he cannot be made liable to the penalties imposed by section 12 (1) on persons who wilfully make or cause to be made false entries on the register. Next, the respondents have a good title under the earlier deed of assignment by Crouch; they do not claim by virtue of any assignment entered on the register, and therefore section 22 (1) does not apply to them; they claim under the deed which conveyed to their predecessors in title both the copyright and something more, that is all the rights which Crouch had prior to the passing of 5 & 6 Vict. c. 45, and all the rights he acquired by that Act, one of which was the right of exclusive performance of these songs. The deed of 1843 evidently and intentionally transfers to D'Almaine two distinct rights, first, the copyright, and then and in addition all the estate, right, title, interest, benefit and claim at law and in equity, and such large words as these must be held to convey to the assignee every kind of interest which the assignor had.

*O. Turner*, in reply.

BRAMWELL, L.J.—I am of opinion that this judgment must be affirmed. I think that the Act of 5 & 6 Vict. is retrospective, but as the provisions of 3 & 4 Will. 4. c. 15 were not brought to the notice of the Queen's Bench Division we are not in fact overruling the opinion of that Court. I think that the provisions of the statute of Victoria apply to all musical compositions published within ten years before the passing of that Act, and I may observe that there is no reason why a statute should not be retrospective in this sense, for it does not operate retrospectively so as to cause anyone to incur any penalty for anything done prior to the passing of the Act. I am of opinion that Crouch had not, when the entries were made which have been expunged, any right or property which he could sell or assign to Adams, for he had already parted, by the deed made in 1843, with all his right and property to D'Almaine & Mackinlay. It may be observed that there is a difference between musical composition and a book.

(5) 4 E. & B. 780; s. c. 24 Law J. Rep. M.C. 98.

(6) 36 Law J. Rep. Exch. 17; s. c. Law Rep. 2 Exch. 15.

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A book is a material thing and a chattel, whereas the composer of a tune may never commit it to paper, and may play it or sing it to a publisher or a friend without ever reducing it into the form and substance of a chattel. I do not think that our decision in any way depends upon this distinction, for I think that the large words of this deed would pass to the assignee the sole right of representation of these songs as well as the copyright. By that deed Crouch assigned all his present and future vested and contingent copyright in the books, pieces or compositions of music and the sole and exclusive right and liberty of printing and publishing the same. The deed then refers to the statute of Victoria and adds, "together with all other the estate, right, title, interest, property, contingent possibility, benefit, claim and demand whatsoever, both at law and in equity of him the said Crouch."

Now the words that I have just read are very large and general words and seem to be intended to convey everything that large words could convey, and I do not think that their sense can be restricted so as to limit them to an assignment of copyright only, but they must be held to convey to D'Almaine any property in or right of representation of these songs that Crouch then had. This being my judgment anything that I might say on the question of estoppel would be said to be an *obiter dictum*, so that I content myself with saying that I do not think there is any estoppel here.

BRETT, L.J.—I think that the statute of Victoria is retrospective in this sense, that it gives the exclusive right of representation in musical compositions published within ten years before the passing of the Act to the author from the date of the passing of the Act for the time provided by the Act. The statute of Victoria incorporates certain parts of the statute of 3 & 4 Will. 4, and the effect is as though those parts of the earlier statute were written again in the later statute, and made applicable to musical compositions published within ten years before the passing of the Act. There is in section 20 of 5 & 6 Vict. c. 45 (1) an

express enactment with regard to the right of representing or performing musical compositions, and I do not think that section 28 (1) of the same Act limits the force and operation of that express enactment or prevents the provisions of the earlier statute from applying to musical compositions and the right of representing and performing them.

I am of opinion that the order made by the Queen's Bench Division must stand, because Adams could not rightly have these entries made, inasmuch as Crouch had not at the time of the assignment to Adams any property or right of representation which he could transfer to Adams, and therefore Adams derived under the assignment from Crouch no interest or right which would justify him in making these entries. There may be distinct and separate rights in a musical composition, that is to say a copyright and the exclusive right of representation, and this latter right is a property, so that there are under the Act of Victoria two rights of property which may be dealt with separately, and which may belong to different owners. Now this deed was executed after the passing of the 6th Vict. c. 45, and the parties were evidently acquainted with the provisions of that statute, for the deed refers to the statute and the recitals refer to the distinction between the two kinds of property and state that Crouch had contracted to sell his "copyright and property." The deed then assigns "the copyright" and further adds, together with all other the estate, right, title, interest, property and benefit whatsoever. These words seem to me to include the right of exclusive representation, the word "property" includes it and I should be inclined to say that the word "benefit" includes it as well. It is, however, said that the words to which I have referred are general words following after particular words, and therefore that their operation cannot extend beyond the meaning of the particular words. I do not think that that rule of construction is so fully applicable to deeds of conveyance as to Acts of Parliament, and there is another rule which does apply to such deeds, and that is, that in doubtful cases words shall be construed most

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strongly against the grantor. Now the words which we have to consider are words of grant, and introduced as they are by "together with," they appear to me to be intended to pass something in addition to that which has been already passed. Therefore taking into account the words of the statute, the words of the deed and the conduct of the parties, I think that the parties to that deed intended that both the copyright and the exclusive right of representation should pass by the words of grant in that deed. If so, then no later assignment by Crouch could give any assignee any title, and Adams as such assignee has no right to have these entries retained. They are all futile and they must, as has been said by the Queen's Bench Division, be expunged. I give no opinion on the question of estoppel.

COTTON, L.J.—I am of the same opinion. The 6th Vict. c. 45 applies to musical compositions published before that Act was passed, for it embodies the provisions of the statute of 3 & 4 Will. 4, and puts musical compositions on the same footing as dramatic compositions were placed under that Act. The respondents had, when Crouch made his assignment to Adams, a title, under an assignment by an earlier deed, to the same right as that which Adams claims. The right of representation is a creation of 5 & 6 Vict. c. 45, and this right is made by the statute a property of the author. The deed under which the respondents claim was made shortly after the 5 & 6 Vict. c. 45, was passed and contains a reference to it. The first part of the clause in the deed relates to the transfer of the copyright, but the words which follow evidently describe a further property, that is the right of exclusive representation, and therefore the conveyance to D'Almaine conveys both the copyright and the right of representation, and the entries made by Adams must be expunged. It was suggested that the third set of entries which was made in pursuance of the provisions of section 4 might be allowed to remain even though the two earlier entries were expunged. We were inclined to think that those

two entries were nugatory, but even if this be so I think that those entries should be expunged as well as the others and that nothing should be left on the register which would tend to injure the property in and right of performing these songs in the hands of Hutchings & Romer.

*Judgment affirmed.*

Solicitors—Walter, Jarvis & Triscott, for appellant; H. S. Russell, for respondents.

[IN THE COURT OF APPEAL.]

(Appeal from the Exchequer Division.)

1879.	{	THE CENTRAL AFRICAN TRADING
May 7.		COMPANY v. GROVE.
	{	GROVE v. THE CENTRAL AFRICAN
		TRADING COMPANY AND TAUB-
		MAN.*

*Practice—Joinder of Parties—Joinder of Third Person as Defendant to Counter-claim—Rules of Supreme Court, Order XXII. rule 5—Order XVI. rule 17.*

*In an action for money lent the defendant set up a counter-claim, in which he joined one T. as defendant to the counter-claim under Order XXII. rule 5, and alleged a contract between himself and T., and a breach thereof by T.; that the contract had been transferred from T. to the plaintiffs; and that the plaintiffs had broken it. He then claimed damages against the plaintiffs, and, in the alternative, against T. :—*

*Held, that T. was not properly joined as co-defendant to the counter-claim under Order XXII. rule 5, but that the defendant should have applied to have the question determined as against T. under Order XVI. rule 17.*

Action for money lent. Writ specially endorsed, and notice in lieu of statement of claim. The defendant pleaded a set-off and counter-claim, joining one G. D.

\* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Thesiger, L.J.



*Central African Trading Co. v. Grove (App.), Exon.*

Taubman as defendant in the counter-claim, and alleging that in 1876 G. D. Taubman had purchased a trading business carried on upon the river Niger by a firm of Holland, Jaques & Co., of which Grove was the principal and active partner; that it had been agreed as the price of the business G. D. Taubman should obtain from Messrs. Martin, bankers, and from J. G. Taubman (who had charges upon the goodwill and effects of the business) a full and complete discharge and indemnity from all claims; that he should pay Grove's debts to the amount of 1,500*l.*, and meet all due and accruing liabilities in respect of a certain underwriting business carried on by the firm, and should secure and pay to Grove one-third share of the profits to be made in the business, and to pay Grove annually the sum of 600*l.*; that, in pursuance of the agreement, the business was transferred by Grove and his partner to Taubman; that Taubman made default in obtaining the indemnity and discharge from Messrs. Martin in meeting Groves' liabilities in respect of the underwriting business, and in paying him one-third of the underwriting business and part of the annuity of 600*l.*; that afterwards Taubman and others, including Grove, were incorporated as the Central African Trading Company, the company being formed with the object of taking over and carrying on the business purchased by Taubman from Grove.

The statement of counter-claim proceeded as follows:—

"The said company accordingly took over the said business and adopted the agreement entered into by the defendant Taubman with the now plaintiff (Grove), and promised and agreed with the plaintiff (Grove), in consideration of his making over the said Niger business of Holland, Jaques & Co., that they would perform all the terms of the said first-mentioned agreement. The plaintiff (Grove) made over the said business, and all things were done, &c., necessary to entitle the plaintiff (Grove) to have the said last-mentioned agreement performed by the Central African Trading Company, yet, although the said company paid certain liabilities of the

plaintiff and a portion of the said annuity, they have failed to perform the whole terms thereof. They have not secured the plaintiff against his liabilities in respect of the said underwriting business, nor have they obtained a complete indemnity and discharge from Messrs. Martin, nor have they paid to the plaintiff the unpaid portion of his annuity of 600*l.*"

The plaintiff in the counter-claim (Grove) then claimed damages against the Central African Trading Company for breach of the said agreement, and, in the alternative, claimed damages against G. D. Taubman for breach of the agreement entered into between him and the plaintiff (Grove). He further claimed an account from both defendants, and that they should be ordered to obtain an indemnity from Messrs. Martin, and to pay the unpaid portion of the annuity of 600*l.*, &c.

The defendant Taubman applied to the Master in Chambers, under Order XXII. rule 9, to have his name struck out of the counter-claim, as having been improperly joined. The Master refused to make the order, as did Denman, J., on appeal. The Divisional Court, however, made the order, being of opinion that, though the present case was probably one to which section 24, sub-sec. 3 of the Judicature Act, 1873, was intended to apply, there was no machinery provided by the rules by which Taubman could properly be made a party.

The defendant in the action (Grove) appealed.

*Orump*, for the defendant.—Taubman is rightly joined under Order XXII. rule 5. *Turner v. The Hednesford Gas Company* (1) is a case similar to this. There the defendants joined one Round as co-defendant in the counter-claim, because he had given a bond to the defendant in the action for the due performance of the contract in respect of which the counter-claim was made.

[BAGGALLAY, L.J.—Was not your proper

(1) 47 Law J. Rep. Exch. 296; s. c. Law Rep. 3 Ex. D. 145.

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course to give notice under Order XVI. rule 17? (2)]

We do not claim an indemnity, but to be relieved altogether from liability. *Treleaven v. Bray* (3) and *Dear v. Swarder* (4) are on the same footing as the present case. In *Treleaven v. Bray* (3) Mellish, L.J., says—"It would be intolerable that a plaintiff who might have a good case against the original defendant should be compelled to wait for his remedy while the defendants were fighting *inter se*." The true test is, Could the counter-claim be the subject of a cross action, in which the party sought to be joined could be made a co-defendant? See *Padwick v. Scott* (5).

[THESIGER, L.J.—I do not see in the counter-claim the necessary connection between the subject of the counter-claim and the original subject of the action.]

It is apparent when the whole of the pleadings is read together.

(2) By Order XXII. rule 5. "Where a defendant by his defence sets up any counter-claim which raises questions between himself and the plaintiff, along with any other person or persons, he shall add to the title of his defence a further title, similar to the title in a statement of complaint, setting forth the names of the persons who, if such counter-claim were to be enforced by cross action, would be defendants to such cross action, and shall deliver his defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff."

By Order XXII. rule 6. "Where any such person, as in the last preceding rule mentioned, is not a party to the action, he shall be summoned to appear by being served with a copy of the defence," &c.

By Order XVI. rule 17. "Where a defendant is or claims to be entitled to contribution or indemnity, or any other remedy or relief, over against any other person, or where from any other cause it appears to the Court or a Judge that a question in the action should be determined, not only as between the plaintiff and the defendant, but as between the plaintiff, defendant and any other person, or between any or either of them, the Court or Judge may, on notice being given to such last-mentioned person, make such order as may be proper for having the question so determined."

(3) 45 Law J. Rep. Chanc. 113; s. c. Law Rep. 1 Ch. D. 176.

(4) 46 Law J. Rep. Chanc. 100; s. c. Law Rep. 4 Ch. D. 476.

(5) 45 Law J. Rep. Chanc. 350; s. c. Law Rep. 2 Ch. D. 736.

*Gainsford Bruce*, for the plaintiffs and for Taubman.—The claim against Taubman is not a question "raised along with" the claim against the company; it is quite collateral. It is merely an alternative claim against Taubman. The company's answer to the counter-claim against them is that they never took over the agreement. Why should they be delayed in their action while the defendant settles his differences with Taubman?

Taubman should have been served with notice under Order XVI. rule 17, when the Judge could have joined him, if he thought fit, under rule 19 of the same order; or he could have been served with notice under Order XVI. rule 18, so as to be bound by the result of this action.

BRANWELL, L.J.—I am of opinion that this rule must be discharged. I entirely agree with the Queen's Bench Division in feeling a wish that this case could be tried, so that all the questions could be decided together. But I think, on consideration, that it cannot be done. I think this case is not within the rule, and that the rule was not intended to comprehend such a case.

The matter is in a dilemma. Either there has been a novation or not. If there has been a novation there is no cause of action against Taubman, and he is not wanted as a defendant to the counter-claim. If there has not been a novation, all that the defendant in the action alleges is this:—Maybe I owe the money to the company, but if I do, I am entitled to a remedy over against or an indemnity from Taubman. But that brings the case under Order XVI. rule 17.

The only doubt in my mind has been whether there is not a *tertium quid*, supposing the defendant to be uncertain whether there has been a novation or not. But I think such uncertainty cannot help the defendant. If, supposing the matter to be certain, the defendant had no right to join Taubman as a party to the action, he can have no further right, because the matter is uncertain. An action would lie in the alternative against the company or Taubman if the defendant were bringing an action, and

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the hardship which was mentioned by Mellish, L.J., in the case cited for the defendant, is amply provided for by rule 17 of Order XVI.

BAGGALLAY, L.J.—I am of the same opinion, and have nothing to add.

THESIGER, L.J.—I thought for some time that the case might be put in this way, viz., that the defendant's counter-claim was in the nature of a bill for specific performance of an agreement, that the agreement had been transferred to the company, and the company had taken assets subject to the provisions of that agreement, and therefore Taubman and the company would be properly parties to such suit, and that, under Order XIX. rule 3, this was a case in which both the company and Taubman might have been made parties in this action. Then it struck me that the terms of rule 5 of Order XXII. were wide enough to include this case.

But after hearing the arguments I am of opinion that the case must be put as it was put by Lord Justice Bramwell. If the defendant alleges that there was a novation, and that the company are liable to perform Taubman's agreement, then Taubman is no longer liable, and is not a necessary party in order to ascertain the defendant's rights; but if we assume that there has been no novation, then we are met by the fact that the whole of the counter-claim is not a claim against the company, but a claim for indemnity against Taubman, which, if it is introduced into the case at all, is not under Order XXII., but under rule 17 of Order XVI.

*Judgment affirmed.*

Solicitors—Flux & Co., for plaintiffs; Elmslie, Forsyth & Sedgwick, for defendant.

[IN THE DIVISIONAL COURT FOR THE Q.B., C.P. AND EXCH. DIVISIONS.]

1879. } BELL v. THE NORTH STAFFORD-  
Jan. 15. } SHIRE RAILWAY COMPANY.

*Practice—Time for appealing from Master to Judge at Chambers—Rules of Court, 1875—Order LIV. rule 4.*

*Rule 4, Order LIV. when interpreted by comparison with rule 6 of the same Order, requires that an appeal summons from a Master to a Judge at chambers should not only be taken out within four days, but also made returnable within four days.*

The defendants had taken out a summons to stay all further proceedings in the action, on the ground that the writ had expired. This summons was heard on the 23rd of December, 1878, before Master Hodgson, who endorsed "no order." On the 24th of December, the defendants took out an appeal summons, which was filled in by the Judge's clerk as returnable on the 31st of December. When it came on for hearing on that day before Hawkins, J., he dismissed the appeal as not having been made within four days, and therefore out of time. As a matter of fact, a Judge had sat at chambers on the 27th of December, which would have been within the time. The defendants then brought the present appeal against the order of Hawkins, J.

Rules 4 and 6 of Order LIV. are as follows:—

"4. Any person affected by any order or decision of a Master may appeal therefrom to a Judge at Chambers. Such appeal shall be by summons, within four days of the decision complained of, or such further time as may be allowed by a Judge or Master.

"6. . . . Every appeal to the Court from any decision at chambers shall be by motion, and shall be made within eight days after the decision appealed against."

Graham, for the defendants.—It is enough if the appeal summons be issued within four days. There is nothing in the rule which requires the summons to

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*Bell v. North Staffordshire Rail. Co., Q.B.*

be heard within four days. The fault, if fault there has been, rests with the Judge's clerk. In accordance with the new rules regulating the business at chambers, the clerk has to fill in the summons with the date and hour when it is returnable.

[*PER CURIAM*.—If the clerk was wrong, you ought to have taken out a fresh summons for extension of time, and so kept your appeal summons alive.]

Gould, for the plaintiff, was not called upon.

KELLY, C.B.—The party who tries to prevent a case being heard on its merits must shew that he has himself used due diligence at every step. The rule of practice is clear and express. Just as in the case of an appeal from chambers to the Court, it is not enough that notice of motion be given within eight days, but the motion must be either heard within eight days or the time extended; so an appeal summons at chambers must be taken out so as to be heard within four days. There may be a discretion in the Judge to extend the time, but this was not a case to exercise it.

POLLOCK, B.—To any one who reads rule 4 of Order LIV. by the side of rule 6, the practice is clear. The summons must be heard within four days, the motion must be made within eight, in the absence of an adjournment.

*Motion dismissed with costs.*

Solicitors—Geare & Son, agents for J. & W. J. Drewry, Burton, for plaintiff; Burchells, for defendants.

[IN THE COMMON PLEAS DIVISION.]

1879. } GIBBONS v. THE LONDON FINANCIAL  
May 1. } ASSOCIATION.

*Practice—Appeal from Master—Time for appealing—Enlarging Time—Order LIV. rule 4.*

*Although the appeal from a Master's decision must be by summons returnable on a day within four days from such decision in order to comply with Order LIV. rule 4, yet on the hearing of the appeal (even though after such time and without any express summons for the purpose), the Court or a Judge has power under Order LVII. rule 6 to enlarge the time for appealing.*

Appeal from a decision of Field, J., at chambers refusing to hear an appeal summons from an order of Master Dodgson respecting the insufficiency of the answers on the part of the defendants to interrogatories which had been delivered by the plaintiff. The order of the Master was made on the 7th of April last, and on the 10th the appeal summons was taken out, but the 11th being Good Friday, and the clerk who took out the summons being told at the Judges' Chambers that the first time at which there would be a Judge at chambers would be on the 17th, caused the summons to be made returnable on the 17th. When the appeal summons came to be heard, Field, J., dismissed it on the ground that it was too late, because, according to the authority of *Bell v. The North Staffordshire Railway Company* (1), in order to comply with Order LIV. rule 4, the appeal summons must be made returnable within four days from the decision of the Master appealed against. Moreover, in *Fox v. Wallis* (2), the Court of Appeal had held that under Order LIV. rule 6 the notice of motion of appeal from the decision of a Judge at chambers was too late when given on the eighth day, because the motion could not then be made until after the eighth day.

*J. O. Mathew* now moved by way of appeal from such decision of the learned

(1) See *ante*, p. 513; s. c. Law Rep. 4 Q.B. D. 206.

(2) Law Rep. 2 C.P. D. 46.

*Gibbons v. London Financial Assoc., C.P.*

Judge.—But for the case of *Bell v. The North Staffordshire Railway Company* (1) it would appear sufficient to satisfy Order LIV. rule 4 if the summons were taken out within four days after the decision complained of. There is this difference between that case and the present one, that there, on the last of the four days after the decision complained of, namely, the 27th of December, a Judge sat at chambers, so that it was therefore possible in that case to have had the appeal heard within such four days, but here it was not possible, for the last of the four days, namely, the 11th of April, was Good Friday, and it could not have been heard if it had been made returnable on that day. However, the learned Judge had power to have enlarged the time, and he ought to have done so here, for the mistake in making the summons returnable on the 17th instead of the 11th or 12th of April was most excusable, and the plaintiff was really not prejudiced by it. Order LVII. rule 6 gives a Court or Judge extensive powers to enlarge the time appointed by the rules, even after the expiration of such time, and accordingly application is now made in the present case to enlarge the time for appealing.

THE COURT having stated that they were prepared to enlarge the time, called upon

*Gibbons*, for the plaintiff.—No summons was ever taken out to enlarge the time when this case was at chambers, and by Order LIV. rule 1 it is stated that “every application at chambers authorised by these rules shall be made in a summary way by summons.”

[DENMAN, J.—May not the parties when they are before the Court apply to enlarge the time?]

No. At all events the Court has no power to extend the time for appealing, and so deprive the plaintiff of a right he had acquired by the defendants being out of time. In *McAndrew v. Barker* (3) the Court of Appeal held that an appeal from an order on the trial of an interpleader issue could not be brought after

twenty-one days. The appellants then applied to the Master of the Rolls who had tried the issue and made the order, for leave to appeal notwithstanding the expiration of time, but the Master of the Rolls refused the application, stating, as reported in the Law Reports, “the Court has no discretionary power to deprive a litigant of any advantage given him by the General Orders, unless there has been on his part some conduct raising an equity against him.” Reference may also be made to the remarks of the Master of the Rolls in *Krehl v. Burrell* (4), as to exercising the discretion of the Court with respect to the jurisdiction given by Lord Cairns’s Act, 21 & 22 Vict. c. 27. In *The International Financial Society v. The Moscow Gas Company* (5) the Court of Appeal refused to make an order, under Order LVII. rule 6, to enlarge the time for appealing, considering that a mere mistake or misunderstanding of the rules was not such a special circumstance as would induce the Court to give the special leave required to extend the time. So also in *In re Mansell; Rhodes v. Jenkins* (6) the Court of Appeal held that the mistake of the solicitor’s clerk as to the meaning of the rule was no ground for extending the time for appealing; and the Master of the Rolls in his judgment said, “The opposite party is not answerable for the mistake, and is entitled to the benefit of it unless he has done something to mislead the applicant.”

DENMAN, J.—I am of opinion that the appeal in this case ought to be allowed to proceed notwithstanding that it was out of date. It has been contended that we ought not to apply Order LVII. rule 6, giving power of enlarging the time appointed by the rules, to the present case, because in the first place the application to enlarge was not made by summons, and in support of this, reference has been made to Order LIV. rule 1. That rule, however, is only applicable to proceedings

(4) 47 Law J. Rep. Chanc. 353; s. c. Law Rep. 10 Ch. D. 431.

(5) 47 Law J. Rep. Chanc. 258; s. c. Law Rep. 7 Ch. D. 241.

(6) 47 Law J. Rep. Chanc. 870.

(3) 47 Law J. Rep. Chanc. 340; s. c. Law Rep. 7 Ch. D. 701.

*Gibbons v. London Financial Assoc., C.P.*

at chambers, and if it were to be applied here would have the effect of most disastrously limiting the power to enlarge the time given by Order LVII. rule 6, and I do not think that that was the intention of the rule. On the contrary, I think that it was intended that whenever a Court or a Judge should see the existence of good reason for enlarging the time appointed by the rules, such Court or Judge should enlarge the time accordingly, and that they should, therefore, have power to do so although no special summons for that purpose was issued. Secondly, it was contended that we ought not to enlarge the time for appealing, because there are decisions in which it has been held that the Court will not enlarge the time unless the party against whom it is sought to enlarge the time has been in default. No doubt there are such decisions, especially by the Master of the Rolls, but they have all been on Order LVIII. rule 15, which applies to limiting appeals to the Court of Appeal, from interlocutory orders to twenty-one days, and to other appeals to one year. That is very different from and unlike this case, where the subject-matter is an appeal from the decision of a Master at chambers, and the time for which appeal must, according to Order LIV. rule 4, be by summons within four days after such decision. That rule has received a very strict construction in *Bell v. The North Staffordshire Railway Company* (1), and the appeal has been held to be not in time by summons within four days, unless such summons itself be returnable within four days from the decision. I look upon the decision in *Bell v. The North Staffordshire Railway Company* (1) as unfortunate, but we are bound by it, and the question here is whether that prevents us from enlarging the time for appealing. I think that in the present case there is good ground why, if we can in our discretion, we should enlarge the time, for the summons was made returnable on the first day the clerk was told that the summons could be heard, and to say that under these circumstances the party is out of time for all purposes would be unjust, and in such a case I for one should not refuse an application to

extend the time, unless there was some decision deciding that we had not the power to do so. *Bell v. The North Staffordshire Railway Company* (1) does not so decide, and, besides, the circumstances of that case were very different from the present, because there was a Judge sitting on the 27th of December, which was on the last of the four days after the Master's decision, whereas here there was no such possibility of the summons being heard on such fourth day. That distinguishes it from the present case, so far as the exercise of our discretion is concerned, and I think it only right that the time in this case should be enlarged, and this appeal heard on the merits.

LINDLEY, J.—I am of the same opinion. I think that Order LIV. rule 4 requires the construction which was put upon it by the Court in *Bell v. The North Staffordshire Railway Company* (1), but the Court there were not asked, as we are, to enlarge the time. I think there is good reason why we should grant this application to enlarge the time. The summons was taken out in time, and it was made returnable on the first day a Judge was expected to attend. The appeal ought, therefore, to be heard.

*Order accordingly* (7).

Solicitors—Ralph Thomas, for plaintiff; Markby & Co., for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1879. } HOYLE (*appellant*) v.  
March 27, 28. } HITCHMAN (*respondent*).

*Sale of Food and Drugs Act, 1875* (38 & 39 Vict. c. 63), ss. 6, 13, 14, 17 and 20  
—“*To the Prejudice of the Purchaser*”—*Purchase by Officer for Analysis*.

[For the report of the above case, see 48 Law J. Rep. M.O. 97.]

(7) The counsel for the plaintiff not being then prepared to argue the case on its merits, the case was adjourned accordingly.

## THE COURT OF APPEAL.]

(Appeal from the Exchequer Division.)

1879. }  
 May 6, 27. } WADDELL v. BLOCKEY.\*

*Sale of Chattel—Fraud on Purchaser—Measure of Damages.*

*The plaintiff was induced by the fraudulent representation of the defendant to buy a quantity of rupee paper. He sold it again when it had become greatly depreciated by a fall in the value of silver in ignorance of the fraud, and afterwards becoming aware of the fraud brought an action against the defendant, claiming the full loss upon the re-sale:—*

*Held, that the plaintiff could not recover so much of his loss as was caused by the fall in the value of silver.*

By BAGGALLAY, L.J., and THESIGER, L.J.—*The measure of damages was the difference between the price given by the plaintiff, and that which he could have obtained for the stock in the market if he had resold on the day of the purchase.*

By BRAMWELL, L.J.—*The measure of damages was the difference between the price given by the plaintiff and that which he could have obtained for the stock, selling in reasonable quantities within a reasonable time and with due caution.*

*Brookman v. Rothschild* (3 Sim. 153) commented upon.

Appeal from the judgment of Baron Huddleston after trial without a jury.

This action was brought by the trustee of the bankruptcy of one Peter Lutscher, to recover damages in respect of fraudulent representations by which the defendant induced Peter Lutscher to purchase Indian 5½ rupee paper to the amount of 300,000*l.* The plaintiff claimed 43,547*l.* damages.

The facts were shortly as follows:—In August, 1875, the defendant represented to Lutscher that rupee paper would be a profitable investment, and trusting to his representations Lutscher authorised the defendant to purchase for him 100,000*l.* rupee paper.

On the 13th of August the defendant

delivered to Lutscher two contract notes purporting to be bought notes for 50,000*l.* and 60,000*l.* rupee paper respectively, purchased on the Stock Exchange; each note being signed, "W. A. Luning."

On the 26th of August, Lutscher authorised the defendant to make a further purchase of rupee paper to the amount of 200,000*l.* And on the 27th of August the defendant wrote to Lutscher: "I am glad to inform you that I have at last been able to secure for your account 200,000*l.* India 5½ rupees at 101, for which I enclose two statements, one payable 15th proximo and the other 30th. I am glad to have been able to save you the usual commission on that amount."

The purchases were completed by Lutscher in the belief that they were *bona fide* purchases by the defendant on behalf of Lutscher upon the Stock Exchange. After the purchases the rupee paper rapidly deteriorated in value, and in March, 1876, was sold by Lutscher at a loss of 43,000*l.*

In April, 1876, Lutscher filed his petition for liquidation by arrangement on the 6th of May. The plaintiff was appointed his trustee, and in June, 1877, the plaintiff discovered that the representations of the defendant with regard to the purchases of the rupee paper were untrue, and that in fact the defendant had made no purchases of rupee paper for Lutscher on the Stock Exchange, but had transferred to him certain rupee paper then belonging to himself.

The plaintiff thereupon brought this action, claiming the full amount of the difference between the price paid by Lutscher and the price at which he sold the paper in March, 1875.

The action was brought in the Chancery Division and was sent by the Master of the Rolls to be tried at Westminster in the Exchequer Division.

At the trial, which took place before Baron Huddleston on the 2nd and 6th of August, the jury were discharged by consent, and the issue was tried by the learned Judge without a jury. His Lordship found that the defendant had been guilty of a fraudulent misrepresentation, in pretending that he had purchased the 110,000*l.* and the 200,000*l.*

\* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Thesiger, L.J.

*Waddell v. Blockey (App.), Excu.*

rupee paper on Lutscher's account in the market, and was not (as in fact he was) selling his own stock to Lutscher; and that Lutscher had parted with his money in the purchase of the rupee paper on the faith of that representation; and directed judgment to be entered for the plaintiff for the full amount of the claim.

An order *nisi* for a new trial was afterwards obtained in the Court of Appeal on the ground that the damages were excessive, and notice of appeal against the judgment was also served upon the plaintiff.

The arguments upon the order *nisi* and on the appeal were heard together on the 6th of May, 1879.

*R. E. Webster and Warmington*, for the plaintiff, against the order and in support of the judgment.—The damages are rightly assessed. The plaintiff is entitled to recover such damages as have resulted to him by taking the shares. If that extends to the full price paid for them, he is entitled to it. See the judgment of Lord Chief Justice Cockburn in *Twycross v. Grant* (1). The same view was held by Lords Justices Bramwell and Brett (at pp. 651, 675).

[BRAMWELL, L.J.—But the loss here was in consequence of the fall of the price of silver. In *Twycross v. Grant* (1), it was the consequence of the worthlessness of the shares sold.]

But the plaintiff would not have lost his money if he had not bought the rupee paper. The loss was therefore the direct and actual consequence of his acting on the faith of the defendant's representation—*Mullett v. Mason* (2).

*Brookman v. Rothschild* (3) is directly in point. In that case the defendant was ordered to sell French rentes for the plaintiff, and instead of selling them on the market sold them to himself, giving the plaintiff credit for the price. The Court ordered the transactions to be set aside. The plaintiff has a right to be put

in the position in which he would have been if the transaction had never taken place. They also cited *Gillett v. Pepper-corn* (4) and *Kimber v. Barber* (5).

*Cohen and Anderson*, for the defendant, in support of the order and against the judgment.—The ground of the decision in *Twycross v. Grant* (1) was that the shares when bought were worthless. If they had been of any value the defendant would have had credit for it. But the shares being worthless, the whole of the loss was occasioned by the purchase and was, therefore, the result of the defendant's fraud.

[BRAMWELL, L.J.—*Twycross* had lost his money from the very moment he embarked in the concern. That is not so in this case.]

According to *Davidson v. Tulloch* (6), the true measure of the damages is the difference between the money paid and a fair price. That the defendant was in a fiduciary position makes no difference. If a fiduciary fails to do his duty, that is constructive fraud, but the damages are no greater than in other cases of fraud.

If Lutscher had not sold the rupee paper but tendered it back to the defendant, there could have been a rescission of the contract. But here the purchaser has kept the thing sold and has dealt with it; he has had the opportunity of using his own judgment in the matter, and has had the benefit he intended to derive from the purchase.

In *Brookman v. Rothschild* (3) the defendant having been instructed to sell rentes sold them to himself. The action was in trover to recover the value of the rentes at the time when they were sold, and the defendant could restore the rentes if he chose, so that the parties could have been put in their original position.

But Lutscher had held the rupee paper for a long time before he sold again. The result is a large depreciation. For this the defendant is not accountable. He could not tell that the plaintiff would hold the stock so long.

*Our. adv. vult.*

(1) 46 Law J. Rep. C.P. 636 at p. 673; s. c. Law Rep. 2 C.P. D. 469.

(2) 35 Law J. Rep. C.P. 299; s. c. Law Rep. 1 C.P. 559.

(3) 3 Sim. 168; s. c. 5 Bligh, 165.

(4) 3 Beav. 78.

(5) Law Rep. 3 Chanc. 56.

(6) 3 Macq. 783, 790.



*Waddell v. Blockey (App.), Exm.*

The following judgments were delivered on May 27:—

BRAMWELL, L.J.—We are all agreed that the damages in this case cannot remain at their present amount. When a person has been induced to buy something by the fraud of the seller, if on discovering the fraud he is still in possession of the chattel, and can restore it in the same state as when he obtained it, he can receive back the full price of the chattel. It may be that in the present case if the trustee of the bankrupt purchaser could have tendered back the rupee paper which the bankrupt had purchased, he could have recovered back the whole purchase-money, according to the case of *Brookman v. Rothschild* (3). I do not say that he could, for I hope this case could have been distinguished from that, which, assuming as I do that it was right in law, was a decision that, in my opinion, worked most grievous and unreasonable injustice, in which money was simply taken out of the pocket of one person who was entitled to keep it, and put into that of another who had no right to have it. Perhaps if there could in any way have been a *restitutio ad integrum* in this case, the plaintiff might have recovered the whole of the price. But it is not necessary to discuss that matter, for our decision is not founded on that consideration. The plaintiff was not in a position to restore the rupee paper and did not tender it. The question, therefore, is not as to the return of the price, but what damages can be recovered. The way of assessing the damages when a man has been induced by fraud to buy some chattel is to see how much worse off the purchaser is by the transaction, and one view is to suppose him to have been a willing purchaser, and to see at what rate he could have purchased the chattel in the market. Suppose, for instance, a man is induced by fraud to buy corn at 50s. a quarter when he could have bought it in the market at 45s., then clearly the amount of the damages is 5s. per quarter, and perhaps something might be added in the way of general damages, whatever that may mean, and juries understand how to give effect to the expression. I take it to mean compensation for the

trouble and annoyance of having bought a worthless thing and having to get rid of it. But in the present case that is not the right way to assess the damages, and would not adequately compensate the plaintiff. It seems to me that the right way to find out how much worse off the plaintiff is, that is, to see how much it will cost him to get rid of his bargain—to “get out of” the situation in which he has been put by the fraud of the defendant. Therefore in this case the question is, not at what price could Lutscher have bought the rupee paper, but at what price, having bought it, could he have sold it. There is a sensible difference between the two methods, because, supposing the sale of a horse by means of a fraudulent warranty for 50l., and such a horse could be bought in the market for 40l., when the unknown condition of the horse was discovered it may be said the loss is 10l., but supposing the purchaser did not want an unsound horse and could not get more than 35l. for it, the loss would be 15l.

In my opinion the plaintiff is entitled to recover at the rate of the price Lutscher could have got for the rupee paper, and perhaps some small amount of damages besides, such, for instance, as were occasioned by the necessity of paying commissions. After a man has become the owner of the thing sold, it is for him to decide whether he will continue the owner or will sell. If he continues to be the owner, and the article falls in price, the loss is not the consequence of his having purchased it, but of his having purchased and retained it. The loss is not proximately caused by the buying. This would be very evident if instead of keeping the article, Lutscher had sold and re-purchased it. When I say the damages should be calculated according to the price Lutscher could have got for them, I do not mean to say that if he had thrown the goods on the market at once as a damaged article, and lost ten per cent., he would necessarily be entitled to recover ten per cent.; but that he should recover the amount he loses if he acts as a reasonable man, and sells at a reasonable time, having a reasonable time allowed him to see how

*Waddell v. Blockey (App.), Excn.*

he can best get out of the situation he is in. In this case the amount had better be ascertained by an official or special referee upon the principle of this judgment.

BAGGALLAY, L.J.—I am also of opinion that the damages in this case have been assessed too highly. It is impossible to lay down a general principle. Each case must depend on the particular circumstances. In this case the defendant having certain rupee paper belonging to himself, induced Lutscher to make a purchase of that paper, suggesting that the rupee paper would pay  $\frac{5}{8}$  per cent. interest, and that he could borrow money to pay for it at a lower rate from the bank. But Lutscher had no idea when he ordered the defendant to purchase for him, that he was selling his own rupee paper. The paper was sold by Lutscher after he had held it about five months at a loss of about 43,000*l.*, and the plaintiff is his trustee in liquidation. There are several modes in which the damage might be assessed. In the first place, it might be assessed as the difference between what Lutscher paid for it and the price he might have bought it for upon the market, but that obviously would be of no use to the plaintiff unless Lutscher had paid too highly for the paper. Secondly, the damage might be assessed at the whole loss, *i.e.* the difference between the price at which the rupee paper was bought and that at which it was actually sold. That, however, would be too much in the present case, for a great part of the loss is occasioned by Lutscher having held the stock from August, 1875, to March, 1876, during which time the value of silver fell, and I think on that point the view stated by my Lord will meet the justice of the case. But I think it should be treated as a transaction completed on the day on which the sale to Lutscher was effected, and the difference between the price paid and that for which Lutscher could have sold the paper on that day is the measure of damages which will meet the justice of the case.

THESIGER, L.J.—I agree in the conclusion that the damages have been assessed upon a wrong principle, are excessive,

and must be reduced. The plaintiff complains that Lutscher was induced by the fraudulent misrepresentation of the defendant to buy rupee paper belonging to the defendant, which he would not otherwise have bought; and he asks to be recouped the loss sustained by the re-sale of such rupee paper through depreciation of the market consequent upon a fall in the value of silver. The mere statement of the plaintiff's case indicates the objection to which his demand is open. There is no natural or proximate connection between the wrong done and the damage suffered. In *Twycross v. Grant* (1) the thing purchased was worthless owing to the inherent defects existing at the time of the purchase. The plaintiff became a shareholder in a company which was a dying one, and the fact of his holding his shares until it was dead was decided by this Court to be no reason for reducing the damages assessed by the jury below the full value paid for the shares. In the present case, on the contrary, the thing purchased had at the time of purchase no inherent defect. There was nothing in it which either necessarily or naturally, or even probably would lead to any loss. It became deteriorated by reason solely of a cause which subsequently arose. Under such circumstances the general rule laid down by the Lord Chief Justice in the case cited would be applicable. "If a man is induced by misrepresentation to buy an article, and while it is still in his possession it becomes destroyed or damaged, he can only recover the difference between the value as represented and the real value at the time he bought. He cannot add to it any further deterioration which has arisen from some other supervening cause." It is said that in this case if the fraud had been discovered before the re-sale, then the plaintiff might have avoided the purchase, and returned the rupee paper claiming the full sum given for it. And it is argued that, inasmuch as in that way practically the defendant would have been mulcted in the damage represented by the difference between the value of the thing sold at the time of the sale and the depreciated value at the time of its return, it ought to follow that even when a re-sale has taken place the plain-

*Waddell v. Blockey (App.), Exch.*

tiff ought to be put in the same position as he would have been if Lutscher had not sold. I am not, in the first place, prepared to admit the premises upon which this reasoning rests, for it appears to me by no means plain that where the article sold, although existing in specie, has depreciated in value by reason of a cause supervening subsequently to the sale, the buyer on discovering the fraud can avoid the sale to him. It may reasonably be argued that the depreciated article proposed to be returned is not the same as that purchased, the parties cannot be put in *statu quo*, and the condition, therefore, upon which an avoidance of a contract upon the ground of fraud depends cannot be performed. But assuming this not to be so, still it does not follow that the buyer who has by re-sale rendered the return of the article in specie impossible, is entitled to have the seller and himself put practically in the same position as if it had been returned. *Davidson v. Tulloch* (6) appears to be an authority for the proposition that in such a case the proper mode of measuring the damages is to ascertain the difference between the purchase-money and what would have been a fair price to be paid for the article at the time of the purchase. But the present case is complicated by the circumstance of the defendant's fiduciary position in the matter of the purchase, and by the fact that the fraud did not touch the value of the article sold, but consisted of a fraudulent representation that it was sold by a third party, and not by the defendant himself. It would seem strange if under such circumstances a plaintiff who has got the article he bargained for, upon whom no fraud as regards its value has been practised could, after the article has been depreciated and re-sold at a loss owing to a cause totally unconnected with the fraud, recover all the loss which he has thereby sustained. I cannot see upon what principle such a claim could be based. *Brookman v. Rothschild* (3) was a case of a very special and peculiar character, and does not, in my opinion, govern the present. I think that the damages may fairly be ascertained in the manner proposed by Lord Justice Baggallay, for by that course being adopted,

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as I understand it, the plaintiff is saved the loss (if any) which really accrued to him by reason of Lutscher's buying the defendant's rupee paper instead of getting rupee paper in the market, and the defendant is precluded from reaping any profit he may have derived from his disposal of the rupee paper privately to the plaintiff instead of throwing it (as regards such sale) as a whole upon the market.

*Judgment varied. Action referred to the official referee to re-assess the damages.*

Solicitors—A. G. Ditton, for plaintiff; Flux & Co., for defendants.

*Gallum v. Welch* 49 L.J. 266.  
*Myers v. Jeffries* 49 L.J. 266.

[IN THE COURT OF APPEAL]

(Appeal from the Queen's Bench Division.)  
1879.

June 25. } HARRIS v. PETHERICK.\*  
*u. Foster v. El. N. Ry* 51 L.J. 52, 254.  
Practice—Costs—Power to order successful Plaintiff to pay Costs of the Defendant—Rules of Court, 1875, Order LV.

The power of a Judge over the costs of an action tried by a jury is, under the proviso at the end of Order LV., as extensive as that given to the Court by the general rule at the beginning of the same order.

A plaintiff who was non-suited in an action, in which he claimed on two causes of action two separate sums of 85l. and 6s. respectively, obtained a rule for a new trial, no order being made as to costs. On the second trial the verdict was for the plaintiff for the smaller sum of six shillings, and for the defendant as to the claim for the larger sum. The Judge before whom the second trial was held, ordered the plaintiff to pay the costs of both trials.—Held (affirming the judgment of the Queen's Bench Division), that it was competent for the Judge to make the order.

Appeal from the Queen's Bench Division.

The plaintiff sued the defendant for 85l. as commission for introducing a part-

\* *Coram* Bramwell, L.J.; Brett, L.J.; Cotton, L.J.

3 X

*Harris v. Peitherick (App.), Q.B.*

ner, and for 6s. for advertisements on the sale of a horse. At the trial before Huddleston, B., the plaintiff was non-suited. He then obtained in the Common Pleas Division a rule for a new trial, and that rule was afterwards made absolute, no order being made as to costs.

At the second trial before Manisty, J., the jury found a verdict for the defendant as to the claim for 85 $\frac{1}{2}$ l., and for the plaintiff for the sum of 6s. The learned Judge gave judgment for the plaintiff for 6s., and judgment for the defendant on the rest of the claim, with costs. The Master accordingly allowed the defendant the costs of both sides from the beginning of the first trial, and Manisty, J., on being applied to, said that he intended the plaintiff to pay the costs of both parties from the beginning, as if there had not been any claim or verdict for the sum of 6s.

The plaintiff applied to the Queen's Bench Division, which, on the authority of *Green v. Wright* (1), affirmed the order of Manisty, J.

The plaintiff appealed.

*Kempe* (with him *Winch*), for the plaintiff.—The order of Manisty, J., cannot be supported. He had no power to order the plaintiff to pay the costs of the defendant at all, and even if he could make any order of that nature it could only relate to the costs incurred since the rule for the new trial. But the power given by Order LV. (2) is only a power of depriving the plaintiff of costs. If the first part of Order LV. gives the Court an absolute discretion over the costs of a proceeding, then the proviso relating to

(1) 46 Law J. Rep. Q.B. 427; s. c. Law Rep. 2 C.P. D. 354.

(2) Rules of Court, Order LV. "Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court; but nothing herein contained shall deprive a trustee, mortgagee or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in Courts of Equity; provided that where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial, for good cause shewn, the Judge before whom such action or issue is tried, or the Court, shall otherwise order."

a case tried by a jury which is found at the end of the Order, must limit the power given at the beginning of the Order, and so prevent a Judge who tries a case with a jury from ordering a successful plaintiff to pay the costs of both sides.

But even if that contention cannot be supported, still this order is bad, in so far as it relates to the costs of the first trial, for the plaintiff was non-suited at the first trial at the instance of the defendant, and the defendant caused by his own act a miscarriage of justice. The rule for a new trial was made absolute without any order as to costs, so that it was in fact an order that the costs should be left to the operation of the general rule, and should follow the event; the event was in favour of the plaintiff and therefore the Judge at the second trial had no power to interfere with the costs of the first trial, for those costs had in fact been the subject of a constructive order in the Common Pleas Division by the absence of any express direction being given when the new trial was granted.

*Lord* (with him *Grantham*), for the defendant, was not called on.

BRAMWELL, L.J.—I think that the order of the Queen's Bench Division now appealed from is right, and I may say that I am glad to be able to come to that opinion. The first question is, can the plaintiff who has recovered a sum of six shillings, that is, has succeeded on an issue which did not go to the root of the dispute between the parties, and who has failed on the substantial issue and question between them, be ordered to pay the defendant's costs? This question would not be of much importance in any case where there were distinct issues so that the costs could be distributed and divided. Where, however, such a division is not possible, when an action has been brought, for instance, for some trumpery slander, and the plaintiff obtains the verdict with one farthing damages, so that it is not possible to make any distribution of costs, I think that it was intended by the rules that the Court should be able to direct that the plaintiff should pay all the costs incurred. I think the broad prin-

*Harris v. Petherick (App.), Q.B.*

ciple is that the mere fact that the plaintiff recovers something is no impediment whatever to his being ordered to pay all the costs incurred by both parties. Order LV. (2) says that the costs shall be in the discretion of the Court, and I do not think that the proviso at the end of the order interferes with the power thus given. That proviso enacts that there must be an application to the Judge at the trial, and good cause shewn, and it then gives the Judge power to prevent costs following the event. It is, however, said that the learned Judge, before whom the second trial took place, had no authority to interfere with the costs of the first trial. I do not agree. The question is rather whether in such a case a Judge would think it desirable to make any order as to the costs of the first trial. It is indeed urged that the nonsuit on the first trial was caused by the fault of the defendant in urging a point which proved not to be tenable; but the second trial proves that there has been no misconduct on the part of the defendant, but that he has been put to unnecessary expense by being made defendant to an unfounded action. This being my opinion, I must add that I do not think the matter is open to us, or that we are really able to consider this question, for the proviso being gone the general rule contained in this Order applies, and Manisty J., having made an order which was within his power and discretion, I do not think that order is open to review (3).

BRETT, L.J.—I think that the first part of Order LV. gives an absolute discretion in the matter of costs to the Court or the Judge, and when the condition contained in the second part of the Order has been fulfilled, that then the Judge before whom the action is tried has the same power that the Court would have under the first part of the order. In the case now before us there was a trial with a jury, application was made, good cause was shewn and the Judge before whom the action was tried exercised his discretion and made the order now complained of. That order appears to me to be a

right and proper order, for the defendant did really and substantially succeed. I think that the same considerations apply to the costs of the first trial, and that the learned Judge had the same discretion with regard to them and the same authority over them that he had over those of the second trial.

COTTON, L.J.—I am also of opinion that the discretion of the Judge under the proviso of the end of Order LV. is as large as is that of the Court under the general rule at the beginning of the Order. I think that Manisty, J., had power to deal with the costs of the original trial and of the motion for the new trial, just as he had power to deal with the costs of the second trial. I should be inclined to doubt whether a successful plaintiff can be ordered to pay the costs of the other side; but as the other Lords Justices are of opinion that he can be made to do so, I do not desire to dissent from that opinion. Perhaps I am somewhat pressed by the consideration of the old practice in Chancery where costs were frequently divided, distributed, and apportioned, but where I do not think a successful plaintiff was ever mulcted in all the costs. As a matter of fact in the present case, even if the costs were distributed, the defendant would substantially have received all and paid none, for the plaintiff only succeeded on one small item of his claim, and it may be a question whether he was entitled to succeed upon that. But supposing that he could, then the Judge might have considered that there were two actions, and in that case the defendant would have succeeded and had all the substantial costs in the substantial action for 85%. The appeal must be dismissed.

*Judgment affirmed.*

Solicitors—Croft, for plaintiff; Walker, Twyford, Belward & Whitfield, agents for Dimsdale, Brighton, for defendant.

(3) See *Myers v. Defries*, ante, 446.

[IN THE QUEEN'S BENCH DIVISION.]

1879. }  
 May 13. } BABCOCK AND OTHERS v. LAWSON  
 June 10. } AND ANOTHER.

*Conversion—Pledge—Rights of Pledges—Special Property—Right of Possession—Re-delivery obtained by Fraud of Pledgor—Innocent Transferee for Value.*

The plaintiffs lent to the firm of D. & Sons their acceptances for 11,500*l.* (for which D. & Sons undertook to provide at or before maturity) on the security of certain flour, a memorandum as to such security being given by D. & Sons in these terms:—"As security for the due fulfilment on our part of this undertaking, we have warehoused in your name sundry lots of flour, and in consideration of your delivering to us or our order, the said flour as sold, we further undertake to specifically pay you proceeds of all sales thereof, immediately on their receipt." The flour in question was duly warehoused with the plaintiffs. Acceptances to the amount of 6,500*l.* were provided by D. & Sons, and it was agreed between them and the plaintiffs that the two remaining bills for 500*l.* each should be renewed, which was accordingly done, a memorandum similar to the former one being again given by D. & Sons. Before the last-mentioned acceptances became due one of the firm of D. & Sons applied to the defendants to advance the sum of 2,500*l.* on the security of the flour deposited with the plaintiffs, but without in any way communicating to them the fact of the flour having been so deposited. The defendants believing the flour to be the property of D. & Sons, advanced the 2,500*l.* on the security of the flour, on the terms that they were to have absolute possession of the flour and to warehouse it in their own name, and to have power to sell it. The plaintiffs by the fraudulent misrepresentations of D. & Sons that they had found a purchaser for the flour and would hand over to them the amount to be received as the price, were induced to part with the possession of the flour, and for that purpose gave, as requested, a delivery order to D. & Sons. Possession of the flour having been transferred to the defendants they, by virtue of the right to sell vested in them by the agreement with D. & Sons, sold the flour in the London

market, and delivered it to the respective purchasers. Of the 2,500*l.* thus advanced by the defendants to D. & Sons, 500*l.* only was paid to the plaintiffs, and D. & Sons afterwards became bankrupts. The plaintiffs having brought an action against the defendants for the wrongful conversion of the flour,—Held, that the flour having been given up by the plaintiffs to D. & Sons to sell as their own, the special property, if any, vested in the plaintiffs as pledgees, was intentionally abandoned, and the possession having been parted with, the contract of pledge was, at all events for the time being, at an end.

Held further, that, though the abandonment of the property in, and the surrender of the thing pledged, might, as between the pledgors and pledgees, have been revoked as having been obtained by fraud so long as the goods remained in the hands of the pledgors, yet that when prior to any such revocation the property in the goods had been transferred by the owners for good consideration to a bona fide transferee, the latter acquired an indefeasible title.

Held also, that the plaintiffs, having allowed D. & Sons to appear as the ostensible owners of the flour, and to exercise uncontrolled dominion over it without intervening themselves in the transaction, ought to suffer rather than the defendants who had innocently advanced money on the goods in the ordinary course of commercial dealing.

This was an action brought by the plaintiffs for the wrongful conversion of a quantity of flour. The facts are stated in the head note, and in the judgment of the Court.

T. H. James, for the plaintiffs.—The plaintiffs had a special property in the articles pledged, and not a mere lien. As pointed out by Willes, J., in *Halliday v. Holgate* (1), there are three kinds of security—the first, a simple lien; the second, a mortgage passing the property out and out; the third, a security intermediate between a lien and a mortgage—viz., a pledge—where, by contract, a

(1) 37 Law J. Rep. Exch. 174; *n. c.* Law Rep. 3 Exch. at page 302.

*Babcock v. Lawson, Q.B.*

deposit of goods is made as security for a debt, and the right to the property vests in the pledgee so far as is necessary to secure the debt. This was a pledge and the pledgee had the whole present interest until the debt was paid off. The plaintiffs therefore having a property in the flour were induced to part with their possession by the fraudulent misrepresentation of Denis Daly & Son that they had sold the flour to the defendants; the latter, therefore, are guilty of a conversion though admittedly ignorant of the fraud which had been committed—*Hollins v. Fowler* (2). *Kingsford v. Merry* (3), shews that the property in the flour did not pass to the defendants, and that the latter are, under the circumstances, liable in an action of trover. He also referred to *Lindsay v. Oundy* (4) and *Roberts v. Wyatt* (5).

*Cohen and Warr*, for the defendants.—Under the arrangement entered into between the plaintiffs and Daly & Sons, the plaintiffs were to hold the flour as security for the money advanced, but subject to the condition that when a contract of sale was complete the plaintiff was to enable Daly & Sons to transfer possession of the goods.

Even allowing that there was a pledge at all, and that the plaintiffs had a property in the flour, it is contended that they had surrendered it. *Lindsay v. Oundy* (4) and *Hollins v. Fowler* (2) were decided on the ground that the owner never intended to pass the property, but here the delivery order was handed over and the circumstances clearly shew that there was an intention on the part of the plaintiffs to pass the property. The plaintiffs gave up the possession of the flour to the owners, and enabled them to deal with the property in their true character as owners. Then the interest in the flour having been transferred to an innocent transferee before any act was done on the part of the plaintiffs to

disaffirm the transaction, the title of the transferee must prevail—*Moyce v. Newington* (6). The plaintiffs by giving the delivery order to Daley and Sons, and so enabling them to transfer the goods to the defendants, are estopped from denying that the property in the goods has passed to the defendants—*Knights v. Wiffen* (7).

Again, the plaintiffs are entitled to succeed on the ground that where one of two innocent persons must suffer, the burthen should fall upon the one who has parted with the possession of his goods and has given credit to the person who committed the fraud. It is more just that the plaintiffs, who might with due caution have guarded themselves against any fraudulent conduct on the part of Denis Daly & Sons, should suffer than the defendants, who, in the ordinary course of commercial delivery, advanced money on the goods. They referred to *Pease v. Gloahec* (8), *Attenborough v. The London and St. Katherine's Dock Company* (9) and *White v. Garden* (10).

*James* in reply.

*Our. adv. vult.*

The judgment of the Court (11) was (on June 10) delivered by

COCKBURN, L.C.J.—This was an action for the wrongful conversion of a quantity of flour alleged to be the property of the plaintiffs. The facts were shortly these.

The plaintiffs, who are merchants at Liverpool, had lent to the firm of Denis Daly & Sons, also merchants at Liverpool, their acceptances for the sum of 11,500*l.* (for which Denis Daly & Sons undertook to provide at or before maturity) on the security of certain flour, a memorandum as to such security being given by Denis Daly & Sons in these

(6) 48 Law J. Rep. Q.B. 125; s. c. Law Rep. 4 Q.B. D. 37:2

(7) 40 Law J. Rep. Q.B. 51; s. c. Law Rep. 5 Q.B. 660.

(8) 35 Law J. Rep. P.C. 66; s. c. Law Rep. 1 P.C. 219.

(9) 47 Law J. Rep. C.P. 763; s. c. Law Rep. 3 C.P. D. 450.

(10) 10 Com. B. Rep. 919; s. c. 20 Law J. Rep. C.P. 166.

(11) Cockburn, L.C.J.; and Mallor, J.

(2) 44 Law J. Rep. Q.B. 169; s. c. Law Rep. 7 E. & L. App. 757.

(3) 1 Hurl. & N. 503; s. c. 26 Law J. Rep. Exch. 83.

(4) 47 Law J. Rep. Q.B. 481; s. c. Law Rep. 3 App. Cas. 457.

(5) 2 Taunt. 268.

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terms: "As security for the due fulfilment on our part of this undertaking we have warehoused, in your name, sundry lots of flour, and in consideration of your delivering to us, or our order, the said flour as sold, we further undertake to specifically pay you proceeds of all sales thereof immediately on their receipt."

The flour was accordingly warehoused in the name of the plaintiffs, in a room let to them for the purpose, and of which they kept the key and paid the rent.

Three of the acceptances thus given by the plaintiffs, amounting in the whole to 6,500*l.*, having been in due time provided for by Denis Daly & Sons, it was agreed between them and the plaintiffs that the two remaining bills, for 2,500*l.* each, should be renewed, which was accordingly done, a memorandum similar to the former one being again given by Denis Daly & Sons, whereby they undertook to provide for the acceptances at or before maturity, with this addition: "As security for the due fulfilment on our part of this undertaking, you hold two lots of Baltic whites flour, warehoused in December and January last." The Baltic whites flour thus mentioned, consisted of 1,500 sacks, being the flour originally pledged to the plaintiffs.

In the interval between the giving of these last mentioned acceptances and the time of their becoming due, one of the firm of Denis Daly & Sons, on the 13th of May, 1878, applied to the defendants to advance the sum of 2,500*l.* on the security of the 1,500 sacks of flour, deposited as has been stated with the plaintiffs, but without in any way communicating to them the fact of the flour having been so deposited. The defendants, in entire ignorance of this fact and believing the flour to be the property of Denis Daly & Sons, agreed to advance the 2,500*l.* on the security of the flour, but on the terms that they were to have absolute possession of the flour, and to warehouse it in their own name, and to have power to sell it.

For the fraudulent purpose of obtaining possession of the flour so as to be able to give possession of it to the defendants, Arthur Daly, one of the firm of Denis, Daly & Sons, brought to the

plaintiffs, but unknown to the defendants, a memorandum in these terms:—

"May 14, 1878.

"We have sold Messrs. R. & J. Lawson 1,500 sacks of Baltic whites, payment as follows: 1,000*l.* upon delivery—1,000*l.* in fourteen days—1,000*l.* in a month, which amounts we will hand you as received.

"D. Daly & Sons."

The plaintiffs by the fraudulent misrepresentation that Denis Daly & Sons had found a purchaser for the flour, and would hand over to them the amount to be received as the price, were induced to part with the possession of the flour, and for that purpose gave, as requested, on the 14th of May, a delivery order to Denis Daly & Sons; and subsequently addressed a written direction to the landlord of the warehouse, which they delivered to Arthur Daly, to transfer the room in which the flour was deposited to Lawson & Co., which was accordingly done.

The defendants on the same day that the delivery order was given by the plaintiffs to Denis Daly & Sons, namely, the 14th of May, advanced to Denis Daly & Sons the sum of 1,725*l.*, and on the next day the further sum of 775*l.* in cash.

It is stated in the case that the fraudulent memorandum of the sale to the defendants, by which the plaintiffs were induced to give the delivery order for the flour, was brought to them by Arthur Daly after banking hours on the 14th, from which it may be inferred that the 1,725*l.* advanced by the defendants to Denis Daly & Sons on that day, was advanced before the possession of the flour had been given up to the latter by the plaintiffs. Possession of the flour having been transferred to the defendants, they, between the 18th of May and the 1st of June, by virtue of the right to sell vested in them by the agreement with Denis Daly & Sons, sold the flour in the Liverpool market, for sums amounting in the whole to 2,647*l.* 10*s.* 3*d.*, and the flour was delivered to the respective purchasers.

Of the 2,500*l.* thus advanced by the



*Babcock v. Lawson, Q.B.*

defendants to Denis Daly & Sons, 500*l.* was paid by the latter to the plaintiffs as part of the price received on the sale of the flour. But the plaintiffs have received no further payment, and Denis Daly and Sons have become bankrupts.

We have in this case to discharge the unpleasant duty of deciding on which of two innocent parties the loss, occasioned to one or other of them by the fraud of a third, shall fall. In discharging such a duty a Court, to use the words of Lord Cairns in *Lindsay v. Cundy* (4), "can do no more than apply, vigorously, the settled and well-known rules of the law." Unfortunately, however, some difficulty presents itself in the present case in applying the law; for the case is, so far as we are aware, *sui generis*, the contract out of which the claim of the plaintiffs arises being of an altogether exceptional character. The contract is not one in which goods are deposited upon the ordinary terms incidental to a bailment of pledge, namely, that the thing pledged shall remain in the possession of the pledgee until the engagement of the pledgor, which it was given to insure, has been fulfilled. Here the pledgors, when they find a purchaser, are to have possession of the thing pledged, *in order to sell it*, not in the name, or even on behalf of, the pledgees, but as their own, subject only to the condition of handing over the proceeds in liquidation of their debt.

It may be doubted whether, under such a contract, any special property, however limited, vested in the pledgees, or whether their right was not limited to the possession and custody of the goods, so as to secure to them the knowledge of any sale which the owners might be able to make, and so to afford them the opportunity of insisting on the price being handed over to them as soon as paid.

Assuming, however, that under the contract with Denis Daly & Sons, the plaintiffs acquired, as pledgees, a special property in the flour deposited in their name, it was subject to the right of the pledgors to have the flour given up to them, on their finding a purchaser, for the purpose of the sale by them as owners, without any intervention on the

part of the pledgees. If, having obtained the goods for the purpose of selling them, and having sold them, the pledgors have kept the price instead of handing it over to the pledgees, the latter could not have disputed the title of the buyer, and would have had no remedy except by action against the pledgors for breach of contract.

In compliance with the agreement the flour was delivered by the plaintiffs to Denis Daly & Sons, the pledgors, with the full intention that they should sell it as their own, and make a good title to it to their vendees.

It is true that the possession of the goods was obtained by the fraud of the pledgors; but this appears to us to make no difference in the result. The flour having been given up by the plaintiffs to Denis Daly & Sons, conformably to the contract, to sell as their own, the special property, vested in the plaintiffs as pledgees, whatever it may have been, was intentionally surrendered, and the possession having been parted with, the contract of pledge was, at all events for the time being, at an end. The abandonment of the property in, and the surrender of the thing pledged, might, as between the pledgees and pledgors, have been revoked, as having been obtained by fraud, so long as the goods remained in the hands of the pledgors. But when, prior to any such revocation, the property in the goods had been transferred by the owners for good consideration to a *bona fide* transferee, the latter acquired, as it appears to us, an indefeasible title. The analogy to a case of sale, where the vendor is induced to part with his property by fraud, appears to us complete; and the principle laid down by the Court of Common Pleas in *White v. Garden* (10), and by the House of Lords in *Lindsay v. Cundy* (4), and acted upon by this Court in *Moyce v. Newington* (6), is, we think, applicable to the case before us; and we are therefore of opinion that the defendants acquired a good title to the flour by their contract with Denis Daly & Sons.

Our view of the case being founded on the assumption that the property in the goods became, by the act of the pledgees,

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revested in the pledgors, it makes no difference that the goods, having been parted with by the plaintiffs with a view to their being sold, were, instead of being sold, pledged. The property having, by the act of the pledgees, become revested in the pledgors, the latter were as competent to dispose of the goods by way of pledge as by that of sale.

Nor in this view of the case is it in any way material that the larger portion of the money advanced by the defendants to Denis Daly & Sons was paid (if we are to take the fact to have been so) before the possession of the flour was given up by the plaintiffs. The property in the flour was made over to the defendants, and the possession of it given up to them, by Denis Daly & Sons, for good consideration, when the full property in it was, as we think, in the latter, and the transfer took place by virtue of a contract whereby the money was to be advanced on the pledge of the goods. That the money was paid down before the goods were delivered, provided the property in the goods was in Denis Daly & Sons when, in fulfilment of the contract, they transferred the property in, and gave possession of, the flour, can make no difference.

But there is a further ground on which we are of opinion that the defendants are entitled to our judgment. We are prepared to hold, as we intimated in *Moyce v. Newington* (6), that where one of two innocent parties must suffer from the fraud of a third, the loss should fall on the one who enabled the third party to commit the fraud. It has been so held by the Supreme Court of Judicature of the state of New York, in a case of *Root v. French* (12). In *Vickers v. Hers* (13), Lord Chancellor Hatherley says—"If one person arms another with a symbol of property he should be the sufferer, and not the person who gives credit to the operation and is misled by it." It is on this principle that the legislation with reference to fraudulent sales made by factors, or agents intrusted with the possession of goods, or of the documents

of title to goods, has been based. It was on this ground that the Court of Session, in *Pochin v. Robmow* (14) and in *Vickers v. Hers* (13), independently of the Factors Acts, and proceeding on general principles, decided in favour of an innocent purchaser. And though, in *Vickers v. Hers* (13), in the House of Lords, the case was decided in favour of the defendant, as coming under the Factors Acts, Lord Colonsay expressly says that the judgment appealed from was well founded, independently of these Acts.

Now, in the case before us, Denis Daly & Sons were allowed by the plaintiffs to appear as the ostensible owners of the flour, and to exercise uncontrolled dominion over it, without the plaintiffs, by intervening themselves in the transaction, as they might have done, securing themselves against any fraudulent conduct on the part of Denis Daly & Sons. It would therefore be in the highest degree unjust and inequitable that the defendants, Lawson & Co., who have innocently advanced money on the goods in the ordinary course of commercial dealing, should be sufferers through the improvident contract of the plaintiffs with Denis Daly & Sons, or want of proper caution on their part.

We therefore, on both grounds, give judgment for the defendants.

*Judgment for defendants.*

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Solicitors--Gregory & Co., agents for Stone & Fletcher, Liverpool, for plaintiffs; Field, Roscoe & Co., agents for Bateson & Co., Liverpool, for defendants.

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(12) 13 Wendell, 570.

(13) Law Rep. 2 Scotch App. 116.

(14) 3rd series, vol. vii., p. 622.

[IN THE COMMON PLEAS DIVISION.]

1879. { MATTHIESSEN AND ANOTHER v.  
May 21. { THE LONDON AND COUNTY  
BANKING COMPANY.

*Bankers Conversion—Crossed Cheques Act, 1876 (39 & 40 Vict. c. 81), Sections 4, 5, 12—Protection to Collecting Banker—“Not Negotiable”—Forged Indorsement.*

*By section 12 of the Crossed Cheques Act, 1876 (39 & 40 Vict. c. 81), it is enacted, “a person taking a cheque crossed generally or specially bearing in either case the words ‘not negotiable,’ shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had. But a banker, who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself, shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment”:—Held, that the cheque mentioned in the latter part of that section is not limited to the cheque described in the former part as one bearing upon it the words “not negotiable,” and that, therefore, a banker, who in good faith and without negligence in due course of collection receives payment for a customer of a cheque crossed generally, but having a forged indorsement, is protected by such 12th section from liability to the true owner of the cheque for having placed the amount of such payment to the credit of his customer, notwithstanding such cheque has not the words “not negotiable” upon it.*

The statement of claim, after stating that J. W. Maddle was in the plaintiffs' employ as servant and traveller, and as such received from the plaintiffs' customers payment for goods sold, alleged that on or about the 20th of July, 1877, Messrs. Oliver & Son, of Bury St. Edmunds, in payment for goods sold to them by the plaintiffs, gave to the said J. W. Maddle a cheque dated the 20th of July, 1877, for 150*l.* 13*s.* 11*d.*, drawn by the said Oliver & Son upon Oakes, Bevan & Co., bankers, Bury St. Edmunds, and payable on demand to the plaintiffs or order, which cheque the said J. W.

Maddle received for and on behalf of the plaintiffs and with their authority.

That on or about the 15th of January, 1878, Mott & Co., of Leicester, in payment for goods sold to them by the plaintiffs, gave to J. W. Maddle a cheque dated the 15th of January, 1878, for 62*l.* 11*s.* 10*d.*, drawn by Mott & Co. upon T. & T. T. Paget, Leicester Bank, payable on demand to the plaintiffs or order, and crossed with the words “& Co.,” which cheque J. W. Maddle received on behalf of the plaintiffs and with their authority.

That on or about the 24th of January, 1878, Pratt & Sons, of Lincoln, in payment for goods sold to them by the plaintiffs, gave to J. W. Maddle a cheque dated the 24th of January, 1878, for 30*l.* 16*s.* 9*d.*, drawn by Pratt & Sons upon Smith, Ellison & Co., Lincoln Bank, payable to the plaintiffs or order, and crossed with the words “& Co.,” which cheque J. W. Maddle received on behalf of the plaintiffs and with their authority.

That the three cheques so received by J. W. Maddle were never delivered to the plaintiffs, but J. W. Maddle stole and embezzled them from the plaintiffs, and J. W. Maddle, without the knowledge, sanction or authority of the plaintiffs, forged the plaintiffs' name on the back of each of the three cheques.

The statement of claim further stated, that after J. W. Maddle had so stolen and embezzled the three cheques, and forged the plaintiffs' endorsements thereon, the said three cheques, without the knowledge, sanction or authority of the plaintiffs, were paid into the defendants' bank, and were received by the defendants, and that the defendants having so received the three cheques, presented the same for payment to the bankers upon whom the said cheques were respectively drawn, and received from each of the said bankers the amount for which each of the said cheques were respectively drawn, and retained and appropriated to their own use such amounts, being 150*l.* 13*s.* 11*d.*, 62*l.* 11*s.* 10*d.* and 30*l.* 16*s.* 9*d.*, making together 244*l.* 2*s.* 6*d.*

And further, that the defendants by so receiving and dealing with the said cheques, converted such cheques to their

*Matthiessen v. London and County Banking Co., C.P.*

own use, and wrongfully deprived the plaintiffs of the possession of the said cheques.

The amended statement of defence was as follows:—

1. The defendants say that they are bankers, carrying on business in London and other places, and are in the habit of collecting cheques drawn upon country bankers for their customers, the holders of such cheques, and that the said three cheques in the statement of claim mentioned were all cheques drawn upon country bankers.

2. In the usual course of business, two of the three cheques were handed to them by one of their customers, named James Fowler, for collection, he being then the holder of the said cheques and having an account at the defendants' bank, and the other cheques were handed to them by one of their customers, named William Wood, for collection, he being then the holder of the said cheque and having an account at the defendants' bank.

3. In the usual course of business they collected the cheques from the country bankers upon whom they were drawn, and in the usual course of business placed the amounts so collected to the credit of their customers, Fowler and Wood.

4. The defendants did not know when they received the cheques from Fowler and Wood, nor when they collected the same, that the plaintiffs' names on the back of any of the cheques were forged.

5. By reason of the premises the defendants say that they are not liable to the plaintiffs in the present action.

6. In further answer to the statement of claim, the defendants say that the cheques were cheques drawn after the passing of "The Crossed Cheques Act, 1876," and were crossed cheques within the meaning of that Act, and had not the words "not negotiable" on them, or on either of them, and that they, when they received the said cheques crossed as aforesaid, were and still are bankers, and that they in good faith and without negligence having received the said cheques as in paragraph 2 is set forth, received payment for their customers of the said cheques crossed as aforesaid, and in no

other way dealt with the said cheques, or any of them, and that by reason of section 12 of the said 39 & 40 Vict. c. 81, they have incurred no liability to the plaintiffs, and the plaintiffs are not entitled to maintain the present action against the defendants.

The plaintiffs demurred to the said statement of defence.

*Waddy* (*Oppenheim* with him), in support of the demurrer.—The first five paragraphs of the statement of defence are bad, and shew no defence to the action—*Arnold v. The Cheque Bank* (1). The question turns in fact upon the sixth paragraph of such statement, and on the construction to be put on section 12 (2) of the Crossed Cheques Act, 1876 (39 & 40 Vict. c. 81). The whole of that section refers to one and the same kind of instrument, which is described in the first part of it, that is to say, "a cheque crossed generally, or specially bearing in either case the words 'not negotiable,'" and in effect enacts that a person, who is not a banker, taking such an instrument, is not to have a better title to it than he from whom he took it, but that a banker, who has in good faith received payment of it for a customer, is not thereby to incur liability to the true owner. The 4th section defines what are general and special crossings of a cheque (3), and it

(1) 45 Law J. Rep. C.P. 562; s. c. Law Rep. 1 C.P. D. 578.

(2) The following is section 12 of 39 & 40 Vict. c. 81, namely, "A person taking a cheque crossed generally or specially, bearing in either case the words 'not negotiable,' shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.

"But a banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself, shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment."

(3) The following is section 4, "Where a cheque bears across its face an addition of the words 'and company,' or any abbreviation thereof, between two parallel transverse lines or of two parallel transverse lines simply, and either with or without the words 'not negotiable,' that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed generally.

"Where a cheque bears across its face an addi-

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appears from such definition, that the words "not negotiable" do not have any effect upon the crossing of a cheque. Then the 12th section professes to deal only with a crossed cheque bearing the words "not negotiable," and then a banker is to be protected, provided he so received payment in good faith and without negligence.

[GROVE, J.—You import then the words "bearing in either case the words not negotiable" after the words "crossed generally or specially to himself" in the second part of the 12th section?]

Yes. Each part refers to the same kind of instrument, and the object of the Legislature was to give the power to the owners of cheques of restraining their negotiability, if they so pleased, by the use of the words "not negotiable." Section 19 of 16 & 17 Vict. c. 59, protects a banker paying a cheque which purports to be indorsed by the person on whose order it is made payable, without proof of such indorsement. In *Bellamy v. Marjoribanks* (4), the Court of Exchequer held that the crossing a cheque did not restrict its negotiability, but only made it evidence of negligence if the cheque afterwards should be paid otherwise than through a banker. This was followed by *Carlton v. Ireland* (5). This led to the passing of 19 & 20 Vict. c. 25, which enacted that a crossed cheque shall be a direction to the banker on whom it is drawn that it shall be paid only to or through a banker. *Simmonds v. Taylor* (6) decided that the crossing formed no part of the cheque, and that if it was obliterated so that the cheque did not appear to be a crossed cheque when presented for payment, the banker was not liable, though it did not come to him through a banker. Thereupon the 21 & 22 Vict. c. 79 enacted that the crossing should be deemed a

tion of the name of a banker, either with or without the words 'not negotiable,' that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed specially, and to be crossed to that banker."

(4) 7 Exch. Rep. 389; s. c. 21 Law J. Rep. Exch. 70.

(5) 5 E. & B. 765; s. c. 25 Law J. Rep. Q.B. 113.

(6) 27 Law J. Rep. C.P. 45.

material part of the cheque, but that the banker should be protected in paying a cheque which at the time of presentment does not plainly appear to be crossed. In *Ogden v. Benas* (7), the banker on whom the cheque is drawn was held protected by 16 & 17 Vict. c. 59. s. 19 from proving it to be indorsed by the person to whose order it is made payable, if it purported to be so indorsed, yet a third person or banker who cashed such cheque was not so protected. That was followed by *Arnold v. The Cheque Bank* (1), which is to the same effect. Notwithstanding the 21 & 22 Vict. c. 79 made the crossing a material part of the cheque, *Smith v. The Union Bank* (8) shewed that the banker on whom the crossed cheque was drawn was not liable for paying the cheque when presented by a different banker than the banker whose name was on the crossing. This last case led to the passing of the Act in question, namely, 39 & 40 Vict. c. 81, the 7th section of which enacts that where a cheque is crossed specially, the banker on whom it is drawn is not to pay it otherwise than to the banker to whom it is crossed. The 12th section is the only one which relates to a collecting banker, the other sections relate to the banker on whom a cheque is drawn, and no doubt it must be admitted that if the second part of that section is to be read alone, and unconnected with the first part, the plaintiffs in this action are answered by the sixth paragraph of the statement of defence, but the plaintiffs contend that the second part of the 12th section applies only to the description of cheque mentioned in the first part.

[GROVE, J.—That might have been the case if there were inserted the word "so" after the word "cheque" in the second part of that section, and the passage were "but a banker who has in good faith and without negligence received payment for a customer of a cheque so crossed generally or specially to himself shall not," &c.]

(7) 43 Law J. Rep. C.P. 260; s. c. Law Rep. 9 C.P. 513.

(8) 44 Law J. Rep. Q.B. 117; on appeal 45 Law J. Rep. Q.B. 149; s. c. Law Rep. 10 Q.B. 291.

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That is what is meant. If it is to be a limitation of the rights of the true owner in favour of the banker, it must be with respect to what is described in the first part, that is to say, "a cheque crossed generally or specially, bearing in either case the words 'not negotiable.'" The collecting banker is not called upon to pay, but only to receive payment of the cheque given him by his customer. If he pays it away he does so at his own risk.

[LINDLEY, J.—What ought he to do with it?]

He must not place the amounts collected to the credit of his customers. That is not protected, and amounts to a conversion, for which the banker is liable according to *Arnold v. The Cheque Bank* (1). In the course of delivering the judgment of the Court in that case Lord Coleridge, C.J., says, "The question here is whether what was done by the defendants amounted to a conversion of the bill, and we are of opinion that it did. Payment of the draft was actually obtained by the defendants from Smith, Payne & Smith, and the next step in dealing with the money was not simply to hand it over to Mrs. Chandler" (the person from whom they had received the cheque to get cashed), "but to retain it and open an account with it, the effect of which was to appropriate it to their own use as a loan from Mrs. Chandler."

[LINDLEY, J.—The defendants in that action might have refused to have opened an account with Mrs. Chandler, but where, as here, they have collected the cheque for their customer, what can they do with the money so collected but place it to the credit of their customer?]

They are not protected, unless indeed they come within the protection given by section 12 of this Act, and that does not apply unless the cheque has the words "not negotiable" on it.

*A. L. Smith*, for the defendants.—The demurrer is to the whole statement of the defence, and, therefore, if there be a good defence in any part of that statement, the demurrer must fail. The sixth paragraph contains a good defence. Previous to the Crossed Cheques Act, 39 &

40 Vict. c. 81, although the banker on whom the cheque was drawn was protected in paying it on a forged indorsement, the collecting bank who collected the cheque was not protected, because the forged indorsement passed no title in the cheque, and the true owner was, therefore, not prevented from recovering the amount. The 12th section of the 39 & 40 Vict. c. 81 has altered this. The Legislature has never, in all the Acts it has passed on the subject, desired to interfere with the negotiability of cheques, but by this last Act it has enabled the holder of a cheque, by putting on it the words "not negotiable," to prevent anyone who might afterwards take it from having a better title than the person from whom he took it. If this, however, be not done, the law as to the negotiability of cheques is not altered, and a collecting banker would be in no better position than he was before the Act, and would, therefore, still be liable to the true owner for the conversion of the cheque. It is for this purpose, and to give such banker relief from such liability, that the latter part of the 12th section has been enacted. If that be read with the interpretation of the meaning of a cheque crossed generally or specifically, as given by section 4, it is clear that the collecting banker, who in good faith and without negligence receives payment for a customer of a crossed cheque, is protected from liability by reason of his doing so, whether the words "not negotiable" are or are not on the cheque, as whether they be there or not the cheque is equally to be deemed crossed generally or specially (as the case may be). The argument is fallacious that the second part of the 12th section applies to a person who is a banker, and the first part to a person who is not, because "a person" in the first part does not exclude a banker, for it will be seen that "banker" by section 3 includes a person who is acting as banker. The second part of that section clearly affords a good defence to this action, and supports the sixth paragraph, and it cannot be limited to cheques which have the words "not negotiable" on them, as contended for by the plaintiffs.

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GROVE, J.—In my opinion this demurrer must be overruled.

It appears to me that the whole question turns upon the language of the statute 39 & 40 Vict. c. 81, and mainly upon the words of section 12 of that statute. The only assistance for construing that section is to be derived from what may be called the definition clauses of that statute. Now the first part of section 12 says, "a person taking a cheque crossed generally or specially." What is a cheque crossed generally or specially? That is explained by section 4 to be "where a cheque bears across its face an addition of the words, 'and company,' or any abbreviation thereof, between two parallel transverse lines, or two parallel transverse lines simply, and either with or without the words, 'not negotiable.' That addition shall be deemed a crossing, and the cheque shall be deemed to be crossed generally. "Where a cheque bears across its face an addition of the name of a banker, either with or without the words 'not negotiable,' that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed specially, and to be crossed to that banker." There are certain other provisions, amongst others, in section 5, "where a cheque is crossed generally a lawful owner may cross it specially." Now section 12 says—"A person taking a cheque crossed generally or specially, bearing in either case the words 'not negotiable,' shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had."

It cannot be argued that the words there, "bearing in either case the words, 'not negotiable,'" are not most important. It is by the use of them that the non-negotiability of the cheque is effected, so that a person taking a cheque crossed with those words on it is not to have or be capable of giving a better title than that of the person from whom he had it. The next half of this 12th section, omitting, as I do for the present, the word "but," states—"A banker who has in good faith, and without negligence, received payment for a customer of a cheque crossed generally or specially to

himself, shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment." Taking those two parts of the section as they appear on plain reading, and grammatically, they each apply to a different state of things; the first part to a cheque which has a limitation to its negotiability by the use of the words on it, "not negotiable;" the second part omitting those words, and giving a protection to bankers with respect to cheques crossed generally or specially, and without saying anything about the words, "not negotiable." Had those two parts been separate sections, and instead of the word "but" had the figure "13" been there, marking it as the 13th section, it does not seem to me possible that anyone could have mistaken the meaning or application of the words in that last part. But then it is contended that, by the use of the word "but," the latter branch of the 12th section is by way of a proviso to the first part, and that, therefore, it is to be read as if the words, "not negotiable," were repeated in that latter part. That, to my mind, would be a strange stretch of language, and one which I would not agree to unless I saw some very imperative reason for it, such as a manifest absurdity resulting from any other construction, which obliged one to import such words into the section as, by so doing, one would be giving a forced meaning to the latter part of that section.

Now do we require to give that forced meaning to the language by reason of the word "but" being employed? It seems to me that the word "but" can receive a very sufficient construction, without giving such a forced construction to the section. The first branch of the section refers to any person, the second branch refers to a banker. Therefore, the section having in the first part given a protection to those who put upon their cheque the words, "not negotiable," by which a person taking it shall not have or be capable of giving a better title to the cheque than that which the person had from whom he took it; the section goes on, in the second part, to give a banker a further protection, whether he

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is included in the word "person" or not; and a banker, if he has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself, is not to incur any liability to the true owner of the cheque by reason only of having received such payment, the word "but" contradistinguishing "banker" from "any person."

For what reason am I to construe the words there used against their obvious and plain meaning, and to import words providing for a different contingency, when, without repeating the words "not negotiable," the Legislature might have made it clear if this was what is intended, by simply inserting the words "such a cheque," or "so crossed," in the second part of that section?

Am I to suppose the Legislature to have made a most singular blunder, and to have purposely expressed, and that, too, in very clear language, that which they did not mean? To give this part of the section the construction contended for by Mr. Waddy I should virtually be making an enactment, for I should be interpolating words in this second part of the section which do not occur, and which, as it seems to me, were intentionally omitted.

Is there, then, anything in the reason of the thing, viewing it with reference to the past law, which prevents my reading this enactment according to the plain and obvious meaning of the words themselves, without either adding to or subtracting from them at all?

I do not wish to go through in detail the previous legislation. It has been carefully gone through by Mr. Waddy, and comes substantially to this, that the Legislature has aimed at making certain limitations as to the negotiability of cheques, but the statutes have been so framed and carried into effect that whatever may have been the intention of those who enacted them, they have done little, if anything, to restrict their negotiability. The case of *Bellamy v. Marjoribanks* (4) threw open what was supposed to be a limitation upon crossed cheques, and the case of *Ogden v. Benas* (7) limited the protection to bankers given

by 16 & 17 Vict. c. 59. s. 19, the effect of which, as construed by *Ogden v. Benas* (7), is that the banker only upon whom the cheque is drawn which has a forged endorsement is protected against the consequence of his paying that cheque; and, as I understand it, upon the reason that, although a banker is bound to know the handwriting of his customer, he cannot know the handwriting of all the persons to whose order his customers may draw. It was supposed that that statute applied not merely to the banker upon whom the cheque is drawn, but to collecting bankers; but the case *Ogden v. Benas* (7), followed by *Arnold v. The Cheque Bank* (1), decided it did not so apply. It is, therefore, not irrational to suppose that the Legislature by the recent Act, 39 & 40 Vict. c. 81. s. 12, wished to give to collecting bankers the protection which it was supposed had been given by a previous statute, and there is nothing unreasonable in that section giving that protection, the more so as one object of the Act could hardly be obtained without it (see section 7). The words are perfectly plain; and I see nothing in the previous history or law of crossed cheques, to make this construction of the section in any way doubtful or irrational. I am therefore of opinion that the demurrer must be overruled.

LINDLEY, J.—I take the same view of the construction of the Act. The Act is confined entirely to crossed cheques, and the observations which I propose to make will also be confined to crossed cheques, for I purposely say nothing about uncrossed cheques. The question is, what is the true construction of the Act 39 & 40 Vict. c. 81? That Act has done more things than one; it has said that when a cheque is crossed it is to be paid through a banker, and through a banker only, and nobody can get it except through a banker. That practically means this, that bankers must receive those cheques and collect them for their customers. Take the position of a collecting bank. A collecting bank receives from its customers crossed cheques; they must collect them or leave them alone; practically of course they do collect them. Then it comes to this: What is the consequence if they do



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collect, and the customer who sends the cheque to them happens to have a bad title? It is, to my mind, a little hard in any case, that a banker who merely collects the money for his customer should be liable for the money. I do not mean to say that, as the law stood before, the banker was not liable, but it is a little hard; and it appeared to me to be only reasonable, at all events, that the Legislature should relieve bankers from some of the consequences against which no amount of foresight could possibly guard. When we look at this 12th section it is obvious that is what is meant. The first part of the section merely affects the title of persons taking cheques which are marked "not negotiable." This is a new fashioned cheque altogether, and the Act of Parliament says that if it is marked "not negotiable," the person who takes that cheque is to have no greater right than the person who gives it him. The consequence of that is, that in this particular case the customers of the bank, Fowler & Wood, have no better title to the cheques than the person from whom they got them. That is the first part of the section. The second part of the section does not relate to cheques, but to the proceeds of cheques. The customer of the bank gets no better title than his transferor. Not only when the cheque is marked "not negotiable," but when it is not so marked, if it is not an open but a crossed cheque, the bank in either case deals with the proceeds. If the bank has the cheque it may be stopped in their hands. But when the bank has got the proceeds, and the true owner says to the bank, "Hand me those proceeds," the Legislature in the second part of the 12th section says, "No;" if you, the bank, have collected only the proceeds of the cheque for your customer, we will not render you responsible for the proceeds when you have dealt with the cheque in the only way in which, as a matter of business, you could deal with it. If you have done anything more, if you have applied it to your own use, that is another matter; but if you have simply collected it from the clearing house in the only way in which a banker collects cheques, and that is all you have done, the true owner

shall look through you to your customer, and he and not you must be responsible to the true owner for the proceeds.

That appears to me to be the true meaning of the language; and when you come to look at the actual words, there is not a single word in the section that militates with that construction in the slightest degree, unless it be the word "but." That word "but" is far too loose a word to control the clear meaning of the latter part of the 12th section, and for the reasons already given it appears to me that the bank is right, and that the demurrer ought to be overruled.

*Demurrer overruled.*

Solicitors—Wild, Browne & Wild, for plaintiffs;  
Harries, Wilkinson & Raikes, for defendants.

*Collins v. Melch 492 J. L. 281.*  
*Marsden v. Lancaster 14 R. 50 L. 96 L. 519.*

[IN THE COMMON PLEAS DIVISION.]

1879. }  
June 19. } TURNER v. HEYLAND.

*Practice—Costs—Jurisdiction of Judge at Nisi Prius—Order made without Application—Rules of Court, 1875, Order LV.*

*In an action tried by a jury the Judge before whom such action is tried has power of his own motion to make an order at the trial depriving a successful plaintiff of costs under Order LV., and no application is necessary in order to give him jurisdiction to exercise such power.*

*Baker v. Oakes (46 Law J. Rep. Q.B. 246; s. c. Law Rep. 2 Q.B. D. 171) discussed.*

Appeal from the Salford Hundred Court.

Action for work done and materials supplied by the plaintiff for the defendant, tried in the Court of Record for the Hundred of Salford, in the county of Lancaster, before the Judge of that Court and a jury, when the jury found a verdict for the plaintiff for 30*l.*, including 23*l.* paid into Court by the defendant. By new rules signed by the Judge of the

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Salford Hundred Court, and approved by the Hon. Mr. Justice Manisty on the 28th day of October, 1878, the Supreme Court of Judicature Acts, 1873 and 1875, and all rules and orders made in pursuance thereof, were and are applied to the Salford Hundred Court.

At the time that the jury gave their verdict the counsel for the defendant had left the Court, but the defendant and her solicitor remained and were present in Court, and no application was made nor any cause shewn why the costs should not follow the event. The counsel for the plaintiff applied for judgment, and the learned Judge directed judgment to be entered for the plaintiff for 7*l.* beyond the 23*l.* paid into Court, but said that each party must pay their own costs. The plaintiff's counsel subsequently applied to the Judge to amend his judgment by striking out the direction depriving the plaintiff of his costs, on the ground that there having been no application made at the trial, on good cause shewn, the costs followed the event, and the Judge had, therefore, no power to deprive the plaintiff of his costs. The learned Judge refused to alter his direction or to amend the judgment.

The plaintiff moved the Divisional Court, sitting as a Court of Appeal from inferior Courts, within eight days of the hearing of the cause, under section 6 of the County Courts Act, 1875 (38 & 39 Vict. c. 50), and obtained a rule *nisi* calling on the defendant to shew cause why the judgment entered should not be amended by striking out the direction as to costs, on the ground that no application was made or cause shewn at the trial why the Judge should otherwise order under Order LV. rule 1 (1) of the Judicature Act, and that the Judge had no discretion as to costs, and that the costs should have followed the event.

(1) Judicature Act, 1875, Order LV. rule 1. "Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court; . . . provided that where any action or issue shall be tried by a jury, the costs shall follow the event, unless upon application made at the trial, for good cause shewn, the Judge before whom such action or issue is tried, or the Court, shall otherwise order."

*Bigham* shewed cause.—The Judge was acting within his jurisdiction, and therefore the Court will not entertain this application, which would interfere with an order which was entirely within his discretion. The case put forward by the other side is, that the Judge had no power to make the order as to costs, because no application was made to him at the trial within the terms of Order LV. rule 1, and that, therefore, he was acting without jurisdiction. The *dicta* of Cockburn, L.C.J., and Brett, J.A., in the Court of Appeal, in *Baker v. Oakes* (2) will be relied on, but those *dicta* were unnecessary to the decision of the case, for the point for the decision of the Court was whether an order as to costs made by the Judge who tried the case, but long after the trial, was valid, and those learned Judges did not intend to hold that an application at the trial was necessary to give the Judge jurisdiction. The word application is not to be so stringently construed. If, however, the Judge had no jurisdiction, then the order is a mere nullity and gives no ground for a new trial. If the taxing-master treats the order as a nullity, the party objecting should apply for a mandamus, as in *In re King v. Hawkesworth* (3). Neither in *Bowey v. Bell* (4), or in any of the cases there decided, had the application been made at the trial.

*Henn Collins* in support.—The plaintiff could not have done otherwise than apply for this rule. The order would have gone to the taxing-master and he could not disobey it, therefore the plaintiff has applied here to amend the judgment or reverse it. In *Baker v. Oakes* (2) there had been a misapprehension as regards figures which was not discovered till after the trial, in consequence of which no application had been made at the trial, and though the merits were all in favour of the party applying, the Court held that because the application had not been

(2) 46 Law J. Rep. Q.B. 246; s. c. Law Rep. 2 Q.B. D. 171.

(3) Law Journal, Weekly Notes, May 31, 1879, p. 97.

(4) 48 Law J. Rep. Q.B. 161; s. c. Law Rep. 4 Q.B. D. 96.

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made at the trial, the order of the Judge must fail.

[LOPES, J.—Is not the fair intent and meaning of Order LV. rule 1, that the matter shall be entertained by the Judge at the trial while fresh in his mind? Otherwise, if the Judge be of opinion that a party ought not to have his costs, yet if counsel be taken ill and obliged to leave the Court so that no application can then be made, the Judge would have no power to make the order.]

In such a case the alternative proposition of the section arises, by which application is to be made to a Divisional Court. In *Baker v. Oakes* (2) Lord Justice Brett describes the application to be a condition precedent.

[LOPES, J.—I observe that in the report in the Law Journal those words are omitted.]

GROVE, J.—The only doubt I have entertained during the argument of this case is whether the judgment of the Court of Appeal in *Baker v. Oakes* (2) amounts to a direct decision that an application by counsel at the trial is necessary before the Judge can exercise the power given him by Order LV. On the best judgment I can form I am of opinion that it does not, and that the Court of Appeal did not lay down any such proposition.

According to the report in the Law Reports, Lord Justice Brett says (Law Rep. 2 Q.B. D., at p. 175), "No application was made at the trial, and therefore the Judge could not make the order, a condition precedent to giving him jurisdiction not having been fulfilled." This sentence, taken alone, would seem to be an intimation of Lord Justice Brett's opinion that the application to the Judge was a condition precedent to the exercise of this power by the Judge; but when we look at the judgment of the Lord Chief Justice in the same case, and at the facts in other cases, where similar applications have been entertained, though no application to the Judge had been made at the trial, at which, as a matter of fact, the matter had been allowed to pass, the good sense and the meaning of the words, "unless upon application made at the

trial," certainly appears to me to be, "unless the matter be dealt with and entertained by the Judge at the trial." This seems really the effect of the judgment of the Court of Appeal in *Baker v. Oakes* (2). I am anxious not to appear indisposed to defer to the Court of Appeal, for if I thought the Court of Appeal really meant the application to the Judge at the trial was to be a condition precedent to the order of the Judge I should bow to that decision, and treat it as law. Curiously enough, the words, "condition precedent," are not used in the Law Journal Reports—see judgment of Brett, L.J., in *Baker v. Oakes* (2)—though probably the words were used, as it is not likely the words would be put in.

The words of the section are, "unless upon application the Judge . . . or the Court shall otherwise order;" so that, if the words are to be literally construed, and the application be a condition precedent to the jurisdiction of the Judge at the trial, it must equally be a condition precedent to the jurisdiction of the Court, and a previous application would have had to have been made to the Judge at the trial, before the Divisional Court could entertain the matter. Cases have been cited which shew that the Divisional Court has power to entertain the matter, though no application has been made to the Judge at the trial.

It appears to me that the true intent and meaning of the words must be that the matter should be entertained and dealt with at the trial; otherwise many cases might arise which would render this Order inoperative, if, for instance, the Judge left the Court, and the verdict was taken by the associate; or counsel be taken ill, or in some way obliged to leave the Court; or the defendant be defending in person, and does not know of the necessity of this application. In such cases no application would be made, and though the plaintiff may gain the verdict on some technical point, and the Judge may be of opinion that the action was scandalous, yet, before he can make an order depriving the plaintiff of costs, he is to wait for the application to be made, which alone can give him jurisdiction. This

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would render the act practically inoperative. I am, therefore, of opinion that the judgment in *Baker v. Oakes* (2) is not intended to apply to a case where the Judge had exercised his power at the trial, though no application had been made to him to do so.

LOPES, J.—This case raises a matter of general importance. The question is whether a Judge sitting at *Nisi Prius* may, without direct application made to him, and of his own motion, prevent the costs from following the event. In the particular case before us it appears that, after verdict for the plaintiff, application was made to the Judge to direct judgment to be entered; he did so, and appended to his judgment an order that each party should pay his own costs.

I should, I have no hesitation in saying, have thought that the Judge could, without application made at the trial, deprive the plaintiff of costs, had it not been for the judgment of the Court of Appeal in *Baker v. Oakes* (2). It is most material to consider what was before the Court in that case; other matter was before the Court, and the present point was not directly before the Court, and to my mind this makes considerable difference in arriving at the result of the judgment. It seems obvious that what the Court of Appeal meant to decide was that, unless the matter was entertained by the Judge at the trial, and the power then exercised by him, he has no jurisdiction. It cannot be said that the judgment of the Court of Appeal has decided that, if the plaintiff had succeeded by some technicality, and had grossly misconducted himself, and was clearly not entitled to his costs; that the Judge was prevented from exercising this salutary power of depriving him of costs, simply and solely because no application was made to the Judge at the trial. I cannot believe that the Act intended any such thing, or that Brett, L.J., intended to lay down such law. It is also material to notice that the expressions of Lord Justice Brett, which would seem most strongly to bear out any such doctrine, are omitted from the *Law Journal*.

*Henn Collins* applied for leave to appeal.

GROVE, J.—I should not have thought this matter for appeal, but as it would be proper to obtain the opinion of the Court of Appeal as to whether we have rightly construed their judgment, we will grant leave to appeal.

*Rule discharged; leave to appeal* (5).

Solicitors—Paddison, Son & Titley, agents for Horner & Son, Manchester, for plaintiff; Pritchard, Englefield & Co., agents for A. D. Edwards, Manchester, for defendant.

[IN THE COMMON PLEAS DIVISION.]

1879. } DIXON v. WHITWORTH.  
April 26. } THE SAME v. THE SEA INSUR-  
May 3, 12. } ANCE COMPANY.

*Marine Insurance—Total Loss—Salvage and Costs—Refitting—Insurable Interest.*

By agreement between the plaintiff and W., the plaintiff undertook at his own expense and risk to transport the *Cleopatra* obelisk from Alexandria to London, and there to erect it uninjured. In the event of success W. was to pay the plaintiff 10,000*l.*, but in the event of failure, the plaintiff was to incur no liability to W. It was calculated that the 10,000*l.* would no more than cover the expenses.

The obelisk was delivered to the plaintiff by the Khedive of Egypt for the purpose of conveying it to London; the plaintiff expended money and labour in preparing for the transport, and built a vessel called the *Cleopatra*, which was little more than an iron case, in which the obelisk was stowed, and in which it would float, and agreed with the owners of the steamship *Olga* to tow the *Cleopatra*, with the obelisk on board, from Alexandria to London for 900*l.* After payment of this sum the plaintiff had expended in all 4,000*l.* on the transport, &c.

The plaintiff next effected two policies of insurance, against total loss only, with the defendants respectively, the first of which, with the defendant Whitworth, was for 1,000*l.* "upon the goods and merchandise

(5) See *Harris v. Petherick*, ante, p. 521.

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in the good ship *Cleopatra*, iron vessel, containing the *Cleopatra* obelisk. The goods and merchandises, &c., for so much as concerns the assured by agreement between the assured and assurers in this policy, are and shall be valued at 4,000*l*." The second policy with the Sea Insurance Company was for 2,000*l*. "upon any kind of goods and merchandises, and also upon the body, &c., of and in the good ship *Cleopatra*, iron vessel, containing the *Cleopatra* obelisk. The said ship, &c., goods and merchandises, &c., for so much as concerns the assured by agreement between the assured and the company in this policy, are and shall be, vessel and obelisk, valued at 4,000*l*." The suing and labouring clause in both policies was as follows:—

"And in case of any loss or misfortune it shall be lawful for the assured, their factors, servants and assigns, to sue, labour and travel for, in and about the defence, safeguard and recovery of the said goods and merchandise, or any part thereof, without prejudice to this insurance, to the charges whereof the assurers will contribute each one according to the rate and quantity of his sum herein assured."

The *Cleopatra* and the obelisk left *Alexandria* in tow of the *Olga*; a severe storm was encountered in the Bay of Biscay, when the *Olga* was compelled to cast off the *Cleopatra* and take her crew on board. The following day the *Cleopatra* was lost sight of, and after vainly endeavouring to find her, the *Olga* came on to England without her. Subsequently the steamer *Fitzmaurice* fell in with the *Cleopatra* and succeeded in towing her into Ferrol, a neighbouring port. The Court of Admiralty awarded 2,000*l*. salvage to the *Fitzmaurice*; the plaintiff had to pay—first, the salvage; second, the costs; third, certain expenses in refitting the *Cleopatra* at Ferrol, and towing her thence to London. The plaintiff now sought to recover from the defendants the several amounts under these heads of expense:—

Held, that both policies were on the ship and obelisk, and that the plaintiff had an insurable interest in each to the extent of 4,000*l*., which was sufficiently described in the respective policies. That the defendants were liable to the plaintiff for the 2,000*l*. paid as salvage; for, though the policies

were against the risk of total loss only, the *Cleopatra* was only saved from total loss by the services of the salvors, and the defendants, therefore, having had the benefit of their services, were bound to indemnify the plaintiff against his liability in respect of them, and that each of the defendants were bound to contribute in proportion to the amount subscribed by them. That the defendants were not liable to the plaintiff for the costs of the Admiralty proceedings, or the expenses of refitting the *Cleopatra* at Ferrol and towage from thence to England, such costs and expenses being too remote to be covered by the policies.

Case on further consideration.

April 26, May 3.—*Butt, Gainsford-Bruce and Hollams*, for the plaintiff.

*Charles Russell and J. C. Mathew*, for the defendants.

The judgment of the Court was (on May 12) delivered by

LINDLEY, J.—These are actions brought by an assured against the underwriters of two marine policies, in respect of losses occasioned by the accident which befel the celebrated *Cleopatra* obelisk on her voyage from *Alexandria* to this country.

The plaintiff is a civil engineer, and it appears from his evidence that he was desirous of seeing the obelisk brought over to England, and had a conversation with Mr. Erasmus Wilson on the subject. Ultimately by an agreement dated the 31st of January, 1877, and made between Mr. Wilson of the one part, and the plaintiff, Mr. Dixon, of the other part, it was in effect agreed that Mr. Dixon should at his own expense and risk transport the obelisk to London and erect it there uninjured, and that in the event of his succeeding, Mr. Wilson should pay him 10,000*l*. Mr. Dixon, however, was to incur no liability to Mr. Wilson in the event of failure; on the other hand Mr. Dixon was to have no claim whatever against Mr. Wilson except in the event of success. Further it appears from Mr. Dixon's evidence that he did not anticipate any profit to himself from the transaction. In other words it was not expected that the 10,000*l*. would more than cover the expenses.

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The only evidence before me respecting the ownership of the obelisk is the plaintiff's statement that there was a dispute about it, and the Khedive presented it to the British nation and handed it to him, the plaintiff, on their behalf.

Having made the above agreement Mr. Dixon commenced to prepare for the transport of the obelisk. He spent considerable sums of money and much labour in doing this, and he built the vessel called the *Cleopatra*. This was in fact little more than an iron case in which the obelisk was stowed, and in which it would float. The vessel had no other use and was fit for no other purpose. The vessel was quite subordinate to its cargo, and the cost of its construction was for all practical purposes nothing more than part of the cost of transporting the obelisk.

In September, 1877, the obelisk was in its case, or in other words was on board the *Cleopatra*, and was ready to be towed to England. On the 15th of September an agreement was entered into between the owners of the steamship *Olga* of the one part and Mr. Dixon of the other part for the towage of the *Cleopatra* with the obelisk on board from Alexandria to London for the sum of 900*l*.

The expenses and liabilities which Mr. Dixon had incurred up to this time in constructing the vessel, in getting the obelisk on board, in properly stowing it there and in providing for its transport were estimated by him at 4,000*l*., and did in fact amount to above this sum.

On the 20th and 21st of September, 1877, the policies on which these actions were brought were effected by Messrs. Barr & Co. for Mr. Dixon. I will state their language and legal effect presently.

The *Cleopatra* and the obelisk left Alexandria on the 21st of September, 1877, in tow of the *Olga*. All went well until the 14th of October, when a severe storm was encountered in the Bay of Biscay, and the *Olga* was compelled to cast the *Cleopatra* off. On the 15th the *Olga* took the crew of the *Cleopatra* on board and afterwards lost sight of her, and having vainly endeavoured to find her gave up the search and came on to England without her. On the evening, however, of the same day the steamer

*Fitzmaurice* fell in with the *Cleopatra* and after great risk and labour succeeded in saving her and in towing her into Ferrol. The *Cleopatra* and obelisk afterwards reached London in safety. The Court of Admiralty awarded salvage to the *Fitzmaurice*. For the purpose of determining the amount to be awarded the obelisk was estimated to be worth 25,000*l*., and the sum awarded to the salvors was fixed at 2,000*l*. This sum the plaintiff paid. He also paid the costs of the proceedings in the Admiralty and certain expenses in refitting the *Cleopatra* at Ferrol and towing her with the obelisk from that port to London. The present actions are brought to recover contributions from the underwriters in respect of these salvage and other expenses.

The policies on which the actions are brought are as follows:—

Whitworth's policy is for 1,000*l*. "upon the goods and merchandises in the good ship or vessel called the *Cleopatra* iron vessel containing the *Cleopatra* obelisk." "The goods and merchandises, &c., for so much as concerns the assured by agreement between the assured and assurers in this policy are and shall be valued at 4,000*l*." "Vessel and obelisk being insured against the risk of total loss only." The risks insured against are the ordinary sea risks, and the suing and labouring clause is in the ordinary form.

The Sea Insurance Company's policy is for 2,000*l*. "upon any kind of goods and merchandises, and also upon the body, &c., of and in the good ship or vessel called the *Cleopatra* iron vessel containing the *Cleopatra* obelisk." "The said ship, &c., goods and merchandises, &c., for so much as concerns the assured by agreement between the assured and the company in this policy are and shall be, vessel and obelisk, valued at 4,000*l*." This policy is also against total loss only. The clauses relating to the risks insured against, and suing and labouring, are in the ordinary form.

The actual wording of the suing and labouring clause was in both policies as follows—"and in case of any loss or misfortune it shall be lawful for the assured, their factors, servants and assigns, to sue, labour and travel for, in and about

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the defence, safeguard and recovery of the said goods and merchandises or any part thereof without prejudice to this insurance, to the charges whereof the assurers will contribute each one according to the rate and quantity of his sum herein assured."

Although the language of the first policy is not quite clear as regards the subject matter insured, I think the first policy is on both ship and cargo, and not on cargo only. The second policy is clearly on both. The plaintiff's interest in the *Cleopatra* and obelisk were as follows: he was owner of the *Cleopatra*; he was not owner of the obelisk; but he had spent money upon it, had possession of it, and probably had a lien upon it for his expenditure. Taking the *Cleopatra* and obelisk together, the value of his interest in them at the date of the policies was 4,000*l.*; this was all he really had at risk, and all that was worth insuring. It is true that in certain events he might become entitled to 10,000*l.* under his agreement with Mr. Wilson; but this sum was only calculated to cover expenses; and Mr. Dixon as a prudent man would hardly incur further expense until the risks of the voyage were over. I regard the policies as being exactly what they purport to be, namely, policies on the obelisk and the vessel it was in; and I regard Mr. Dixon as having an insurable interest in them to the value of 4,000*l.*, and as having insured that interest by the policies. The description in the policies is sufficient in my opinion to cover that interest. *M'Kenzie v. Whitworth* (1) shews that it is sufficient to specify the subject matter of insurance, and that it is not necessary to describe the assurer's interest in it; unless his interest is such as to affect the risk insured against, which was not the case here. It was suggested that these policies ought to be regarded as analogous to policies on freight to be earned on the safe arrival of cargo, but in my judgment this is not the correct view. The analogy is too fanciful and far-fetched to be of any practical use. The true effect of the

policies is in my opinion what I have above described.

The first question which arises is whether the underwriters are bound to pay anything in respect of any of the expenses to recover which the actions are brought. These expenses are—First, The 2,000*l.* paid for salvage. Second, the costs of the proceedings in the Admiralty. Third, the expenses of refitting at Ferrol and of towing from that port to England. It will be convenient to consider each of these in turn.

1. As to the 2,000*l.* paid for salvage. The policies are against the risk of total loss only. Neither the *Cleopatra* nor the obelisk was totally lost; both were in fact saved; and the defendants therefore contend that they are under no liability whatever. But although there was no total loss it is clear beyond all doubt that the *Cleopatra* and her cargo were in imminent danger of destruction, and were saved from total loss by the services of the salvors. The underwriters therefore have had the benefit of these services, and are bound in my opinion to indemnify the plaintiff against his liability in respect of them. It is true that the language of the suing and labouring clause does not in terms extend to any services except those rendered by the assured, their factors, servants and assigns; and it is also true that the salvage services in this case were not rendered by Mr. Dixon nor by any factor, servant or assign of his, unless the salvors are to be regarded as having been his agents by necessity or by ratification. But without discussing how far the salvors can properly be regarded as agents, I take it to be settled that the suing and labouring clause ought to be construed to cover expenditure which the assured necessarily became liable to pay by way of salvage in respect of preservation from loss, which, if it had occurred, would have fallen on the underwriters. See *Lohre v. Aitchison* (2); *Kidstone v. The Empire Marine Insurance Company* (3).

(2) 46 Law J. Rep. Q.B. 715; s. c. 47 Law J. Rep. Q.B. 534; s. c. Law Rep. 2 Q.B. D. 501; s. c. Law Rep. 3 Q.B. D. 558.

(3) 35 Law J. Rep. C.P. 250; s. c. Law Rep. 1 C.P. 535 and 2 *ib.* 357.

(1) 44 Law J. Rep. Exch. 81; s. c. 45 Law J. Rep. Exch. 233; s. c. Law Rep. 10 Exch. 142; s. c. Law Rep. 1 Ex. D. 36.

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In truth, Mr. Russell did not seriously contest this point, although he thought it his duty to submit it to the Court for decision. The same case of *Lohre v. Aitcheson* (2) shews that this clause is operative even although there is no total loss, and nothing abandoned to the underwriters; and, in my opinion, they are bound by this clause to indemnify the plaintiff in proportion to the sums they respectively insured against his loss of the 2,000*l.* awarded for salvage.

2. As regards the costs of the Admiralty proceedings. I am of opinion that the underwriters are not liable for these costs or any part of them. I quite accede to the view that they were necessarily and properly incurred in ascertaining the proper amount of salvage to be paid; and I agree in the observation that in order to enable Mr. Dixon to get the obelisk out of the hands of the salvors it was as necessary to pay or secure their costs as to pay or secure the salvage itself. But the costs which Mr. Dixon has had to pay are not in my opinion charges incurred by him to avoid a loss insured against, and at all events they are too remote to be covered by the words of the policies before me. The suing and labouring clause is silent about costs; and no authority has been produced in which costs have been recovered under it. I do not regard *Xenos v. Fox* (4) as conclusive against the plaintiff on this point; but it certainly is rather against him than for him, and the fact that the suing and labouring clause did not cover such losses as are now usually provided for by the collision clause, goes far to shew that the costs which I am considering cannot be thrown on the underwriters. Their contract does not cover them.

3. As regards the expense of refitting at Ferrol and towage from that port to London. I am of opinion that these matters cannot be thrown on the underwriters. They are not incurred to avoid a total loss by perils of the sea, of the obelisk or of his interest in it. They were not incurred until after the obelisk had been

saved. It is true that Mr. Dixon would have lost the benefit of his agreement with Mr. Wilson if he had not got the obelisk home. But, as has been seen, he did not insure the benefit of that agreement; and as soon as the obelisk was saved the interest in it which he had insured by the policy was saved also. These policies are against total loss only, and any loss sustained by the plaintiff in getting the obelisk home after it was safe at Ferrol must be borne by him. See *The Great Indian Peninsular Railway Company v. Saunders* (5).

I pass now to the next and last question which arises, namely, whether the plaintiff is entitled to recover in respect of the whole 2,000*l.* or only in respect of some portions of that sum, namely, in respect of what, as between himself and the other persons interested in the obelisk, would be his proper proportion supposing the obelisk to have been uninsured.

This question depends on the true construction and effect of the suing and labouring clause; and curiously enough appears never yet to have been decided, at least in this country. The language of the clause is in favour of the plaintiff; and so in my opinion is its true effect. By it the underwriters agree to contribute in proportion to the amount subscribed to such charges as the assured shall be put to in preventing a loss, which if not prevented would fall on the underwriters. There are no words to the effect that the assured shall only be repaid such proportion of those charges as, in an equitable adjustment between himself and others, would fall on him alone. The agreement is to contribute (in proportion to the amount subscribed) to the charges of his services. In other words, the underwriters agree to pay him for his services; each underwriter agreeing to pay in proportion to the amount for which he insures. Moreover, the early part of the clause authorises the assured to endeavour to save, not his interest in the thing insured, but the thing itself; and the language of the clause is adapted to cases in which other persons besides

(4) 37 *Law J. Rep.* C.P. 294; s.c. 38 *Law J. Rep.* Q.B. 551; s.c. *Law Rep.* 3 C.P. 631, and 4 *ib.* 665.

(5) 1 *Bish. & Sm.* 41, and 2 *ib.* 266.



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himself are interested in that thing. Further it is now clearly established that this clause is a distinct and independent agreement, which although occurring in and forming part of the policy, may entitle the assured to recover more than the amount underwritten. See *Lohre v. Aitcheson* (2). Having regard to this principle, to the language and known object of the clause, I am of opinion that whatever services or charges of the assured fairly come within it must be paid for by the underwriters in proportion to their subscriptions. This view is in accordance with that adopted by Chancellor Kent in *Watson v. The Marine Insurance Company* (6), and although that decision is controverted by Mr. Phillips (§ 1742, note 5) and by Mr. Lowndes (*Law of Average*, p. 231, ed. 4), I am of opinion that Chancellor Kent's view is more in accordance with the true interest and meaning of the suing and labouring clause than are the views of his critics. They do not, I think, attach sufficient importance to the clause, being a distinct agreement to pay for services rendered to avoid a loss insured against. The underwriters will be at liberty, on paying Mr. Dixon, to enforce such rights, if any, as he may have against other persons in respect of their proper shares in the salvage expenses, see *Dickinson v. Jardine* (7); and although in this particular case those rights will probably be of no avail, yet whatever they may be worth, the underwriters will be entitled to enforce them.

In the result my judgment is for the plaintiff for 500*l.* against the defendant Whitworth, and for 1,000*l.* against the defendants, the Sea Insurance Company, these sums being their respective shares of the 2,000*l.* In each action the defendants must pay the costs.

*Judgment for the plaintiff accordingly.*

Solicitors—Argles & Argles, for plaintiff; Robinson & Co., agents for Bateson & Co., Liverpool, for defendant Whitworth; Gregory & Co., agents for Stone & Fletcher, Liverpool, for defendants, the Sea Insurance Company.

(6) 7 John's N.Y. 57.

(7) 37 Law J. Rep. C.P. 321; s. c. Law Rep. 3 C.P. 689.

[IN THE EXCHEQUER DIVISION.]

1879. }  
July 3. } LEFTLEY v. MONNINGTON.

*Metropolis Management Act, 1855* (18 & 19 Vict. c. 120)—*Members of Vestry—Churchwarden—Disqualification—Bankruptcy.*

*The disqualification of the members of vestries provided by section 54 of the Metropolis Management Act, 1855, on their becoming bankrupt, applies to the churchwardens as well as to elected members.*

SPECIAL CASE, stated by consent, in an action for 50*l.* penalty, incurred under the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), s. 54, by the defendant voting at a meeting of the vestry for the parish of Plumstead, after having been adjudicated bankrupt.

On the 20th of August, 1878, and for some months previously, the defendant was churchwarden of the parish of Plumstead. On the 14th of June, 1878, he was adjudicated bankrupt.

On the 20th of August, 1878, the defendant attended a meeting of the vestry of the parish of Plumstead, and acted by voting upon a resolution submitted to the meeting. He was not otherwise qualified than as churchwarden of the parish.

The Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), section 2, provides that the incumbent and churchwardens of each of the parishes referred to in schedule B. (of which Plumstead is one) shall constitute a part of the vestry, and shall vote therein, in addition to the elected vestrymen. Section 54 provides, amongst other things, that in case any member of the vestry for any parish mentioned in schedule B. be declared bankrupt, such person shall cease to be a member; and any person who acts as a member of any such vestry after ceasing to be such member, and any person who acts as a member of any such vestry as aforesaid without being qualified by rating or occupation, as required by the Act, shall for every such offence be liable to a penalty of 50*l.*, which may be recovered by any person who may sue for the same in any of the Superior Courts of law, with full costs of suit.

*Lefily v. Monnington, Exch.*

*T. W. Chitty*, for the defendant, was called upon. — The disqualification of bankruptcy was not intended to apply to *ex officio* but only to elected members. The incumbent and churchwardens are not members within section 54, although by section 2 they are part of the vestry. This is shewn by that part of section 54 which makes it penal for any member to act without a property qualification. This cannot have been intended to include *ex officio* members.

[STEPHEN, J.—Section 6, providing the property qualification, only applies to elected members.]

Still, the argument remains that the word "members" throughout section 54 refers only to elected members. It could not have been intended that the incumbent, if he should become bankrupt, should cease to attend vestry meetings.

*W. M. Baylis* was for the plaintiff.

KELLY, C.B.—There is no serious question in this action. Section 2, after determining the number of vestrymen in proportion to the inhabitants of the parish, makes the incumbent and churchwardens part of the vestry, with a vote. If they are part of the vestry and vote, how can they be other than members of the vestry? By section 54 members of the vestry becoming bankrupt cease to be members, and the defendant having become bankrupt, had no right to vote. Judgment must be for the plaintiff, with costs.

STEPHEN, J.—We must consider the reasonable meaning of plain words. A member of a vestry means a man who is part of it and votes with it. All the minute consequences of the Act may not have been fully considered, but there is no doubt as to the meaning of the words which the Legislature has used.

*Judgment for the plaintiff, with costs.*

Solicitors—*E. Kimber*, for plaintiff; *Thomas Kipping*, for defendant.

[IN THE COMMON PLEAS DIVISION.]  
1879. } *MORTEO AND ANOTHER (appellants)*  
May 2. } *v. JULIAN (respondent).*

*Shipping—Pilot carried to Sea beyond Limits of Pilotage—Pilotage Dues—Liability of Shipbroker—Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), ss. 357, 363.*

[For the report of the above case, see 48 Law J. Rep. M.C. 126.]

[IN THE QUEEN'S BENCH DIVISION.]

1879. } *THE QUEEN (on prosecution of*  
April 26. } *THE GUARDIANS OF LEWISHAM)*  
*v. THE LONDON, BRIGHTON AND*  
*SOUTH COAST RAILWAY COMPANY.*

*Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 159, 161—District Rate—Inequality of Benefit—Exemption of Part of a Parish.*

[For the report of the above case, see 48 Law J. Rep. M.C. 116.]

[IN THE QUEEN'S BENCH DIVISION.]

1879. } *THE QUEEN on the prosecution of*  
April 2. } *THE GOVERNOR AND COMPANY*  
*OF THE NEW RIVER v. THE*  
*ASSESSMENT COMMITTEE OF THE*  
*PARISH OF ST. MARY, ISLINGTON.*

*Poor Rate—Water Company—Valuation of Property (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), ss. 43, 46 and 47—Supplemental Valuation List.*

[For the report of the above case, see 48 Law J. Rep. M.C. 123.]

[IN THE COURT OF APPEAL.]

(Appeal from the Exchequer Division.)

1879. } HIOET v. THE LONDON AND NORTH  
May 13. } WESTERN RAILWAY COMPANY.\**Conversion, what amounts to—Conversion by Bailees—Misdelivery—Predelivery—Measure of Damages—Costs.*

The defendants were in possession of the plaintiffs' goods as bailees, under orders not to part with them except upon delivery orders signed by the plaintiffs. The defendants parted with the goods upon the order of one G., who was the plaintiffs' agent for the sale but not for the delivery of the goods. Shortly afterwards the plaintiffs sent a delivery order for the same goods to T., who indorsed it to G., who lodged it with the defendants to cover the previous delivery. Afterwards the plaintiffs being unable to obtain the price of the goods from T., sued the defendants for the conversion of the goods, and claimed the full value.

Held, by BRAMWELL, L.J., and THESIGER, L.J., that there had been a conversion in respect of which the plaintiffs were entitled to recover; but that what had occurred with respect to the delivery order was equivalent to a return of the goods by the defendants to the plaintiffs, and therefore, under the circumstances of this case, the damages could only be nominal.

By BAGGALLAY, L.J., that the plaintiffs were not entitled even to nominal damages.

PER CUBIAM, the plaintiffs must pay the costs of the action.

This was an appeal from a decision of the Exchequer Division on a Special Case. The material facts, as set forth in the Special Case, were as follows:—

The plaintiffs are corn and grain merchants, carrying on business at Hull and other places. They employed at Birmingham a person named Grimmett as their broker, to sell grain for them in the Birmingham district, and from time to time forwarded grain from Hull to the defendants' station at Birmingham, addressed "to our order" (i.e. the plaintiffs' order) which was received by the defendants and held by them (after the expiration of

forty-eight hours) as warehousemen, and on the express understanding that they were to deliver only to the order of the plaintiffs and not to that of Grimmett.

The defendants, however, on several occasions made predeliveries of corn belonging to the plaintiffs without orders from the plaintiffs but upon the orders of Grimmett, Grimmett afterwards obtaining orders from the plaintiffs to cover the predeliveries. In some cases the plaintiffs received payment for the corn so delivered, but in others no payment was obtained.

The particulars of the predeliveries in respect of which the plaintiffs received no payment were as follows:—

On the 19th of November, 1872, fifty quarters of oats, and on the 22nd of November, ten quarters were delivered by the defendants on the orders of George Grimmett in favour of John Sheldon and W. J. Read respectively.

On the 24th of November, the defendants received the plaintiffs' delivery order for the sixty quarters in favour of George Tarpley, the said order being indorsed over to George Grimmett by George Tarpley. Tarpley was debited on the plaintiffs' books with the price of the sixty quarters, but he still owes and has not paid the plaintiffs any part thereof.

Similar deliveries were made on the 1st of February, 1873, on the 20th and 22nd of February and on the 6th and 8th of March, in favour of various persons which were subsequently covered by delivery orders of the plaintiffs drawn in favour of the persons and endorsed over to Grimmett. In each case the person in whose favour the delivery order was drawn was debited in the plaintiffs' books with the price of the corn mentioned in the delivery order.

The plaintiffs claimed damages from the defendants, first, in respect of the predeliveries without the plaintiffs' orders, in cases where the plaintiffs had been subsequently paid for the corn delivered, and secondly, they sought to recover 230*l.* 5*s.* 4*d.* (the value of the corn) and interest, for the cases in which plaintiffs had not been paid for the corn.

The case was argued in the Exchequer Division before Kelly, C.B., and Cleasby,

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\* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Thesiger, L.J.

*Hiort v. London and North Western Rail. Co. (App.), Exch.*

B., who gave judgment for the defendants, holding that though there had been in point of law a conversion, the plaintiffs were entitled to no damages.

The plaintiffs appealed.

*Gully and Sutton*, for the plaintiffs.—There has been a clear conversion, and it makes no difference that the plaintiffs have parted with the property in the goods. The question is whether the goods were the plaintiffs' at the time when the defendants dealt with them—*Isaac v. Belcher* (1).

[BRAMWELL, L.J.—But what is the measure of damages? Has there not been a constructive redelivery? The defendants have satisfied the order to deliver to Tarpley, and the plaintiffs can sue Tarpley for goods sold and delivered.]

The plaintiffs have in point of fact been deprived of their goods, and can get neither them nor their value, and the defendants converted them. The only measure of damages is the value of the goods—*Johnson v. The Lancashire and Yorkshire Railway Company* (2), *Keen v. Priest* (3), *Edmundson v. Nuttall* (4).

*Dugdale* (*Russell Griffiths* with him), for the defendants.—The plaintiffs are not entitled even to nominal damages. A misdelivery would be a conversion, but here there has only been a predelivery. The plaintiffs have not been deprived of their goods. They have sold and delivered them to Tarpley, and can sue him for goods sold and delivered.

*Sutton* replied.

BRAMWELL, L.J.—Substantially I am of opinion that this judgment ought to be affirmed: the judgment is a judgment for the defendants, and the only misgiving I have is whether it ought not to be a judgment for the plaintiffs for nominal damages. Supposing that the judgment in the Court below had been given in that way, the costs would have been given to the defendants just as they

have been given; the verdict in the plaintiffs' favour for one shilling would have made no difference. Being of this opinion I do not wish to labour a matter, which in my judgment is one of absolute indifference. But I cannot give my opinion that the plaintiffs are not entitled to substantial damages without saying why they are, in my judgment, entitled to nominal damages. Now I take it the plaintiffs have shewn what would have been a conversion before the Judicature Acts, and the Judicature Acts have not altered the law. If it was so before those Acts, it is so still. It is true that in the forms given in the appendix to the rules, in the form given instead of the old count for trover it is averred that the "plaintiff was deprived of the use of his goods." But the substance of the law remains the same though there may be some difference in the manner of stating it. The question arises, therefore, whether there was in this case what would have been a conversion before the Judicature Act. I have never been able to frame an exhaustive definition of conversion, nor can I now, though I have referred to several cases, as for instance to the case of *Burroughs v. Bayne* (5) and *Pillott v. Wilkinson* (6). But speaking with all reserve, I think this would clearly have been a conversion before the Judicature Acts, and is so still. It seems clear that if a man disposed of property by taking upon himself to deliver it to somebody who was not entitled to receive it, he was guilty at law of converting it to his own use. So a misdelivery by a carrier was a conversion. I do not, therefore, see why misdelivery by a warehouseman should not also be a conversion. So that if nothing had been done here but the delivery of the goods to Grimmer and his nominees, and there had been no subsequent order of the plaintiffs there would have been a misdelivery, and therefore a conversion.

In the present case I think, therefore, there was technically a cause of action against the defendant for breach of his

(1) 5 Mee. & W. 139.

(2) Law Rep. 3 C.P. D. 499.

(3) 4 Hurl. & N. 236; s. c. 28 Law J. Rep. Exch. 157.

(4) 17 Com. B. Rep. N.S. 280; s. c. 34 Law J. Rep. C.P. 102.

(5) 5 Hurl. & N. 296; s. c. 29 Law J. Rep. Exch. 185.

(6) 2 Hurl. & C. 72; s. c. 32 Law J. Rep. Exch. 201. In Exch. Ch. 3 Hurl. & C. 345; s. c. 34 Law J. Rep. Exch. 22.

*Hiort v. London and North Western Rail. Co. (App.), Exch.*

duty as a warehouseman, in delivering the goods without authority. If I am wrong in this the defendants are entitled to judgment, but if I am right the plaintiffs are entitled to nominal damages, but nominal damages only. I take the law to be that you cannot purge a conversion. Therefore if a conversion has been committed the plaintiffs are entitled to some damages. But a return of the goods might always be proved in mitigation of damages, not only when the owner took the goods back voluntarily, but when they were restored to him against his will. And there was a practice in actions of trover for the defendant to apply to the Court for leave to bring the goods into Court, then the plaintiff could only recover such damages as he had actually sustained, and the action went on at his peril, and if he did not obtain substantial damages he had to pay the costs of the action after the goods were brought into Court. The return of the goods, therefore, would reduce the damages to those actually sustained by the wrongful act. Apply these rules to the present case. What are the facts? The goods were delivered to Grimmatt's order. After they have been so delivered the plaintiffs give a delivery order to Tarpley, and Tarpley orders that they shall be delivered to Grimmatt, and Grimmatt lodges the order with the defendants. Grimmatt could not ask for delivery of the goods to himself for they had already been delivered to his nominee. If he had claimed them it could have been successfully answered that he had already got them. Tarpley of course could make no claim, for he had said, "deliver to Grimmatt;" and if Grimmatt is satisfied by what took place so is Tarpley. That being so, the plaintiffs are entitled to maintain an action against Tarpley, and Tarpley would have no defence against a claim for goods sold and delivered. For if he answered that he had not received any goods the reply would be—"Either you or your nominee have had them." And, as has been already pointed out, if the plaintiffs' contention is right they can say to the defendants, "the goods are ours, and you have converted them to your own use," while they say to Tarpley, "the goods are

not ours, but the price is, for we have sold and delivered them to you."

I think, therefore, that we must say that what has taken place was equivalent to a return of the goods. Not that it was actually a return, but in the nature of a return. And the same reasonings apply which would reduce the plaintiffs' claim to one for nominal damages. Suppose when Grimmatt came to lodge the order the defendants had said, "Then I suppose you had no authority when you ordered us to deliver the goods," and Grimmatt had replied "No," and then the defendants had said, "Then the best thing you can do is to bring the goods back again and we will redeliver them"? It is obvious, then, there would have been a re-delivery to the plaintiffs, the goods being re-delivered to the defendants to hold for them. But it cannot be necessary for the parties to go through such a ceremony as that; and what happened is to my mind equivalent to it. I may observe that it seems that Baron Cleasby had some misgivings on this point, for he seems to express a doubt whether the plaintiffs are not entitled to nominal damages. But I do not think that question depends upon whether the property in the goods was in the plaintiffs at the time of action brought, but whether it was so at the time of the conversion of the goods by the defendants to their own use, if there was one. For the reasons I have given I think that it was. The plaintiffs, therefore, are in this position. Either they cannot maintain the action at all, or if they can maintain it, they can maintain it for nominal damages only; and that being the case, whichever view is right, they ought to pay the costs of this action, and the judgment ought to be substantially affirmed.

BAGGALLAY, L.J.—I propose very shortly to state my view of the facts of this case, upon which I base my judgment. On three several occasions parcels of wheat were in the custody of the defendants to be delivered to the plaintiffs' order, and to their order only. There is no difference between the circumstances as to the three parcels, except that as to the last two, or a part of them, there had

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been distinct instructions in writing to the defendants not to part with them except to the order of the plaintiffs. I will, therefore, deal with the first case only.

On the 19th and the 22nd of November the defendants delivered out the wheat to the order of Grimmett. Grimmett was the agent of the plaintiffs for certain purposes, but not for the purpose of ordering delivery of these goods. On the 24th or 25th an order reaches the defendant for the delivery of the same parcel of goods to Grimmett; that is to say, an order primarily for delivery to Tarpley, but by Tarpley endorsed to Grimmett. On that order the company were on the 24th or 25th of November bound to act. They would have then been bound to deliver the goods to Grimmett's order, if they had not already done so two or three days before. They had done by anticipation on November the 20th and 22nd what they were bound to do on the 25th. Looking at the case in that way, it seems to me in the first place that there can be no substantial damages in respect of this matter.

As regards nominal damages I speak with very great hesitation upon matters involving the very abstruse law relating to trover and conversion, when expressing an opinion differing from that of my Lord. But I confess it appears to me that this is a case either for substantial damages or no damages at all. There possibly might be a claim for damages for the period intervening between the 19th and 22nd of November and the 24th and 25th. But no claim is made in respect of that time; but, as I understand it, only a substantial claim for 230*l.*, the value of the parcels sold and delivered. I should have had the greatest possible diffidence in expressing a dissent on the question of nominal damages if I stood alone; but it appears to me that the matter was considered by Baron Cleasby and the Lord Chief Baron, and they seem to have been of opinion that there was not only no case for substantial damages, but also none for nominal damages, and fortified by their authority I am bound to say I think the judgment was right and ought to be affirmed.

THE SINGER, L.J.—I have entertained some doubt as to whether this action is maintainable even for nominal damages. But on consideration I think that it is, and for this reason. Stripping the case of all accidental circumstances, not necessary for considering the law applicable to the case, the matter stands thus. The defendants being in possession of certain goods of the plaintiffs as bailees, were bound to keep them until they had the authority of the plaintiffs to part with them. They, nevertheless, delivered them to parties who had no authority at the time to receive them, and without an order from the plaintiffs, and though it is perfectly true that the delivery was only made in anticipation of a delivery order from the plaintiffs, which order was afterwards received, and which warranted their delivery to the persons to whom they were delivered, yet the previous unauthorised act, whether it is called a misdelivery or a predelivery, or whether it is technically a conversion of the goods or only a breach of the contract of bailment, or of the duties which flow from the contract bailment, was a wrongful act, in respect of which a right of action vested in the plaintiffs; and that right having once vested, was not divested by the delivery orders subsequently given. It appears to me that that unauthorised act was a wrongful act, and that there was sufficient damage in the eye of the law to entitle the plaintiffs to bring this action. And although final dominion over the goods was not taken from the plaintiffs, they were for a few days deprived of the control of their goods, which they were legally entitled to exercise; and the law presumes a legal damage in consequence. The question assumes a different aspect when we come to consider what is the damage. The plaintiffs are forced to contend that where a bailee has been told by a person who has had dealings between the bailee and the bailor, a person in whom the bailee has every right to have confidence, that a delivery order will be coming forward in a day or two, and he is asked for the convenience of all parties to deliver the goods, all parties being persons whom the bailee can trust, and

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he does so deliver them, then, even if afterwards the delivery order comes, the bailor is entitled to recover from the bailee the full value of the goods. Now the mere statement of that proposition seems to me to shew that it cannot be maintained. It appears to me that there are several answers to it. In the first place if the unauthorised delivery is regarded as a breach of the contract of bailment, it follows that the bailor can only recover the damage flowing from the breach of contract. And here it is obvious that no damages have flowed from the unauthorised act of the defendants. If they had not delivered the goods on the days on which they did actually deliver them, they would have been bound by the delivery order they afterwards received to deliver them in exactly the same way, and to the same persons. Consequently the damage has been sustained not through the delivery, but by the plaintiffs selling the goods and authorising the delivery of them to persons who, though liable for the price, and so treated up to the present time by the plaintiffs, have made default in payment.

But it is said there is some magic in the term conversion, and that the unauthorised delivery was a conversion of the goods. The plaintiffs have not received their goods nor the value of them, and consequently the damages they are entitled to obtain in respect of the conversion is the full price of the goods. This argument seems to me specious rather than sound. Though the action for conversion has been surrounded by technicalities which have in some cases worked injustice, the tendency of the Courts at the present time is to treat it in what may be called the common sense way. As in other actions for tort the injured person can only recover the damages flowing from the wrong, so the Courts have had a tendency to hold the same in actions of trover. This view is supported by the cases of *Brierly v. Kendall* (7) and *Ohinery v. Viall* (8), where it was held that a per-

son whose goods had been technically converted was not entitled to recover the full value of the goods. But if the technicalities of the action of trover are relied on, the plaintiffs are met by a technicality, or rather a substantial rule of the action which they cannot fulfil. If the plaintiff who sues in an action for trover is entitled to recover and recovers the full value of the goods, it follows that the property in the goods for which he recovers the full value is on satisfaction of the verdict and judgment transferred to the defendants. No doubt there are cases in which the defendant, though bound to pay the full value of the goods, may have so disposed of them that he is unable to obtain either the goods or their value for himself. But that is not the case as regards the person recovering the full value. He must be in a position to convey or transfer to the defendants the full dominion over and property in the goods as far as he is concerned. But what is the state of the case here? There is an act of conversion, and subsequently a valid transfer of the property in the goods from the person who has the right of action and brings the action of trover to another person, who becomes entitled to hold the goods and bound to pay the price of them. Therefore the plaintiffs have no longer any dominion or property in the goods which they can transfer to the defendants on the satisfaction of the judgment. They can only transfer the property which they possessed between the time of the unauthorised delivery and the actual sale, when they transferred the property to the third person. It seems to me, therefore, to follow from the ordinary rules of the action of trover that the plaintiffs have no right to recover any damages except for the deprivation of the control of their property during the period I have mentioned. But as it is admitted that they really sustained no damage during that period, it follows that they can only recover a verdict for nominal damages. That being so, inasmuch as the parties have stated their Special Case and come to the hearing of the Special Case for the purpose of trying the substantial question who shall

(7) 17 Q.B. Rep. 937; s. c. 21 Law J. Rep. Q.B. 161.

(8) 5 Hurl. & N. 268; s. c. 29 Law J. Rep. Exch. 180.

*Hort v. London and North Western Rail. Co. (App.), Exch.*

bear the consequences of Grimmett's fraud, and as it now is held that the plaintiffs themselves must bear them, it seems to me that they must also bear the costs of the action, in which they have substantially failed.

*Judgment for the plaintiffs for 1s., the plaintiffs to pay the costs of the action and appeal.*

Solicitors—Chester & Co., agents for Arnold & Sons, Birmingham, for plaintiffs; R. F. Roberts, for defendants.

[IN THE EXCHEQUER DIVISION.]

1879.  
June 17, 18.

*In re* THE WARWICK AND BIRMINGHAM CANAL COMPANY AND OTHERS *v.* THE BIRMINGHAM CANAL COMPANY AND OTHERS; *ex parte* THE BIRMINGHAM CANAL COMPANY AND THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

*Railways and Canals—Through Rate—Railway Commissioners—Prohibition—Statute fixing a Company's Tolls subject to Consent of another Company—Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2—Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 11.*

*Where it is enacted by a Special Act that in consideration of a guarantee by a railway company of a dividend on the capital of a canal company, the canal company shall not reduce the rates for the time being payable on the canal without the consent of the railway company, the Railway Commissioners have no power without the consent of the railway company, and without the railway company being before them, to make an order establishing a through rate over that and other canals, and reducing the rates payable on that canal and others.*

Rules nisi obtained on behalf of the Birmingham Canal Company and the London and North Western Railway

Company for a writ of prohibition to the Railway Commissioners, the Warwick and Birmingham Canal Company, and the Warwick and Napton Canal Company, to restrain them from proceeding on two orders made by the Railway Commissioners on the 20th of June, 1877, and the 7th of February, 1878 (1).

In December, 1876, the Warwick and Birmingham Canal Company (hereinafter called the Warwick Canal Company) and the Warwick and Napton Canal Company (hereinafter called the Napton Canal Company), instituted a proceeding, under section 11 of the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), before the Railway Commissioners for the purpose of enforcing certain through rates, against the Birmingham Canal Company and the Companies of Proprietors of the Stourbridge Navigation, of the Oxford Canal Navigation, of the Stratford-on-Avon Canal Navigation, of the Grand Junction Canal and of the Regent's Canal respectively, the Sharpness New Docks and Gloucester and Birmingham Navigation Company, and the Great Western Railway Company. On the 20th of June, 1877, the Railway Commissioners made an order whereby, after reciting that the applicants lately required the defendants to receive, forward and deliver through traffic to and from the canals of the applicants at through rates, and gave to the defendants respectively notice in writing of the proposed through rates, stating in a schedule to the notice the amount of each through rate and its apportionment, and also the several routes; and that certain of the defendants informed the applicants that they did not agree to such rates or the apportionment thereof, and that evidence and argument had been heard on both sides, the Commissioners found that the granting of the rates was a due and reasonable facility in the interest of the public; and that the routes proposed were respectively reasonable routes; and granted and allowed the several rates accordingly as proposed in the schedule, with certain modifications set out in the order.

(1) The proceedings before the Railway Commissioners are reported 3 Nev. & Mac. 113.



*In re Warwick and Birmingham Canal Co. ; ex parte Birmingham Canal Co., Exch.*

By the London and Birmingham Railway and Birmingham Canal Arrangement Act, 1846 (9 & 10 Vict. c. cexliv.), it was provided that the London and Birmingham Railway Company should for ever guarantee and make good to the Birmingham Canal Company a dividend of 4l. per share on the capital of the Birmingham Canal Company. By section 5 it was provided among other things that the Birmingham Canal Company should not thereafter, without the previous consent of the London and Birmingham Railway Company, "make any order to reduce, advance or otherwise vary all or any of the tolls, rates or dues for the time being payable or to become payable under the recited Acts, any or either of them, or otherwise howsoever, upon or in respect of the canals and other works of the same company, or the use or enjoyment thereof respectively within the respective powers for those purposes which are or for the time being shall be subsisting, nor without the like consent, enter into any arrangement or agreement with any person in respect of any such tolls, rates or dues, or rescind or in any manner alter or vary any such arrangement or agreement which now is or for the time being shall be subsisting."

By 9 & 10 Vict. c. cciv. the London and Birmingham Railway Company was merged in the London and North Western Company, and all its powers, rights and duties were transferred to the London and North Western Railway Company.

The portions of the through rates or tolls allowed by the Commissioners by their order of the 20th of June, 1877, to the Birmingham Canal Company, were lower than the rates or tolls which the Birmingham Canal Company were at the time of the apportionment entitled to charge and were charging for the local traffic over the same parts of their canal.

The London and North Western Railway Company had received notice of the proposed routes and rates, and had replied that they had no control over the Birmingham Canal Company, and requested that the notice should be withdrawn as far as they were concerned. They were not made parties to the

application to the Railway Commissioners. No consent to any reduction of tolls on the Birmingham Canal, or to the proposed through routes, rates or apportionments was given by the London and North Western Railway Company.

On the 17th of November, 1877, the Railway Commissioners stated a case for the opinion of the High Court of Justice on the questions of law arising in the apportionment, and on the 7th of February, 1878, made an order that the order of the 20th of June, 1877, be forthwith issued, and unless the Birmingham Canal Company did within fourteen days from the 4th of February, being the date of the summons, set down the case in the High Court, they should pay the costs of stating the case to the Warwick Canal Company.

By the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2, it is provided that "every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats and other vehicles; and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and every railway company and canal company and railway and canal company having, or working railways or canals, which form part of a continuous line of railway or canal or railway and canal communication, or which have the terminus, station or wharf of the one near the terminus, station or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other without any unreasonable delay, and without any such

*In re Warwick and Birmingham Canal Co. ; ex parte Birmingham Canal Co., Exch.*

preference, or advantage, or prejudice, or disadvantage as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals, or railways and canals, as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf."

The Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 11, after reciting section 2 of the Railway and Canal Traffic Act, 1854, and that it is expedient to explain and amend that enactment, provides that, subject as hereinafter mentioned, the said facilities to be so afforded are hereby declared to be and shall include the due and reasonable receiving, forwarding and delivering by every railway company and canal company, and railway and canal company, at the request of any other such company, of through traffic to and from the railway or canal of any other such company at through rates, tolls or fares (in this Act referred to as through rates), provided as follows:

1. The company requiring the traffic to be forwarded shall give written notice of the proposed through rates to each forwarding company, stating both its amounts and its apportionment, and the route by which the traffic is proposed to be forwarded.

2. Each forwarding company shall within the prescribed period after the receipt of such notice, by written notice, inform the company requiring the traffic to be forwarded, whether they agree to the rate and route; and if they object to either, the ground of the objection.

3. If at the expiration of the prescribed period no such objection has been sent by any forwarding company, the rate shall come into operation at such expiration.

4. If an objection to the rate or route has been sent within the prescribed period, the matter shall be referred to the commissioners for their decision.

5. If any objection be made to the granting of the rate or to the route, the commissioners shall consider whether the granting of the rate is a due and reason-

able facility in the interest of the public, and whether, having regard to the circumstances, the route proposed is a reasonable route, and shall allow or refuse the rate accordingly.

6. If the objection be only to the apportionment of the rate, the rate shall come into operation at the expiration of the prescribed period, but the decision of the commissioners as to its apportionment shall be retrospective; in any other case the operation of the rate shall be suspended until the decision is given.

7. The commissioners in apportioning the through rate shall take into consideration all the circumstances of the case, including any special expense incurred in respect of the construction, maintenance or working of the route, or any part of the route, as well as any special charges which any company may have been entitled to make in respect thereof.

8. It shall not be lawful for the commissioners in any case to compel any company to accept lower mileage rates than the mileage rates which such company may for the time being legally be charging for like traffic carried by a like mode of transit on any other line of communication between the same points, being the points of departure and arrival of the through route.

9. The prescribed period mentioned in this section shall be ten days or such longer period as the commissioners may from time to time by general order prescribe. Where a railway company or canal company use, maintain or work, or are party to an arrangement for using, maintaining or working steam vessels for the purpose of carrying on a communication between any town or ports, the provisions of this section shall extend to such steam-vessels, and to the traffic carried thereby.

The rules for a prohibition having, on the motion of *H. Matthews* and *W. G. Harrison*, for the Birmingham Canal Company and the London and North Western Railway Company respectively, been obtained on the 22nd of February, 1878,

*A. Wills, Pember* and *B. E. Webster*, on

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behalf of the Warwick Canal Company and Napton Canal Company, and *The Attorney-General (Sir J. Holker)* and *W. Potter*, on behalf of the Railway Commissioners, now shewed cause.—They were directed to deal first with the effect of the enactment of 9 & 10 Vict. c. cxxliv. s. 5, requiring the consent of the London and North Western Railway Company to reduction of the tolls.

The Railway Commissioners had jurisdiction to make this order notwithstanding that enactment. They have to consider whether the granting of a rate applied for is a due and reasonable facility in the interest of the public, and whether, having regard to the circumstances, the route proposed is a reasonable route, and have to allow or refuse the application according to those considerations. They find those considerations in favour of the application, and have granted it accordingly. It was not necessary that the consent of the London and North-Western Railway Company should be obtained. The object of invoking the Commissioners is to create a through route without the consent of the intervening companies or some of them, and the Arrangement Act of 1846 does not oust the power of the Commissioners. It was also unnecessary that the London and North Western Railway Company should be made parties to the application. Notice had been given to them of the proposed rate and they had not objected; and, moreover, their interests were sufficiently protected by the Warwick Canal Company.

*S. Pope, W. G. Harrison* and *R. S. Wright*, for the London and North Western Railway Company, and *Sir H. James, H. Matthews* and *Jelf*, for the Birmingham Canal Company, supported the rules.—The Railway Commissioners can only act according to law, and their discretion cannot overrule an Act of Parliament. The Birmingham Canal Company and the London and North Western Railway Company are entitled to stand on their Act of Parliament, which cannot be set aside except by another Act. The London and North Western Railway Company, as parties interested in the proceeding, ought to have been made parties to the

apportionment. They did object to the rate, and they ought to have been made parties whether they objected or not. The order of the commissioners being bad in one respect falls altogether.

KELLY, C.B.—I am of opinion that these rules must be made absolute. The proceedings before the Railway Commissioners had reference to the communication between London and the north-west of England. There is water communication by a chain of canals belonging to five companies. Of these the Warwick Company desires a through rate, and applies to the commissioners for that purpose. All the canal companies are brought before the commissioners, but the London and North Western Railway Company is not. The objection raised by the North Western Company is made *de facto* through the Birmingham Canal Company, and it is that, by reason of statutory provisions made with reference to the Birmingham Company and the North Western Company, there is no power to lower the rate over the Birmingham Canal as the Warwick Company desire. The commissioners had the provisions brought to their notice, and they ought to have said that there was an interested party not before them. They were aware of the state of things existing between the Birmingham and North Western Companies, and that the Birmingham Company could not be parties to any measure reducing their rates. Under these circumstances notice ought to have been given to the London and North Western Railway Company. It was not only unjust to make the order in the absence of the Railway Company, but there was no power to make it. The arrangement had been made between the Birmingham Company and the North Western to avoid competition. The Birmingham Company were anxious to secure about 700*l.* a year out of a capital of 17,000*l.* One term of the arrangement was that there should be no change in the rates without the consent of the North Western Company. The order of the Railway Commissioners sets aside this agreement as if it had never been made. They had no

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power to set aside an agreement made for valuable consideration at least without hearing counsel for the North Western Company. Not only had the Birmingham Company no power to reduce their rates, but the London and North Western Company had guaranteed four per cent. as long as the arrangement lasted. They were bound to pay the Birmingham Company 700l. a year so long as the arrangement lasted. I do not say that if the London and North Western Company had been before them, the commissioners might not have made this order on certain conditions, such as for example obtaining the consent of the North Western Company. But this was not the case here, and I think the rules must be made absolute.

POLLOCK, B.—I am of the same opinion. We have before us two orders of the Railway Commissioners of the 20th of June, 1877, and the 7th of February, 1878, made for the purpose of establishing a continuous line of water traffic between Birmingham and the Thames by means of the Regent's Canal and other companies. The objection made applies to one link in the chain, that is, the Birmingham Canal Company. The commissioners upon the application made to them find "that the rate asked is a due and reasonable facility and the route reasonable," and they grant the rate. The finding is obviously within section 11, sub-section 5 of the Act, and is perfectly proper. They had power to make such an order in the interests of the public, and I assume that they dealt with the question properly. But they deal with the Birmingham Company as one link in the chain, and they order certain rates which they approve and allow. The question is whether they have power to do this? Our office is limited to seeing whether the commissioners had jurisdiction to do as they have done. We say that in so doing the commissioners have repealed the rates governed by the Act of 1846. The jurisdiction is governed by the statute called Cardwell's Act, which provides among other things that "Every railway and canal forming part of a continuous line shall afford all due and reasonable facilities for receiving and forwarding

traffic." A series of companies was contemplated, and a proposal made by one company and resisted by another. In such a case the question would be whether a through rate is due and reasonable. The ground of my decision is that it was not the intention for anyone to make a complaint and the commissioners to call on all the companies interested and deal with the matter according to natural justice. Have they exceeded their jurisdiction in this particular instance? The tolls of the Birmingham Company are not to be lessened except by the consent of the London and North Western Company. Has the Legislature intended by the Act of 1873 to disturb such previous arrangements? I think there is no power whatever to disturb an existing arrangement previously sanctioned by Parliament. The propriety of releasing the London and North Western Company from its guarantee clearly comes into question, and this is a matter which cannot be dealt with. There is no decision assisting us except possibly *Toomer v. The London Chatham and Dover Railway Company* (2). I think this order in excess of the jurisdiction of the commission. As it is bad in part it is bad in entirety, and the rules for a prohibition must be made absolute.

HAWKINS, J.—I am of the same opinion. By the Act of 1846, the Birmingham Company were forbidden without consent to vary their rates. In looking at the powers conferred by the Act of 1873, it is necessary to see what the Act of 1854 says. It is contended that the Act of 1873 vested power in the commissioners to vary the rates although no consent is given. Only three lines of the Act of 1854 need be referred to: "Every canal and railway company shall, according to their respective powers, afford facilities, &c.," but there is nothing as to through rates. The deficiency is supplied by the Act of 1873, which recites that "it is expedient to amend the law," &c., and provides that each forwarding company is to give notice whether they agree, and if they do not give notice they are taken

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to agree. If they object, the matter comes before the commissioners. If the company were to answer, "I do not agree because I have not the power," the answer, it seems to me, would be conclusive. The ground on which I base my decision is that the companies are required to give facilities only "according to their respective powers."

*Rules for prohibition absolute; costs against the Warwick Company.*

*found that it was caused by the defendants' negligence,—*

*Held, that, notwithstanding there was a contract with the S. W. R. Company by their issuing the ticket to the plaintiff, there was evidence of an undertaking on the part of the defendants to carry the plaintiff to R. with reasonable care and with reasonable facility also for alighting on the platform at R. at the end of the journey, and that they were liable for their neglect to perform such undertaking.*

Solicitors—Hare & Fell, Solicitors to the Treasury, for the railway commissioners; Taylor, Hoare & Taylor, agents for R. C. Heath, Warwick, for Warwick Canal Company and Napton Canal Company; Tucker & Lake, agents for Wragge, Evans & Holiday, Birmingham, for Birmingham Canal Company; R. F. Roberts, for London and North Western Railway Company.

[IN THE COMMON PLEAS DIVISION.]

1879. } FOULKES v. THE METROPOLITAN  
April 1, 2. } DISTRICT RAILWAY COMPANY.

*Negligence—Railway Company—Passenger—Implied Contract to carry although an express Contract by another Railway Company.*

*The S. W. R. Company have a station at R. and a railway from R. to S., where the defendants' line of railway joins, and the defendants have running powers over the railway of the S. W. R. Company from S. to R. The plaintiff took a return ticket of the S. W. R. Company from R. to a station beyond S. belonging to the defendants, and on the return journey from such station to R. he went by one of the defendants' trains under the management of the defendants' servants. On arriving at R. he received an injury in attempting to alight there by reason of the platform being considerably lower than the carriages of the train, such carriages being suitable only for the platforms of the stations throughout the defendants' own line and not for the platform at R. In an action against the defendants for such injury, the jury having*

This was an action to recover damages in respect of an injury which the plaintiff had sustained in consequence of negligence, as it was alleged, on the part of the defendants. The cause was tried before Lord Coleridge, C.J., at the last Middlesex Hilary Sittings, when the jury found a verdict for the plaintiff, damages 500*l.* A rule nisi was afterwards obtained upon affidavits to set aside such verdict, and to enter instead a verdict and judgment for the defendants, on the ground that upon the facts proved the defendants were not liable to the plaintiff.

The facts appeared to be these. In July, 1877, the plaintiff went to the booking-office of the railway station at Richmond, over the door of which were the words "South Western and Metropolitan Booking-office and District Railway," and took a third class return ticket from Richmond to Hammersmith. The station at Richmond belongs to the South Western Railway Company, and the ticket which was issued to the plaintiff was issued by a clerk in the employment of that company. The defendants have a station at Hammersmith called the Hammersmith Broadway Station, which is distinct from the station at Hammersmith of the South Western Railway Company. The defendants also have a short line of rail between their station at Hammersmith and a station called the Shaftesbury Road Station, by which their line of railway is connected there with the Richmond line of the South Western Railway Company, and they have running powers over the line of the South Western Railway Company from the Shaftesbury Road Station to Richmond. Two different sets of tickets are issued at the Richmond Station, one

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for the stations of the South Western Railway Company only, and headed with the initials of that company, and the other for the said Hammersmith Broadway Station of the defendants, which has not the name of any company upon it, but has the words, "via Shaftesbury Road and District Railway." The ticket given to the plaintiff was in form according to this last set, and the plaintiff went with such ticket by the train from Richmond to the said Hammersmith Broadway Station, and having alighted there, he afterwards took a return ticket from there to the Temple Station of the defendants' railway. In the evening he returned *via* the said Temple and Hammersmith Broadway Stations to the station at Richmond by one of the defendants' trains, drawn by an engine of the defendants and under the management of the defendants' servants. The carriages of the train were suitable for the platforms at the defendants' different stations throughout their own line of railway, but not for the platform at the said station at Richmond, which was nearly two feet lower than such carriages, so that the plaintiff in attempting to alight there from the carriage in which he had travelled, lost his footing and fell, and was thereby severely injured. It was for this injury that the action was brought.

The defendants contended that the contract to carry the plaintiff was not with them but with the South Western Railway Company, and that, therefore, the defendants were not liable. Against the rule, which had been so granted as above-mentioned, to set aside the verdict for the plaintiff and to enter it instead for the defendants,

*Parry (Sergt.)* and *A. L. Smith* now shewed cause.—The train by which the plaintiff was carried as a passenger belonged to the defendants, and the injury he incurred was caused by the negligence of the defendants' servants while lawfully in the defendants' train, therefore the question of whether the plaintiff contracted with the defendants or with some other railway company cannot arise, because the defendants are tortfeasors. In *Dalyell*

*v. Tyrer* (1) the defendants were owners of a steam ferry which had been hired for the day by H., he receiving the ferry fares from the passengers, and the defendants supplying the master and crew; the plaintiff, who had contracted with H. to be carried across, was injured by the negligence of the crew, and it was held that the plaintiff was entitled to recover against the defendants for such negligence. So in *Austin v. The Great Western Railway Company* (2), where the plaintiff was received as a passenger by the defendants without his fare being paid, and no contract therefore arising from the taking of any ticket, and in the course of the journey the plaintiff was injured through the negligence of the defendants, it was held that the plaintiff was entitled to recover against the defendants. The principle to be gathered from a series of cases, extending from *Marshall v. The York, Newcastle and Berwick Railway Company* (3) down to *Martin v. The Great Indian Peninsular Railway Company* (4), is that you can always sue the tortfeasor.

*Waddy and Bray*, for the defendants, in support of the rule.—There was no duty in this case except such as arose from contract, and the contract was only with the South Western Railway Company, and they alone are the parties to be sued. The case of *Powell v. Layton* (5) shews that it must be a tort arising out of a contract, for the defendant was there allowed to plead in abatement that the goods for not safely carrying which he was sued were delivered to him and his partners jointly, and that his partners were not sued.

[*LOPES, J.*—Why may there not be two contracts, namely, a contract with the South Western Railway Company by reason of their issuing the ticket to the plaintiff, and a contract with the defendants by

(1) E. B. & E. 699; s. c. 28 Law J. Rep. Q.B. 52.

(2) 36 Law J. Rep. Q.B. 201; s. c. Law Rep. 2 Q.B. 442.

(3) 11 Com. B. Rep. 655; s. c. 21 Law J. Rep. C.P. 34.

(4) 37 Law J. Rep. Exch. 27; s. c. Law Rep. 3 Exch. 9.

(5) 2 N. R. 365.

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reason of their receiving the plaintiff as a passenger in their carriage?]

There cannot surely be implied two contracts with two distinct parties to do the same thing. Even if there be an implied contract with the defendants it ended when the plaintiff had passed beyond the defendants' line of railway.

[LOPES, J., referred to *Blake v. The Great Western Railway Company* (6). GROVE, J.—The defendants have here running powers over the line of the South Western Railway Company.]

Still, every implied contract must be limited to the subject-matter which in this case is the carriage, and the only implied contract could be that such carriage should be reasonably safe to carry the plaintiff; but though the defendants might therefore be responsible to the plaintiff for any injury resulting from such carriage breaking down or the like, they cannot be responsible for the defective state of the platform at Richmond of the South Western Railway Company. Here, by reason of that company giving the ticket to the plaintiff, there was a contract by that company with the plaintiff to carry him to Hammersmith and back to Richmond, and to provide at this last place a proper platform for his alighting there. If so, why should another contract to do the same thing be inferred to have been made by another company? The defendants must be considered as the mere agents of the South Western Railway Company in helping to carry out the contract of the latter. In *Addison on Torts*, 4th ed., p. 487, it is said, "In the absence of special circumstances the responsibility of a railway company in and about the conveyance of goods accepted by them for delivery at a particular destination, is the same whether their own line extends the whole distance or stops at an intermediate point, and the railway companies carrying the goods beyond the limits of the first line of railway are, in respect of the conveyance and delivery of such goods, to be regarded as the agents of the railway company which originally received the goods," and for this is cited *Crouch v.*

*The Great Western Railway Company* (7), and *Scothorn v. The South Staffordshire Railway Company* (8). "The same principle," the author says, "applies to the conveyance of passengers who are injured during the journey, although the negligence be that of the company over whose line the defendant company have running powers, and not of the defendants themselves."

[LOPES, J.—Why should not the agents be also liable?]

Agents may be liable for acts of misfeasance done by them in the course of their employment, but not for acts of nonfeasance or mere omission—*Dacey on Parties to an Action*, 463, citing *Story on Agency*, s. 309. The defendants are not liable to the plaintiff, for there is no privity of contract between them—*Winterbottom v. Wright* (9).

GROVE, J. (after reading and commenting on the rule which had been obtained in this case, proceeded as follows)—The question here is were the defendants liable for that which the jury have found was an act of negligence? The alleged negligence is this. The defendants (who have running powers over a certain portion of the South Western Railway) have carriages adapted to their own stations, so that when such carriages stop at their own stations it would be perfectly safe for the passengers to alight from them, but not so when they stop at a South Western Company's station, the platform of which, though adapted to the South Western Company's carriages, is a considerable depth, namely, about two feet below the level where passengers would have to get out of the defendants' carriages, and, therefore, unless a person travelling by one of such carriages were cautioned (particularly if he had been in the habit of travelling by the defendants' railway, and had been accustomed to step out on to a level platform), he would probably meet with a severe fall. Now the negligence, therefore, as I understand it,

(7) 26 Law J. Rep. Exch. 418.

(8) 8 Exch. Rep. 341; s.c. 22 Law J. Rep. Exch. 121.

(9) 10 Mees. & W. 109; s.c. 11 Law J. Rep. Exch. 416.

(6) 7 Hurl. & N. 987; s.c. 31 Law J. Rep. Exch. 346.

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is in the defendants inviting a passenger to travel by one of their carriages, and stopping at a station where there is no suitable platform to descend upon, and in allowing him to step out of the carriage without any warning of the danger, so that reasonably presuming when he got out of the carriage that he would, as at other stations, descend on to a level platform, he would suddenly find himself putting his foot down two feet or some considerable distance, and so be liable to have, as the plaintiff on this occasion had, a fall, and a very serious one. The question is, who is liable for that negligence?

Now it is unnecessary for me, in this case, to say whether, if this action had been brought against the South Western Company, they might have been held liable or not, because it does not seem to me to follow that two parties may not be liable in an action for negligence for the same accident. Take an ordinary case of an accident caused by the negligence of a servant, in which the action may be brought against the master or against the servant. The man who has caused the negligence is not exempt from liability because the master is liable. It is unnecessary now that I should give my judgment as to whether the South Western Company are liable or not. I do not base my judgment upon that, but upon this, that there was reasonable evidence to go to the jury of liability on the part of the defendants, even assuming, as I do, that the persons in the employ of the South Western Company were the persons who issued the tickets at the office where the plaintiff took his ticket.

Now the evidence shortly stated is this, first of all the Metropolitan District Railway Company, the defendants in this case, provide the carriages, which are suited to run over their own line. They use these carriages in this particular instance to run for about half a mile over their own railway and for four or five miles over the South Western Company's line. Then it is shewn, and not denied, that the carriage in which the plaintiff travelled was a carriage belonging to the defendants, and under the control wholly of the defendants' servants, that the

engine was the defendants', and that the guard was in the service of the defendants; that the whole conduct of the train and the places where it stopped, so far as we can gather from the evidence, were arranged by the defendants. Nobody else but the defendants' guard and engine-driver could have stopped the carriage in which the plaintiff travelled, and they were the persons who stopped it at this place where the accident happened.

Then it was admitted also that the defendants knew of the danger, that is to say, that the platform at this place was considerably below the carriage, so that the passengers would have to get down a considerable distance, and they must have also known that at their own platforms and their own stations there would be no such distance and no such danger. Further, it was proved that outside the booking-office at the Richmond station, where the tickets are taken, there are over one of the doors written the words "South Western and Metropolitan Booking Office and District Railway;" so that passengers are told that they may book there, not only for the South Western Company but for the Metropolitan District Railway. Then there are two sets of tickets issued at this station. The one ticket, where the carriages are to travel over the South Western line itself only and not to go upon the Metropolitan District line, is headed "L. & S.W.R.," that is, London and South Western Railway, and nothing is said on that ticket at all about the District Railway. The other ticket has not got any heading of any railway, but has got in the body of it "*Via District Railway.*" Then in addition to that there is the fact that the defendants provide tickets from Hammersmith to Richmond. The plaintiff took a return ticket from Richmond to Hammersmith, but it is not denied that if he had taken a ticket at the Hammersmith Broadway station direct for Richmond, there would have been a contract with the defendants, and that the defendants would have been liable. But it is said that because the plaintiff used the return part of his ticket from Hammersmith to Richmond (which is



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exactly the same as if he had taken a direct ticket, with the difference simply of a small reduction in price in consequence of its being a return ticket), that the defendants are not liable, because the original contract being with the South Western Railway Company, that contract remains to fix the South Western Railway Company with the liability, and exempts the defendants. Now I am of opinion that, whatever may be the liability of the South Western Railway Company, on which I pronounce no judgment, the defendants are not exempt.

I think there was evidence, from all the matters to which I have alluded, of an invitation and permission to the plaintiff to travel as a passenger in the defendants' carriages, and that being so, the defendants were bound to keep their carriages and the modes of ascent to and of descent from them in a reasonable and proper state of safety, and that the mere fact that the ticket was issued by the servants of the South Western Railway Company, or that there was a contract with that company, does not exempt the defendants from liability arising out of their undertaking when they receive a person into carriages which are under their control.

Now it was strongly argued by Mr. Waddy that the carriages here were really to be taken as South Western Railway carriages, but I find no evidence, either on the notes of the Lord Chief Justice or in the interrogatories, or upon the affidavits, of any such hiring, or of any arrangement by which the defendants let out the carriages with their guards, engine-men and servants to the South Western Railway Company. Even Mr. Forbes, who is a deponent for the defendants, says this, "The District Railway run over and use the before-mentioned South Western Railway, under the authority of the Metropolitan District Railway Act, 1875, by which it is provided that the District Company may run over and use with their engines and carriages of every description, and with their officers and servants in charge of trains, but only for the purposes of passenger and coach traffic, to and from their railway, the portions of the London and South

Western Railways from the junction therewith of the District Railway and the new passenger station of the London and South Western Railway at Richmond." So that so far from saying that the defendants hire or let out their carriages to the London and South Western Company, it makes them the *domini* as far as this is concerned, and gives them power to use the South Western Company's line, whether the South Western Company wish it or not with engines and carriages of every description.

I assume then that the defendants take very good care that the expenses of all these carriages and things are paid, and that they do not act gratuitously, but that they get an accession in the number of their passengers whereby a greater amount of money is put into their pockets. Therefore, in my judgment, there was ample evidence for the jury that for reward, or what is equivalent to reward, they run their carriages over this railway and take passengers in their carriages. Then comes the question whether it is absolutely necessary that there should be an express contract between the parties to make the defendants liable for an action such as this is. Now I incline to think that it is not necessary. In the case of *Marshall v. The York, Newcastle and Berwick Railway Company* (3) the declaration was that the plaintiff, at the request of the defendants, became and was a passenger in one of their carriages, to be by them safely and securely carried and conveyed thereby, together with his luggage, on a certain journey along the said railway. Now here the statement of claim is that the plaintiff became and was received by the defendants as a passenger to be carried by them from Hammersmith to Richmond for reward, and therefore in form the declaration and statement in the two cases is almost identical. In giving judgment in that case Chief Justice Jervis, speaking of the liability of a master for a servant, says: "It is said that that is because the master could not maintain an action in respect of the personal suffering of the servant though he might in respect of the loss of services. But upon what principle does the action lie at the

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suit of the servant for his personal suffering? Not by reason of any contract between him and the company, but by reason of a duty implied by law to carry him safely. If, under the circumstances of this case, the plaintiff could have recovered in respect of a personal injury sustained by him, there is no reason why he should not also recover in respect of the loss of his luggage." So that, if anything, he holds that, *a fortiori*. Then Mr. Justice Williams says: "The case was, I think, put upon the right footing by Mr. Hill when he said that the question turned upon the enquiry whether it was necessary to shew a contract between the plaintiff and the railway company. The proposition was that this declaration could only be sustained by proof of a contract to carry the plaintiff and his luggage for hire and reward to be paid by the plaintiff, and that the traverse of that part of the declaration involves a traverse of the payment by the plaintiff. I am of opinion that there is no foundation for that proposition. It seems to me that the whole current of authorities, beginning with *Govett v. Radnidge* (10) and ending with *Pozzi v. Shipton* (11), establishes that an action of this sort is in substance not an action of contract but an action of tort against the company as carriers." That was in the year 1851, and in the year 1867, in the case of *Austin v. The Great Western Railway Company* (2), Mr. Justice Blackburn, now Lord Blackburn, referring to this case of *Marshall v. The York, Newcastle and Berwick Railway Company* (3), says: "I think that what was said in the case of *Marshall v. The York, Newcastle and Berwick Railway Company* (3) was quite correct. It was there laid down that the right which a passenger by railway has to be carried safely does not depend upon his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely."

Mr. Justice Shreeve and Mr. Justice Lush put it upon contract. Mr. Justice Lush says: "I prefer to rest my judgment on the ground of contract. I think there

was a contract to carry the mother and the child, and that contract operated in favour of each party. The only question is whether the facts averred in the plea and found by the jury negative the existence of any such contract as I have mentioned. I think they shew that there was an undertaking to carry the plaintiff."

Mr. Justice Lush so far puts it upon a different ground, but then he assumes that the undertaking to carry the plaintiff does in fact amount to a contract. Therefore *quacunqve via*, the action lies either without a contract, for which the cases of *Marshall v. The York, Newcastle and Berwick Railway Company* (3) and *Austin v. The Great Western Railway Company* (2) are strong authorities, or if it be necessary that there should be a contract, then I think that there was here evidence to go to the jury of a contract, that is to say of an undertaking to carry, and for reward; because the permitting for their own interest the plaintiff to go into their railway carriage and dealing with him as a passenger in the way they did would be evidence of a contract to carry. The case of *Austin v. The Great Western Railway Company* (2), to my mind, goes beyond the present case. That was a case where the railway company, by their statute, were to carry free of charge children under three years of age when they were accompanied by their friends. Now a woman took a child with her into the carriage who was two months above three years of age. She was not guilty of fraud, but she ought to have paid half a fare for the child. The railway company were not aware of the child's age, and made no enquiry, and the child having met with an accident the railway company were held liable. Now the peculiarity of that case was that though the railway company there may be taken to have contracted if the mother paid her fare, and the child was under three years old, that they would carry the child for nothing, there was no such undertaking to carry a child above three years of age, and therefore, as far as contract goes, if a contract was there to be assumed, there was no contract, because the railway company not only did not agree but they would not have agreed to

(10) 3 East 62.

(11) 8 Ad. & E. 963.

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have carried the child if they had known that the child was above three years of age, and yet the Court there held that taking the child into the carriage and permitting the child to be a passenger on the railway made them liable. To my mind that is a stronger case than the present one. In the present case the defendants did receive the party knowingly, they took him knowingly, and the jury have found that they were negligent, and I must say I cannot see that the jury could have come to any other conclusion. Mr. Waddy, however, has argued that the negligence was in the South Western Railway Company having their platform too low. If that be so, it does not appear to me any reason why the defendants, who undertook to carry in safety a person and to bring him to that platform, which it is admitted they knew was too low, are not liable if they allow that person to get out there and break his leg without any warning of the danger. In my opinion there is no reason why the verdict should be disturbed, and therefore I think this rule should be discharged.

LOPES, J.—I think too that this rule should be discharged, and after the judgment which has been delivered by my brother Grove, I propose to state my reasons very shortly. The question is whether, assuming the defendants to have been negligent, there was evidence of the defendants' liability upon which the jury could reasonably act. Mr. Waddy has argued that there was no such evidence. He says there was no contract with the defendants, since the ticket which the plaintiff took was not issued by the defendants, but by the South Western Company. It may be that he is right in saying that the South Western Company issued the ticket, and that they did not issue the ticket as the agents of the defendants, but according to my view it is not necessary to decide that point, and for the purpose of this case I will assume that there was no ticket issued by the defendants, and that the ticket that was issued was issued by the South Western Company. It may be that the plaintiff would have a remedy against the South Western Company upon the contract

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which would be embodied in that ticket, but independently of that I think that there was evidence on which the jury might reasonably infer an undertaking by the defendants to carry the plaintiff with reasonable care, and at the end of the journey to provide for him reasonable facilities for getting out of the carriage. The evidence was that the defendants received the plaintiff into one of their carriages at Hammersmith, and that in point of fact they invited him to get into it. The carriage in which they so received him was a carriage of the defendants, and under the control of their servants, and the engine drawing the train to which the carriage was attached belonged to the defendants. The defendants at Hammersmith might, and in point of fact ought, to have examined the plaintiff's ticket, and if they thought fit they might have prevented him from going into the carriage at all. The plaintiff proceeded therein to Richmond and there the accident happened, and the jury have found that it was caused by the defendants' negligence, and that it arose from the difference of the platform relatively to the construction of the defendants' carriages. It seems to me that there is evidence, and I may say abundant evidence, to support the verdict of the jury. But it is said that then the plaintiff might have two remedies, one against the defendants and the other against the South Western Company. I cannot see any difficulty in that, and I will illustrate it in this way: Railway A. issues tickets for railway A. and railway B., and the traffic is sometimes worked by carriages and servants belonging to railway A., and sometimes by carriages and servants belonging to railway B. A passenger takes a ticket from railway A. and gets into a carriage belonging to railway B., drawn by railway B.'s engine, and managed by railway B.'s servants, and an accident is caused by the negligence of railway B.'s servants and through some defect in railway B.'s carriages in their not being properly adapted to the exigencies of the traffic. I take it that then, according to the cases, the passenger could sue either railway A. or railway B.; he could sue railway A. on the contract arising from the

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ticket issued by that company, or he could sue railway B. on the implied undertaking arising from his having been received into or invited to go into the carriage of railway B., and become a passenger on the railway. I therefore think that this rule ought to be discharged.

GROVE, J.—I did not say anything upon the question of agency, but I may add that the inclination of my opinion is that the South Western Company were for this purpose the agents of the defendants. I think, in fact, there was a species of mutual agency, each company acting for the other, but I do not, however, rest my judgment upon this, because I think the affidavits do not shew it, and that there was no evidence of it at the trial.

*Rule discharged.*

Solicitors—Faithfull & Owen, for plaintiff; Baxter & Co., for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1878.  
Dec. 19, 20, 21. { HILL AND OTHERS v. THE  
1879. { MANAGERS OF THE METROPOLITAN ASYLUM DISTRICT.  
Jan. 28.

*Statute executed so as to cause Damage unnecessarily—Statutory Superior directing unauthorised Act—Hospital under Statute so planned as to be a Nuisance—Local Authority acting under direction of Local Government Board—Asylum under Metropolitan Poor Act, 1867 (30 Vict. c. 6).*

*A hospital for infectious disease was erected by the defendants, a body created under the Metropolitan Poor Act, 1867, according to directions issued to them by the Local Government Board under that Act. The hospital, according to the finding of a jury, was a nuisance to occupiers of neighbouring houses, and the nuisance was not shewn to have been unavoidable:—Held, that the defendants were not protected by the*

*directions of the Local Government Board if those directions ordered what was not legal, and that as the nuisance was not shewn to have been unavoidable the statute could not be held to have legalised it.*

This was an action for damages and an injunction in respect of an alleged nuisance by the erection and maintenance of a small-pox hospital at Hampstead, brought by Sir Rowland Hill, William Lund and Alfred Downing Fripp, occupiers of neighbouring houses, against the managers of the Metropolitan Asylum District, who are incorporated under the Metropolitan Poor Act, 1867 (30 Vict. c. 6). The action, which was tried before Pollock, B., and a special jury, was heard on December 19, 20, 21, 1878, by Pollock, B., on further consideration.

*Herschell, Bompas and Finlay, for the plaintiffs.*

*Sir John Holker (Attorney-General), Willis and Proudfoot, for the defendants.*

The facts and arguments are sufficiently stated in the following judgment, delivered by the learned Judge after taking time to consider.

POLLOCK, B. (on January 28, 1879).—This action was brought to recover damages in respect of, and to obtain an injunction against the recurrence of, what the plaintiffs alleged to be a nuisance, affecting their rights, by the erection and maintenance of an asylum, consisting of several buildings which were erected and maintained for the reception and treatment of paupers suffering from small-pox. The rights of the three plaintiffs, who occupied land and houses adjoining the land and buildings occupied by the defendants, were independent and differed in their character. For the purpose of this judgment, it will be sufficient to refer to them as set forth in the statement of claim. At the opening of the case, it was arranged by counsel that, in the event of a verdict passing for the plaintiffs, the amount of damages should be referred to an arbitrator; and, before it had proceeded far, it was further agreed that the questions to be tried should be limited to whether the asylum was a nuisance, occa-

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sioning damage to the plaintiffs, either *per se* or by reason of the patients coming to or from the asylum; and further, assuming that the defendants were entitled to erect and carry on the asylum, did they do so with all proper and reasonable care and skill with reference to the plaintiffs' rights?

The plaintiffs proved that between December, 1870, and July, 1872, 7,352 patients were admitted into the asylum, of whom 1,379 died, and that there were for a considerable period as many as 560 patients under treatment. They also adduced evidence to shew that, during this period, the proportion of small-pox cases in the neighbourhood of the hospital was far larger than in other parts of the parish; and they called a number of medical witnesses who stated that, in their opinion, the existence of the asylum, as carried on by the defendants, was a source of danger to the neighbourhood, and to the plaintiffs in particular, owing to the probable spread of the disease by infection, to the effect of the dead-house, and also to the bringing to and from the asylum of the patients in ambulances, and the visiting of the patients by their relations in cases where death was apprehended. With regard to the plaintiff Sir Rowland Hill, some evidence was also given that patients within the grounds of the asylum were allowed to walk so near to the fence which separated the asylum grounds from those belonging to Sir Rowland Hill as to interfere with the safety of the latter. With regard to the plaintiff Fripp, he deposed to having perceived when in his own house a bad smell from the dead-house, whereby his family and others were compelled to leave, and that on a particular day in February, 1871, this smell was specially noticed by himself and his wife, and shortly after she sickened and was attacked by small-pox. He also stated, however, that about the same period Mrs. Fripp had examined an empty ambulance standing in the high road, wherein a patient suffering from small-pox had been conveyed.

The defendants called a great number of witnesses, consisting of those who had the superintendence and personal management of the asylum, and also medical

men, who stated that, in their opinion, no danger or disturbance of the plaintiffs' rights was occasioned by the asylum, and that it was built and carried on with all possible care and skill so as to avoid any evil consequences.

At the end of the case on both sides, I left to the jury five questions, which were answered as follows:—

First, Was the hospital a nuisance occasioning damage to the plaintiffs, or either and which of them, either *per se*?

Second, Or by reason of the patients coming to, or going from, the hospital?

A.—First and Second. It was a nuisance to each of the plaintiffs *per se*, and by reason of the patients coming to or going from the hospital.

Third, Assuming that the defendants were by law entitled to erect and carry on a hospital, did they do so with all proper and reasonable care and skill with reference to the plaintiffs' rights?

A.—No.

Fourth, Assuming that the defendants were by law entitled to erect and carry on *this* hospital, did they do so with all proper and reasonable care and skill with reference to the plaintiffs' rights?

A.—No.

Fifth, Did defendants use proper care and skill with respect to ambulances?

A.—No; we consider that the ambulances ought to have been disinfected before leaving the hospital.

The jury also expressed their opinion that everything had been done by everybody in the hospital with regard to the internal arrangements, and that great praise was due to the sisters and the hospital authorities.

For the purposes of this judgment, I must assume that the answers thus given are supported, in point of fact, by the evidence which was laid before the jury, and further that the direction given to them was proper and sufficient, in point of law, any objection upon either of these heads being available only upon motion before the Divisional Court.

At the further argument of the case, which took place before me during the last Michaelmas sittings, the plaintiffs' counsel contended that the plaintiffs were entitled to have the verdict and judg-

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ment entered for them, and also to an injunction, and that the answers of the jury to the first two questions were sufficient to shew that a legal cause of action had been established. Counsel for the defendants denied this, and, with respect to the answers to the first two questions, asserted that no case had been made out for the following reasons:—

First, They argued that, even were it admitted that the building and carrying on of the hospital was a nuisance, and one which was not authorised and protected by law, the defendants were not liable, because, in all that they did, they acted simply in obedience to the Local Government Board, whose orders they were bound to obey; and the position of the defendants was likened to that of a constable executing a warrant and officers carrying out the orders of their government.

Secondly, It was argued, on broader and more intelligible grounds, that the defendants were not liable because, in all that they did, they acted *bona fide* in the execution of a duty cast upon the Local Government Board and themselves by a statute which required certain things to be done for the public welfare.

Before I consider whether either of the points contended for by the defendants can be supported, it is necessary to examine what is their exact position both with relation to the Local Government Board and also to members of the public whose property and rights may be affected by their acts.

The statute by which the defendants are incorporated, and under which they seek to exercise the powers and do the acts complained of, is the Metropolitan Poor Act, 1867 (30 Vict. c. 6); but this statute is only in continuance of a course of legislation commencing with the Poor Law Act of 1834 (4 & 5 Will. 4. c. 76), whereby a poor law board was first established and power was given to such board (amongst other things) by sections 23 and 25 to direct overseers, or guardians, to enlarge or alter workhouses according to such plan, and in such manner, as the board shall deem most proper. Similar powers will also be found in the Poor Law Act of 1844 (7 & 8 Vict. c. 101),

whereby the Poor Law Board is authorised to order district boards to purchase, hire or build buildings for asylums or schools.

The Act of 1867 is limited to the metropolis, and provides by section 5 for the establishment of asylums for the reception and relief of "sick, insane or infirm paupers" chargeable in the metropolitan unions. This is carried out by the formation of asylum districts, and the constitution of a body of managers for the asylum of each district, and by directing (section 7) that "for each district there shall be an asylum or asylums as the Poor Law Board from time to time by order direct." By section 15, "The Poor Law Board may from time to time by order direct the managers to purchase or hire, or to build, and (in either case) to fit up a building or buildings for the asylum, of such nature and size, and according to such plan, and in such manner as the Poor Law Board think fit, and the managers shall carry such directions into execution;" and by section 16, "The managers shall have, for the purposes of the asylum, the like powers as are for the time being vested in guardians of unions or parishes in the metropolis relative to the purchase or hiring of lands or buildings." The following sections are also material—Section 20, "The managers shall from time to time provide for the asylum necessary fixtures, furniture and conveniences, and such as the Poor Law Board from time to time by order direct;" Section 21, "The mode of admission of persons into the asylum shall be such as the Poor Law Board from time to time by order direct;" Section 22, "The managers shall have the like powers as guardians for the relief, maintenance and management of the inmates of the asylum, and shall from time to time provide such medicines, appliances and requisites for the medical and surgical care and treatment of the inmates, and cause the same to be furnished and used according to such rules as the Poor Law Board from time to time by order direct." Section 51 provides that "the provisions of the Act 5 & 6 Will. 4. c. 69, 'to facilitate the conveyance of workhouses and other property of parishes, and of incorporations or unions of parishes in England

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and Wales,' relative to the acquisition of sites or buildings for workhouses, and of all Acts extending or amending the same, shall apply to lands and buildings required to be purchased, hired or otherwise acquired for any of the purposes of this Act, and shall have effect as if managers under this Act were guardians, and as if an asylum or dispensary were a workhouse." Section 53, "So much of the Lands Clauses Acts as relates to the purchase of lands otherwise than by agreement, shall not be put in force except for the purchase of lands for enlarging a workhouse, hospital or school, existing at the passing of this Act, and then not without a previous order of the Poor Law Board directing such purchase." By the Local Government Board Act, 1871 (34 & 35 Vict. c. 70), the powers and duties vested in the Poor Law Board are transferred to the Local Government Board, which was established by that Act.

It will be seen from these provisions that the scope and intention of the Act is to create and carry on, within the metropolis, asylums for the sick, insane or infirm, by district managers under the direction and control of the Poor Law Board, much in the same way as workhouses, asylums and schools had been before carried on by guardians and district boards; and it is observable that the only reference to smallpox is contained in section 69, which provides for the repayment out of the common poor fund of certain expenses, including those incurred "for the maintenance of patients in any asylum specially provided under this Act for patients suffering from fever or smallpox."

It is under this statute that the defendants were appointed and have acted; and it is under the provisions contained in it, and under the orders of the Local Government Board made in pursuance of it, which were given in evidence at the trial, that the defendants seek to shelter themselves upon the ground that they acted only as the innocent agents of a public board, and in pursuance of their orders carried out what they have done, and therefore are irresponsible.

I am unable, upon what seems to me to be a fair construction of the statute and

a proper appreciation of its meaning, to arrive at this conclusion.

Upon comparing sections 15 and 16, it is clear that, whereas the former empowers the Poor Law Board to direct the managers to purchase, hire or build buildings for the asylum, by the latter section the managers alone have the power, similar to that vested in guardians of unions or parishes in the metropolis, relative to the purchase of lands; and, as far as I can gather, the policy and provisions of the Poor Law Acts, beginning with the 59th Geo. 3. c. 12. s. 8, and continued and enlarged by 5 & 6 Will. 4. c. 69. s. 4, and 5 & 6 Vict. c. 57. s. 16, has been that formerly churchwardens and overseers, and now guardians, should be the persons to acquire and hold land or buildings required for workhouses, hospitals or other like purposes, although since the establishment of the Poor Law Board the guardians must exercise their rights under the control of the Poor Law Commissioners.

It would appear from these and the other sections of the Act of 1867 that, although the intention is clear that the Poor Law Board are to have, so far as is possible, the ultimate control of, and to give their sanction to all that is done, the managers are the body who have power, subject to the orders of the board, to take and hold land, and it is they who, subject to such orders, are to purchase, hire or build and to fit up the asylum, to provide the fixtures, conveniences and medicine, and moreover they are to have the like powers as guardians for the relief, maintenance and management of the inmates, and in the appointment, control and payment of officers.

All these provisions appear to shew that the asylum managers have authority and power vested in them involving a discretion, and that it could not have been the intention of the Legislature to make them mere irresponsible instruments to carry out the orders of the Poor Law Board.

It is quite true that each act that was done by the defendants with reference to the formation of the asylum, and in particular the purchase of the land whereon it was built (which was authorised by an order dated the 13th of

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February, 1868), was done by the express directions of the Local Government Board; but these directions must be taken with reference to the statutable powers and duty which are conferred upon the two bodies respectively, and cannot be so dealt with as to vary the provisions of the Act, or to enlarge, or cut down, the responsibilities which arise out of anything done by the board or the managers, whose acts must be dealt with as referable to the legal right that is vested in them.

The first point made by the defendants is, so far as I can find, wholly new, and were it tenable would lead to very serious consequences as affecting the rights of property; for it amounts to this, that a body of managers, constituted for the purpose of carrying out a public object under the direction and supervision of a public department, may do acts which are admitted to be a nuisance and injurious to the owners of neighbouring property, and are also admitted to be unauthorised by law, and yet not be liable because they did them by the mandate of the department under which they act.

In dealing with a contention so novel in character and so serious in its consequences, it will be well to examine shortly the only principle and authorities which are said to be analogous.

The immunity of ministerial officers for acts committed by them has long been established, and is founded upon the clearest principles of reason and justice, namely, that the officer of a Court is bound to obey the writ of a Court acting within its jurisdiction, and has no means of ascertaining whether it issues upon a valid judgment or not; moreover, he is punishable if he does not so obey; and it would be unjust that a man should be punished if he does not do a thing, and liable to an action if he does do it. This was clearly pointed out in *Moravia v. Sloper* (1), and in the judgment of the Court of Queen's Bench in *Andrews v. Marris* (2). In the present case, whether the defendants were bound to obey the orders of the Local Government

Board would depend upon whether those orders were legal, or not; and therefore to say that the defendants were bound to obey such orders is to beg the question.

The exemption from liability of officers carrying out Government orders has always been rested upon the ground that their conduct, under such circumstances, is an act of State for which, on grounds of public policy, they cannot be made liable.

In the present case, assuming that the Local Government Board were not authorised by the Act of 1867 to do the acts of which the plaintiffs complain, the defendants were bound to enquire into their own legal position, and were also bound to take care that they so exercised their rights as not injuriously to affect the rights of others, and they are in this respect in the same position as all other persons are by whose wrongful acts a nuisance is created.

The second ground upon which the defendants rest their case involves a much more important question, namely, whether the defendants are protected in doing what they did by the provisions of the Act of 1867.

That there are no provisions in that Act requiring them to build the very hospital, and on the very site, and to carry it on in the very manner in which it was carried on, was admitted. Had this been so, the case would have come within the well-known rule that, if the legislature authorises the doing of a particular thing, it cannot be wrongful; which is constantly acted upon where the construction of roads, railways, canals and other public works has been authorised by Act of Parliament. But it was said that, looking at the purview and general intent of the Act, and the fact that it was passed with the view of obviating, or at least lessening, a great public danger, the statute must be construed in a liberal spirit, and so as not unduly to place difficulties in the way of those to whom its execution is entrusted. With regard to this last argument, if it means that this statute is to receive a construction different from that which would be put upon a statute authorising the car-

(1) *Willes*, 30.

(2) 1 Q.B. Rep. 3; s. c. 10 Law J. Rep. Q.B. 225.



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rying out of any other public work, I see the greatest difficulty in giving effect to it; for nothing would be a more dangerous doctrine, or one more contrary to the true rules of construction, than that which required or allowed a Judge to give an effect to the same words wider, or narrower, in proportion as he might think the general object of the Act in which they were found of great, or small, public importance. The principle is, as was said by Blackburn, J., in *The Mersey Docks Trustees v. Gibbs* (3), "that the Act is not wrongful, not because it is for a public purpose, but because it is authorised by the Legislature." Moreover, when stress is laid upon the general prevalence of small-pox in the metropolis, and the desirability of removing patients suffering from it to the hospital, it must be remembered that there is nothing in the general scope of the Act, or in any particular provisions of it, that points specially to small-pox. The class for the reception and relief of whom the Act professes to provide asylums is "the sick, insane or infirm, or other class or classes of the poor," &c.

There is another consideration which also affects the question at issue. The dispute here is not between the Asylum Board and any person, or body of persons, with whom any relation is established by the statute. It is not as though the persons complaining of the acts of the board were officers of the asylum, or patients; in which case it might fairly be said that, if there were two ways of carrying out the intention of the statute or the orders of the Local Government Board, it must be assumed that a discretion was vested in the Asylum Board to do that which seemed to them best under all circumstances, though possibly not best for some particular person or persons. Here the plaintiffs are strangers to the defendants and to the whole matter over which they have control; their rights are simply those of owners and occupiers of land, and they assert that they have suffered damage by reason of the defendants acquiring land adjoining, and

so using it as to create an actionable nuisance.

To meet this, therefore, the defendants must certainly make out a clear case of right; for, if the defendants could, at any place, and in any manner, carry out the requirements of the Act without creating a nuisance, it cannot be supposed that the Legislature armed them with an option, so to perform their duty as to create, or not to create, a nuisance affecting the rights of others as it might seem to the defendants, or the Local Government Board, fitting and proper with reference to the internal advantage or economy of the asylum. If this principle were once admitted, it is difficult to see where any line could be drawn. A statute which justified the defendants in creating a nuisance to neighbours would seem, by parity of reasoning, to justify the diminution of light or air, and this although the statute contained no provisions for compensating those who might be injured by its operation.

The real question, therefore, seems to come to this—Looking at that which was done by the defendants, and which the jury have found to be a nuisance, injurious to the plaintiff's rights, can it be truly said that the doing of it was, in substance, and impliedly, though not in express words, authorised by the statute? Now, no evidence was tendered by the defendants to shew, nor was there any finding of the jury, that the defendants could not have carried out what the Legislature intended them to carry out without necessarily creating a nuisance.

It is clear, from the facts proved, that no such conclusion could have been arrived at; for, although to build and carry on the hospital where, and in the manner in which, it was built and carried on, and with its large number of patients, may have been the most proper and convenient mode of complying with the intention and provisions of the Act in so far as the patients, the officers, medical staff and nurses were concerned, and the least expensive to the ratepayers, it cannot be assumed that, if several smaller hospitals had been built instead of one large one, or if a larger area around the hospital had been obtained, that which has

(3) 35 Law J. Rep. Exch. 281; s. c. Law Rep. 1 E. & Ir. App. 112.

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been found to be a nuisance might not have been avoided.

I have dealt with the case hitherto apart from authority. Several cases were, however, cited in argument, and, so far as these afford any assistance, they appear to me to support the view which I have taken.

In some of them the nuisance complained of was considered to have been expressly authorised by the Legislature. Thus, in *The King v. Pease* (4), where a company was empowered to make a railway according to a deposited plan, and to use locomotives thereon, and the jury found that the engines used were of the best construction known, and that the defendants used due care and diligence in the using of them, the Court held that, inasmuch as unqualified power was given to use the engines on the particular railway, the defendants were not liable to be indicted for a nuisance, and that it must be presumed that the Legislature intended that those of the public who used an adjacent highway should sustain some inconvenience for the sake of the greater good to be obtained by those who used the railway. The same principle was followed in *Vaughan v. The Taff Vale Railway* (5), and by the House of Lords in *The Caledonian Railway Company v. Ogilvy* (6) and *The Hammersmith Railway Company v. Brand* (7).

Where the nuisance is not shewn to be the absolutely necessary consequence of what is authorised by statute, the Courts have been slow to admit of any argument by which it has been contended that the creation of a nuisance must be taken to have been implied. This appears from what was said in *The Queen v. The Bradford Navigation Company* (8), and by the judgment of the Court of Appeal in *The Attorney-General v. The Colney Hatch Lunatic*

*Asylum* (9) and in *Clowes v. The Staffordshire Potteries Waterworks Company* (10), where Lord Justice Mellish dwells much upon the absence of any compensation clause as indicating that the Legislature could never have intended to justify an injury to a private right.

I agree also with what was said by Fry, J., in *The Attorney-General v. The Gas Light and Coke Company* (11), that the full burden of proof in such a case rests entirely upon those who say that they cannot, without creating a nuisance, do a thing which they are bound to do.

Whether the proposition be so framed as to assert that the Legislature never intended the act complained of to be done, or to say that those to whom the Legislature has intrusted the carrying out of a public object could do so without doing that particular act, the result is the same. In *Geddis v. The Proprietors of Bann Reservoir* (12), Lord Blackburn says, "I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the Legislature has authorised if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the Legislature has authorised, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented, it is, within this rule, "negligence" not to make such reasonable exercise of their powers. I do not think that it will be found that any of the cases (I do not cite them) are in conflict with that view of the law."

My attention was particularly called by the Attorney-General, for the defendants, to the judgment of the Master of the Rolls in *Hawley v. Steele* (13), declining to grant an injunction on motion to re-

(4) 4 B. & Ad. 30.

(5) 5 Hurl. & N. 679; s. c. 29 Law J. Rep. Exch. 247.

(6) 2 Macq. Sc. App. 229.

(7) 38 Law J. Rep. Q.B. 265; s. c. Law Rep. 4 E. & Ir. App. 171.

(8) 6 B. & S. 631; s. c. 34 Law J. Rep. Q.B. 191.

(9) 38 Law J. Rep. Chanc. 265; s. c. Law Rep. 4 Chanc. App. 146.

(10) 42 Law J. Rep. Chanc. 107; s. c. Law Rep. 8 Chanc. App. 125.

(11) 47 Law J. Rep. Chanc. 534; s. c. Law Rep. 7 Ch. D. 217.

(12) Law Rep. 3 App. Cas. at p. 455.

(13) 46 Law J. Rep. Chanc. 782; s. c. Law Rep. 6 Ch. D. 521.

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strain a general in Her Majesty's army, and the officers under his command, from causing or permitting rifle practice on a common in close proximity to the plaintiff's house, which, as he alleged, was a serious nuisance, and occasioned damage to his property. The principle upon which this injunction was refused has no doubt a material bearing upon the present case, and I in no way differ from what was there said by the Master of the Rolls; but I cannot follow the course of argument by which it is submitted that any true analogy exists between the case of lands vested in the Secretary of State for War "for the purposes of the defence of the realm" and a power given to acquire or build an asylum for sick paupers. In the first case, it would be extremely difficult to contemplate the user of land for military purposes which did not carry with it the right to fire guns. In the present case, upon the materials presented to me, the inference does not seem to follow that an asylum for sick paupers, including those suffering from smallpox, cannot be maintained without the creation of a nuisance.

I have dealt thus far with the answers given by the jury to the first two questions. The remaining findings assume the legal right of the defendants to erect and carry on the asylum, but raise the question whether the defendants, in so doing, used all proper and reasonable care and skill with reference to the plaintiffs' rights. Here, again, I must assume that the jury received a proper direction, and that the findings were not contrary to the evidence adduced; and the only question that remains is, whether that evidence disclosed any legal cause of action.

As to this, counsel for the defendants argued that the evidence for the plaintiffs was too general in its character, and that, although it might establish that some nuisance existed, it was not shewn that the plaintiffs had sustained any special damage in consequence of it. I cannot think that either of these contentions is established.

As to the first of these, some of the plaintiffs' witnesses spoke clearly to the creation, by the asylum, of a nuisance not

merely affecting comfort but endangering health; and as to much of their evidence it would be impossible to say to what extent it arose necessarily from the existence of the asylum, or from it being carried on in a manner more injurious to the plaintiffs than it might have been. This would be, and must have been, a matter of inference for the jury.

Upon the second point, the plaintiffs would be entitled to a verdict, and at least nominal damages, if the jury should think the nuisance created by the defendants rendered the enjoyment of life or property unsafe, although no special damage was proved.

The result of the conclusion at which I have arrived is that the plaintiffs are entitled to have the verdict entered for them, and also to judgment with costs.

With respect to the injunction which is sought, I propose to adopt the course which was followed in *The Attorney-General v. The Colney Hatch Lunatic Asylum* (9). I therefore grant an injunction to restrain the defendants, their servants or agents, from carrying on the asylum so as to be a nuisance to all or any of the plaintiffs, and I suspend the issue of it for three months, with liberty to either side to apply.

*Judgment for plaintiffs, with an injunction* (14).

Solicitors—Bischoff, Bompas, Bischoff & Co., for plaintiffs; Few & Co., for defendants.

## IN THE COURT OF APPEAL.]

(*Appeal from the Exchequer Division.*)

1879. }  
June 18. } RAY v. BARKER.\*

*Practice — Specially indorsed Writ — Leave to defend on Terms—Rules of Court, Order XIV. Rules 1, 6.*

*Upon an application for leave to sign final judgment under Order XIV. rule 1, the defendant in shewing cause by affidavit, must bring himself within one of two classes of case provided for by that order. To be*

(14) Notice of Appeal has been given.

\* *Cram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

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*within the first he must shew that he has a good defence to the action on its merits, and in such a case no terms ought to be imposed upon him. The second class contains those cases in which the defendant, while failing to do that, yet discloses facts which may entitle him to defend, and then rule 6 of the same order applies, and such terms may be imposed, as a condition of allowing him to defend, as may be thought fit.*

Appeal from the Exchequer Division.

The plaintiff issued a specially indorsed writ, by which he claimed the sum of 62*l.* 17*s.* from the defendant as the price of certain articles of jewellery which he had sent to the defendant on "sale or return."

The plaintiff then took out a summons under Order XIV. rule 1 (1), calling on the defendant to shew cause why he should not be allowed to sign judgment. The Master made an order that the plaintiff should be allowed to sign judgment unless 40*l.*, the only part of the claim of the plaintiff which the defendant disputed, was paid into Court within four days.

The defendant appealed, and Stephen, J., being of opinion that the case of *Runnacles v. Mesquita* (2) was in point, reversed the decision of the Master. The plaintiff then appealed to the Exchequer Division, which restored the order of the

(1) Order XIV. Rule 1. "Where the defendant appears to a writ of summons specially indorsed under Order III. rule 6, the plaintiff may on affidavit made by himself, or by any other person who can swear positively to the debt or cause of action, verifying the cause of action, and stating that in his belief there is no defence to the action, call on the defendant to shew cause before the Court or a Judge why the plaintiff should not be at liberty to sign final judgment for the amount so indorsed, together with interest (if any) and costs. A copy of the affidavit shall accompany the summons or notice of motion. The Court or a Judge may thereupon, unless the defendant, by affidavit or otherwise, satisfy the Court or a Judge that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empowering the plaintiff to sign judgment accordingly."

6. "Leave to defend may be given unconditionally or subject to such terms as to giving security or otherwise, as the Court or a Judge may think fit."

(2) 45 Law J. Rep. Q.B. 407; s. c. Law Rep. 1 Q.B. D. 416.

Master, but extended the time for payment into Court to eight days. From that decision the defendant now appealed.

It appeared from the affidavits that the plaintiff had sent to the defendant on the 23rd of February, 1878, a number of articles of jewellery, worth 62*l.* 17*s.*, "upon sale or return." The defendant acknowledged that he owed the plaintiff 22*l.* 17*s.*, the price of part of the jewellery so sent; but stated that he, the defendant, had delivered certain earrings, also part of the same jewellery, and which were worth 40*l.*, to a person who had pledged them and then absconded. A warrant had been taken out and a reward offered for her apprehension, but she had not been arrested, and the defendant did not state that he knew where the earrings had been pledged.

On the 19th of July, 1878, after the plaintiff had learned that the earrings had been misappropriated he invoiced them to the defendant in accordance with an alleged custom of the trade, the existence of which custom the defendant, however, denied.

On the 3rd of December, 1878, the plaintiff took out a debtor's summons against the defendant for the amount claimed in this action. The defendant applied to have the summons dismissed, and on the 21st of January, 1879, the Registrar in Bankruptcy stayed the proceedings without calling on the defendant to give security, and directed an action to be tried. The plaintiff did not appeal from that order, and took no steps to try the question in an action. The defendant applied in May to the Registrar to dismiss the debtor's summons, and the plaintiff then issued the writ in this action.

*Anderson*, for the defendant.—The question to be tried is whether the property in the earrings had passed to the defendant, and the plaintiff will have to establish the custom which he alleges, but which the Registrar, before whom witnesses were called, thought was not proved. *Moss v. Sweet* (3) was relied on by the plaintiff in the Divisional Court; but it does not govern this case. That decision was

(3) 20 Law J. Rep. Q.B. 167; s. c. 16 Q.B. Rep. 493.

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on the pleadings coupled with the findings of the jury in that particular case. The Master of the Rolls considered the question of goods delivered on sale or return in *Ex parte Wingfield* (4), and held that a person who receives goods on such terms does not become the owner. The Registrar declined to order the defendant to give security, and if the plaintiff wished to vary that order he should have appealed from it; but while that order stands, it shews that the Registrar has exercised his discretion in the matter, and it ought to prevent the defendant from being harassed by what is in fact a contradictory order by a tribunal of co-ordinate jurisdiction on the same facts and on the same subject-matter.

The process under Order XIV. is a summary process, and should not be used when the defendant shews that he has a defence, as the defendant has done here both before the Registrar and by his affidavits in this action—*Runnacles v. Mesquita* (2).

*M. Smith*, for the plaintiff.—*Runnacles v. Mesquita* (2) does not apply to this case, for here the defendant does not even shew that he has a good defence on the merits, much less does he go beyond that and shew what the grounds of his defence are. Even if *Moss v. Sweet* (3) does not govern this case, so as to make the defendant the owner of these goods and so liable to pay for them, still he must be bound to return them within a reasonable time, and if he does not do so, he must be considered to have exercised an option to purchase by his conduct in not returning them.

The plaintiff is entitled to the benefit of the procedure given by Order XIV. rule 1 (1), and he gains, if he succeeds in this action, under the order of the Exchequer Division, the amount he claims, whereas if he had obtained, by appeal, the discharge of the Registrar's order, he would not have been in any better position as regards the recovery of the money he claims.

*Anderson*, in reply.—The defendant can only be liable, if at all, in conversion.

The judgment of Bramwell, B., in *The Agra and Masterman's Bank v. Leighton* (5) lays down the principles on which a defendant ought to be allowed to defend under the similar provisions of the Bills of Exchange Act, and those principles apply to this case.

BRAMWELL, L.J.—I am of opinion that this appeal must fail. I think that Order XIV. is a very useful order, and I also think that it has been considerably misunderstood. The Courts of Common Law in this country exercise the functions of debt collectors in addition to their other functions, and the provisions of Order XIV. seem to me intended to assist the Courts very materially in their function of collecting debts. I do not think that the provisions of rule 1 (1) of that Order, which give the plaintiff leave to sign judgment in a summary manner ought to be applied save where the case is quite free from doubt. I think that those who have to apply the provisions of the Order should be careful only to apply those provisions in very clear cases, and not be ready to apply them merely because they have been made and do exist. The first rule of Order XIV. does not relate to the question of whether a defendant shall have liberty to defend; it relates to the leave to be given to a plaintiff to sign judgment. Then rule 6 of the same Order provides that leave to defend may be given unconditionally or on terms, so that this rule would appear to be applicable to cases where a defendant might be in fact asking leave to defend. I think that the effect of these rules, when considered together, is that a plaintiff may have his application to sign judgment granted, or it may be refused and dismissed, or it may be granted, unless the defendant complies with some term to be imposed upon him, so that when the defendant opposes the application of the plaintiff for leave to sign judgment, it is possible for the defendant to shew that he has a good defence on the merits, and then it would seem no terms or con-

(4) Law Rep. 10 Ch. D. 591.

(5) 36 Law J. Rep. Exch. 33; s. c. Law Rep. 2 Exch. 56.

*Ray v. Barker (App.), Exch.*

ditions should be imposed on him, or he may fail to do this, and yet he may disclose such facts as may be deemed sufficient to entitle him to defend even though he does not quite shew a good defence on the merits, and then it would probably be thought that he should be given leave to defend on terms.

Then the question arises whether the defendant does in this case disclose such facts as may be deemed sufficient to entitle him to defend. I certainly think that the facts do not disclose a good defence on the merits, and I doubt whether they entitle the defendant to be allowed to defend unconditionally. I may say that I think it would perhaps have been better if the Master had declined to interfere, as the matter seemed to be doubtful, and as the Court of Bankruptcy had made an order which had not been appealed against. The counsel for the respondent argued that there was a reason for not appealing, inasmuch as the plaintiff could not by the proceedings in Bankruptcy obtain the payment of his debt, as he will do if he succeeds in this action; and there is no doubt some force in that contention. The Divisional Court has, however, considered that the discretion which the Master undoubtedly had has been rightly exercised, and I do not think that we can say that that discretion has been wrongly exercised, and that the defendant ought to be allowed to defend unconditionally. I think that in the ordinary case of a delivery of goods on the terms of purchase or return, the receiver of the goods must generally be held to say that he will purchase the goods or that he will return them, and if he cannot return them, that is his misfortune, and he must pay for them. This has never been actually decided, for the case of *Moss v. Sweet* (3) does not lay down any broad principle. However, I confess that the defence in this case appears to me to be of a shadowy nature, and does create some misgivings as to the *bona fides* of the defendant, although as the plaintiff's statement as to the custom is denied by the defendant, we cannot try the question, nor can we give a final opinion on the point. The case is not absolutely undefended, and the Divi-

sional Court has exercised its discretion as to the conditions which ought to be imposed on the defendant, and I am of opinion that in a doubtful case, such as this is, we ought not to overrule the opinion of the Court below.

BRETT, L.J.—Order XIV. (1) enables the plaintiff, when he asserts that the defendant has no defence, to call on the defendant to shew cause why judgment should not be signed. Then if the defendant does not satisfy the Court that he has a good defence it would seem that the Court must, if we look at the first half of the rule alone, make the order allowing the plaintiff to sign judgment. Rule 1 (1), however, contains an alternative, and allows the defendant to disclose such facts as may entitle him to defend even though he has not a good defence on the merits. This must mean something less than a good defence on the merits, so that facts which do not amount to a good defence on the merits may still be facts which will entitle the defendant to defend the action. This being so, then rule 6 (1) gives the Court a discretion as to the terms on which the defendant who “discloses such facts” within rule 1 may be allowed to defend, and enables the Court to allow him to defend either unconditionally or conditionally. In the present case there was an action at common law in which the plaintiff made an application under Order XIV. rule 1 (1), so that the Court had jurisdiction to deal with the case under that order. The defendant shewed cause, his affidavits did not disclose a good defence on the merits, and I am inclined to think that he had no defence to the action; this question has, however, never been decided, for the case of *Moss v. Sweet* (3) did not settle this question. The defendant, however, did disclose facts which would justify the Court in saying that there might be a plausible defence, and so he has been allowed to defend, and the Divisional Court has imposed certain terms on him. That was within the power and jurisdiction and discretion of the Court, and the question is, whether the proceedings before the Registrar in the Court of Bankruptcy ought to make any difference in

*Ray v. Barker (App.), Excn.*

the exercise of that discretion. The order of the Registrar does not take away the jurisdiction of the Divisional Court, and the only question is as to the way in which that jurisdiction should be exercised after the order which had been made by the Registrar in Bankruptcy. I agree that it would have been better if the Master had not exercised his discretion in the way in which he has, and had not interfered; the Divisional Court, however, supported the view which the Master took. All the circumstances of the case must be considered, and we cannot, in my opinion, in a case such as the present, overrule the discretion of the Divisional Court as to the terms on which the defendant is to be allowed to defend.

COTTON, L.J.—The provisions of Order XIV. are very useful for the purposes of preventing delay, and they give the Court large powers, to be exercised as I think with care, in preventing the setting up of defences which are unreal and not *bona fide*. Rule 1 points out the circumstances which should exist so as to justify the Court in making the order that the plaintiff may sign judgment, and the question is whether the discretion given by the rule has or has not in each case been well exercised by the tribunal which has to exercise that discretion. Rule 1 of Order XIV. (1) contains two provisions. The first is that the Court may, "unless the defendant satisfy the Court that he has a good defence," make an order empowering the plaintiff to sign judgment. Under this provision the defendant can shew that he has a good defence on the merits, and then it would appear that the Court cannot make an order that the plaintiff may sign judgment. The second provision enables the defendant to disclose facts which will lead the Court to the conclusion that, although he has not a good defence on the merits, still he ought to be allowed to defend, and then rule 6 shews that the Court may, in such a case, impose terms on the defendant and exercise its discretion in allowing him to defend unconditionally or conditionally. The earlier provisions of rule 1 do not relate to the question of leave

being given to the defendant to defend; the latter part does apply to such a case, and when taken together with rule 6 applies to a case not covered by the first provision, to a case in which the defendant may reasonably try to establish facts on which he may *bona fide* desire to contest the action.

In the present case the first provision of rule 1 has no application; but the second provision does apply. There is a question as to the meaning of goods being delivered on sale or return. This question has been discussed, but not formally decided, and the case of *Moss v. Sweet* (3) is not an authority on the question, so as to enable us to hold that the defendant cannot reasonably believe that he has a defence which he ought to be allowed to try and maintain. I think that looking to the proceedings in the Court of Bankruptcy this was a case in which it was not necessary to impose the term of bringing a sum of money into Court, but the Master did impose that term, and a learned Judge at chambers would have affirmed that order but for an authority which it was then thought covered this case, but which does not do so; and finally the Divisional Court has considered the matter, and has exercised a discretion which it had a right to exercise, and has re-imposed the term of bringing the money into Court. I do not think we ought to interfere with that discretion. I am strongly of opinion that the discretion of a Court should not be interfered with by a Court of Appeal unless it has been exercised in a manner that is clearly wrong, or exercised on a wrong principle. That cannot be said to be the case here, and therefore the order of the Divisional Court must stand.

*Judgment affirmed.*

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Solicitors—A. Leslie, for plaintiff; T. C. Russell, for defendant.

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## [IN THE EXCHEQUER DIVISION.]

1879. }  
 June 26. } WALE v. THE COMMISSIONERS  
 July 4. } OF INLAND REVENUE.

*Stamp Duty—Transfer of Mortgage—  
 Stamp Act, 1870.*

*An indenture reciting an indenture of mortgage of certain hereditaments for 350l., and that the mortgage debt was still owing, witnessed that in consideration of 350l. paid to the mortgagee, at the request of the mortgagor, by O. S., party of the last part to the present indenture, in discharge of all moneys owing upon the recited indenture, and in consideration also of 120l. paid by O. S. to the mortgagor, the former mortgagee granted, released and conveyed, and the mortgagor granted, released, conveyed and confirmed the said hereditaments to O. S. to hold discharged from the proviso for redemption in the recited indenture, and from all equity thereupon, but subject to the provisos, &c., hereinafter contained, which were a proviso for reconveyance upon payment to O. S. as therein mentioned of 470l. and interest, a covenant by the mortgagor with O. S. for payment of the 470l. and interest, a power of sale in default, covenants for title and other usual clauses. This indenture having been assessed with duty under the Stamp Act, 1870, as a mortgage for 470l.,—Held, that the indenture was as to 350l. chargeable only as a transfer of a mortgage, and that the assessment was therefore wrong.*

CASE stated under the Stamp Act, 1870, section 19, by the Commissioners of Inland Revenue, for the purpose of an appeal against an assessment by them of stamp duty upon an instrument presented, under section 18, for their opinion as to the duty chargeable thereon.

The commissioners being of opinion that the instrument was chargeable under the Stamp Act, 1870 (1), as a mortgage

(1) The Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 3:—“ . . . Subject to the exemptions contained in the schedule to this Act . . . there shall be charged . . . upon the several instruments specified in the schedule . . . the several duties in the said schedule specified.”

Section 6, sub-section 2: “The said schedule and everything therein contained is to be read and construed as part of this Act.”

for 470l., that is to say, with 12s. 6d. *ad valorem* duty, assessed the duty thereon accordingly. The appellant contended that the instrument was, as to 350l., part of the amount secured by it, chargeable only as a transfer, assignment, disposition or assignation of a mortgage, that is to say with duty only at the rate of 6d. for every 100l. and fraction of 100l., and was only to the extent of 120l. chargeable as a mortgage, that is to say with duty amounting to 3s. 9d., making the total amount of duty 5s. 9d., and that the instrument, which when presented to the commissioners was already stamped with 6s. duty, was accordingly already sufficiently stamped.

The instrument in question (of which a full copy was annexed to the case) was, so far as material, as follows:—

“This indenture, made the 15th day of November, 1877, between B. H. C. Fox of the first part, Susannah Ingram of the second part, Joseph Wale of the third part and Catherine Sutton of the fourth part; Whereas by an indenture

Section 109: “No transfer of a duly stamped security, and no security by way of further charge for money or stock, added to money or stock previously secured by a duly stamped instrument, is to be charged with any duty by reason of containing any further or additional security for the money or stock transferred or previously secured, or the interest or dividends thereof, or any new covenant, proviso, power, stipulation or agreement in relation thereto, or any further assurance of the property comprised in the transferred or previous security.”

Schedule: “Mortgage, bond, debenture, covenant, warrant of attorney to confess and enter up judgment, and foreign security of any kind.

1. Being the only, or principal, or primary security for the payment or repayment of money . . . exceeding 100l. and not exceeding 150l. . . . exceeding 300l. For every 100l., and also for any fractional part of 100l. of such amount . . . 3 9
3. Transfer, assignment, disposition or assignation of any mortgage, bond, debenture, covenant or foreign security, or of any money or stock secured by any such instrument . . . For every 100l. and also for any fractional part of 100l., of the amount transferred, assigned or disposed . . . 0 6

And also where any further money is added to the money already secured, the same duty as a principal security for such further money . . . ”



*Wale v. Commissioners of Inland Revenue, Exch.*

dated the 15th day of July, 1872, and made between the said Joseph Wale of the first part, the said Susannah Ingram of the second part, and the said B. H. C. Fox of the third part, it was witnessed that in consideration of 350*l.* paid by the said Susannah Ingram to the said Joseph Wale . . . . the said Joseph Wale at the request of the said Susannah Ingram granted and conveyed unto the said B. H. C. Fox, his heirs and assigns," certain hereditaments ". . . . And it was . . . . declared that if the said Joseph Wale . . . . should pay unto the said Susannah Ingram . . . . 350*l.*" and "interest" as "therein mentioned, the said B. H. C. Fox . . . . would . . . . reconvey the said hereditaments . . . . unto the said Joseph Wale . . . . or as he . . . . should direct; And the said indenture contained powers of sale and other powers and provisos, but which have never been exercised; And whereas the said principal sum of 350*l.* still remains owing to the said Susannah Ingram upon the said indenture of mortgage . . . . And whereas, the said Susannah Ingram having required payment of the said sum of 350*l.*, the said Joseph Wale hath requested the said Catherine Sutton to lend him 470*l.* to enable him to pay off the same, and to supply his other occasions, which she has consented to do upon having repayment with interest secured in manner hereinafter expressed; Now this indenture witnesseth that in consideration of 350*l.* paid by the said Catherine Sutton to the said Susannah Ingram at or before the execution of these presents at the request and by the direction of the said Joseph Wale . . . . being in full satisfaction and discharge of all moneys owing upon the said indenture of mortgage, the receipt of which said sum of 350*l.* she the said Susannah Ingram doth hereby acknowledge and therefrom doth release the said Catherine Sutton, her heirs, executors, administrators and assigns, And also the said Joseph Wale, his heirs, executors, administrators and assigns, And also in consideration of 120*l.* at the same time paid by the said Catherine Sutton to the said Joseph Wale, the payment and receipt of which said sums of 350*l.* and

120*l.*, making together 470*l.*, the said Joseph Wale doth hereby acknowledge, . . . he the said B. H. C. Fox at the request and by the direction of the said Susannah Ingram and Joseph Wale . . . doth grant, release and convey, And the said Susannah Ingram doth remise and release, And the said Joseph Wale doth grant, release, convey and confirm unto the said Catherine Sutton and her heirs all the said hereditaments and premises assured by the said hereinbefore in part recited indenture of mortgage or expressed or intended so to be, together with all . . . appurtenances . . . and all the estate . . . interest . . . and demand whatsoever . . . of them the said B. H. C. Fox, Susannah Ingram and Joseph Wale respectively, in, to or upon the same, to hold . . . unto" and "to the use of the said Catherine Sutton, her heirs and assigns for ever, freed and absolutely discharged from the said proviso for redemption thereof contained in the said indenture of mortgage and all equity thereupon, and the trusts or powers for sale in the same indenture contained, but subject . . . to the powers of sale, and other the powers and provisos hereinafter contained."

There followed a proviso that if the said Joseph Wale should pay to the said Catherine Sutton the sum of 470*l.*, together with interest at five per cent. per annum, on the 15th day of May next ensuing, the said Catherine Sutton, her heirs or assigns, would reconvey the said hereditaments and premises to the said Joseph Wale, his heirs and assigns, or as he or they should direct; a covenant by the said Joseph Wale with the said Catherine Sutton for payment of the said sum of 470*l.* with interest for the same after the rate aforesaid at the time and in manner thereinbefore appointed; a proviso that if default should be made in payment, Catherine Sutton might sell the said hereditaments; covenants for title and other usual clauses.

The recited mortgage for 350*l.* was duly stamped.

The question for the Court was—with what amount of stamp duty the instrument of the 15th of November, 1877, was chargeable.

*Wale v. Commissioners of Inland Revenue, Exch.*

*Wills* (Dickinson with him), for the appellant.—The commissioners were wrong in assessing stamp duty upon the instrument as a mortgage for 470*l.*; the instrument was as to 350*l.* chargeable only as a transfer of a mortgage, within the meaning of the Act (1). Such an instrument as this, which is identical with the form in *Bythewood and Jarman's Precedents* (3rd edition), vol. 6, p. 315, form 2 of transfers of mortgage, has always been called by conveyancers a transfer of mortgage. Section 109 of the Act (1), re-enacting a proviso in the Schedule to 13 & 14 Vict. c. 97, title mortgage, prevents the transfer from being chargeable with increased duty by reason of its containing new covenants and provisos.

*The Solicitor-General* (Sir H. S. Giffard), for the Crown (*Dicey* with him).—This is not a transfer of a mortgage, but a new mortgage. The lands are discharged from the old equity of redemption and the old debt is extinguished; a new equity of redemption and a new debt are created in their stead. *Bythewood and Jarman* (3rd edit.), vol. 6, p. 337, says, speaking of form 6:—"Though this precedent is classed with transfers of mortgages in conformity to popular phrase, yet it is, more properly speaking, a new mortgage. . . . The estate is subject to a new proviso for redemption, which in effect constitutes it a new mortgage." Those remarks are applicable to the present instrument. Section 109 is only intended to prevent the addition of new covenants from subjecting to further duty where the old debt and the old equity of redemption are kept on foot.

The following authorities were also cited:—*Bythewood and Jarman*, vol. 5, pp. 537, 538; *Sweet's Supplement to Bythewood and Jarman*, Tit.—"Purchase Deeds," p. 149; *Hayes' Concise Conveyancer* (2nd edit.), pp. 425, 426; *Davidson's Precedents*, vol. ii. (3rd edit.), pp. 823–826; *Phillips v. Gutteridge* (2).

KELLY, C.B.—In my opinion the Crown is not entitled to any further duty than the instrument was already stamped with when presented to the commissioners.

(2) 4 De Gaz & J. 531.

The contention on the part of the Crown is that the instrument is not a transfer of a mortgage. But Catherine Sutton immediately after the execution of the instrument became possessed of the mortgage whereof Susannah Ingram, by herself and B. H. C. Fox, was previously possessed. And, although this was by a circuitous process through the intervention of the mortgagor, Joseph Wale, the instrument was, I think, a transfer of a mortgage within the meaning of the Act.

POLLOCK, B.—I also think that the appellant is entitled to our judgment. The argument of the Solicitor-General would have been much stronger if, according to the words of the Act, the transfer of the estate were the thing to be regarded. But the language of the schedule is: "Transfer, assignment, disposition or assignation of any mortgage, bond, debenture, covenant or foreign security, or of any money or stock secured by any such instrument. . . . For every 100*l.* . . . of the amount transferred, assigned or disposed, 6*d.*" And, having regard to the difficulties placed by the rules of the common law in the way of a direct transfer of a debt, I think that there clearly was a transfer within the meaning of the Stamp Act, 1870, of the money secured by the former mortgage. I think also that, reading as we must read the word "transfer" as referable to the language of conveyancers, there was a transfer of the mortgage as well as a transfer of the amount secured. Although the note to *Bythewood and Jarman*, cited by the Solicitor-General, says that where there is a new proviso for redemption the instrument is more properly speaking a new mortgage, an instrument with such a proviso is nevertheless classed in that collection of precedents with transfers of mortgage. I think that this instrument is as to 350*l.* chargeable only as a transfer of an old mortgage and not as a new mortgage.

*Judgment for the appellant with costs.*

Solicitors—The Solicitor to the Inland Revenue, for the Crown; E. W. Williamson, for appellant.

## [IN THE COURT OF APPEAL.]

1879. { THE HOUSEHOLD FIRE AND  
May 22, 23. { CARRIAGE ACCIDENT INSUR-  
July 1. { ANCE COMPANY (LIMITED)  
v. GRANT.\*

*Company—Allotment of Shares—Contract, when complete—Letter posted but not received.*

*Where an offer is made by a letter which expressly or impliedly authorises the sending of an acceptance of such offer by post, and a letter of acceptance is duly addressed and posted, the contract is complete, even though the letter of acceptance is never received by the offerer.*

*So held by BAGGALLAY, L.J., and THESIGER, L.J.; dissentiente BRAMWELL, L.J.*

Appeal by the defendant from the judgment of Lopes, J., on further consideration, in favour of the plaintiffs. The case is reported 48 Law J. Rep. C.P. 219.

The plaintiffs sued for the amount of a call on certain shares in their company alleged to be held by the defendant. The defendant denied that he was a shareholder. It appeared that the defendant duly applied by a letter in the usual form for 100 shares in the plaintiffs' company on the 30th of September, 1874; that the shares were allotted to him, and a letter of allotment directed to him at the address given by him was posted on the 20th of October, 1874. The defendant said that this letter of allotment never reached him, and that he never heard anything about the shares until March, 1877, when he received a letter demanding the payment of a call upon 100 shares, which was the amount sought to be recovered in this action.

The jury found that the letter of allotment of the 20th of October, 1874, had been posted, but that it had never been received by the defendant. On these findings the learned Judge, after consideration, gave judgment for the plaintiffs.

The defendant appealed.

*Finlay and Dillwyn*, for the defendant.—The learned Judge thought that he was concluded by authority, and especially by

\* *Coram* Bramwell, L.J.; Baggallay, L.J.; and Thesiger, L.J.

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the authority of *Dunlop v. Higgins* (1); but if reference be made to the report of that case in the Scotch Courts, it will be seen that the *ratio decidendi* is much narrower than it has sometimes been supposed to be. In that case the acceptance arrived in a reasonable time; the decision of the House of Lords in *Dunlop v. Higgins* (1) is a decision on the ruling of the Lord-Justice General, and that is all that is binding on this Court. The judgment of Lord Fullerton (2) shews what the decision of the Court of Session was, and he says at p. 1414: "I am by no means prepared to say that in the larger question of the actual completion of the contract the mere fact of putting the letter of acceptance into the Post-office has the same effect as if it had not only been put into the Post-office but had been actually delivered to the other party." The difference between the phraseology used in different letters would, if it be held that the mere posting of a letter suffices to complete the contract, lead to minute and perplexing distinctions. If the offerer were to write, "If I hear," then he would not be bound unless the letter reached him; and surely the same thing is meant by "if you write;" both mean "if I get a letter." The Post-office is an ordinary means of communication, and if some casualty occurs, one party to an intended contract cannot throw all the responsibility on the other.

[BRAMWELL, L.J.—The Post-office is a proper means of communication; but the question seems to be, Is the communication complete when, and because, commenced?]

*The British and American Telegraph Company v. Oolson* (3) is in the defendant's favour, and the judgment of Bramwell, B., enforces the view now contended for by the defendant. In *Duncan v. Topham* (4) this point was not necessary to the decision. In *Finucane's Case* (5) the posting of a letter of allotment

(1) 1 H.L. Cas. 381.

(2) 9 Scotch Sess. Cas. at p. 1411.

(3) 40 Law J. Rep. Exch. 97; s. c. Law Rep. 6 Exch. 108.

(4) 8 Com. B. Rep. 225; s. c. 18 Law J. Rep. C.P. 310.

(5) 17 W.R. 813.

*Household Fire, &c., Ins. Co. v. Grant (App.), C.P.*

which was not received was held not to be sufficient, and *Reidpath's Case* (6) is to the same effect. In *Townshend's Case* (7) the Vice-Chancellor held that the allotment, notice of which had not reached the applicant, was a good notice, because the non-arrival of the letter was due to the applicant's own negligence; but he did not dissent from the law as laid down in *The British and American Telegraph Company v. Colson* (8). In *Wall's Case* (8) the same Judge held that there was not sufficient evidence that the letter had not been received, and he also thought the authority of *The British and American Telegraph Company v. Colson* (8) had been shaken by the decision in *Harris's Case* (9); but that case is not necessarily inconsistent with the decision in *Colson's Case* (8), for James, L.J., expressly refers to the distinction which is the foundation of the judgment, and Mellish, L.J., states that the judgment in that case was not a "direct decision" on the question raised in *Harris's Case* (9). *Potter v. Sanders* (10) is not against the defendant, for it decided that a posted letter concluded the contract unless it was interrupted in its progress, as the letter here must have been. *Taylor v. The Merchants' Fire Insurance Company* (11) decided that when a letter has been received, the contract is complete from the time of the posting, and that is in accordance with *Harris's Case* (9), and not at variance with the judgment in *Colson's Case* (8). *Ex parte Cote* (12) turned on the rules of the French Post-office. *Dummore v. Alexander* (13) decided that where two letters arrived at the same time, though posted at different times, one being an acceptance and the other revocation of that acceptance, there was no contract; and a decision to the same effect will be found in an

anonymous case in the Court of Cassation in France, *S. v. F.* (14).

In *Pellatt's Case* (15) it was held that registration of shares not communicated to the applicant did not make him a shareholder; and in *Gunn's Case* (16) notice of an allotment was held necessary to constitute an applicant a shareholder. These cases were decided on the provisions of the statute as to registration, but still they shew that a communication of the assent of one party to the proposal of the other is necessary.

The provisions of, and the illustrations in the Indian Code tend to throw light on the English law, and they shew that an acceptor can revoke his acceptance before his letter arrives.

*Wilberforce (W. G. Harrison and Arbuthnot with him)*, for the plaintiffs.—The learned Judge was right both on principle and authority. The principle is that when an offer has been accepted the contract is *ipso facto* complete. The English law fixes the moment when the parties are *ad idem* as the moment when the contract is complete, and, except by the consent of both parties, unalterable and irrefragable. The Indian Code does not assist the interpretation of the English law, for it differs in an important point; for by Indian law one party may be bound when the other party is not, but that is not so according to English law—*Dickinson v. Dodds* (17).

[THE SINGER, L.J.—It would seem that the two minds were *ad idem* in the case before us, and so that the contract would be complete; but the question is whether notice has been given to the offerer that his offer is accepted.]

The posting of the letter is the notice, and the plaintiffs are not responsible for casualties in the Post-office; and this shews that *Dunlop v. Higgins* (1) and *Harris's Case* (9) are conclusive authorities which govern this case. *Colson's Case* (8) is not consistent with the prin-

(6) 40 Law J. Rep. Chanc. 39; s. c. Law Rep. 11 Eq. 86.

(7) Law Rep. 18 Eq. 148.

(8) 42 Law J. Rep. Chanc. 372; s. c. Law Rep. 15 Eq. 18.

(9) 41 Law J. Rep. Chanc. 621; s. c. Law Rep. 7 Ch. App. 587.

(10) 6 Hare 1.

(11) 9 Howe Sup. Ct. U.S. 390.

(12) 43 Law J. Rep. Chanc. 19; s. c. Law Rep. 9 Ch. App. 27.

(13) 9 Shaw & Dunlop 190.

(14) Reported in *Langdell's Cases on Contract*, 155; *Merlin, Répertoire du Jurisprudence*, Tit. Vente, s. 1, art. iii. No. 11 bis.

(15) 36 Law J. Rep. Chanc. 613; s. c. Law Rep. 2 Ch. App. 527.

(16) 37 Law J. Rep. Chanc. 40; s. c. Law Rep. 3 Ch. App. 40.

(17) 45 Law J. Rep. Chanc. 777; s. c. Law Rep. 2 Ch. D. 463.

*Household Fire, &c., Ins. Co. v. Grant (App.), C.P.*

ciple of those decisions, although there are differences of detail; for in that case there were two letters and a repudiation, whereas in the present case the defendant did not repudiate the contract when he received the letter about the call. A letter delivered to the post is equivalent to a letter delivered to the person who authorises the use of the post as his agent, and it is submitted that such a letter would bind an offerer even though he sent a telegram afterwards revoking his offer. The decision in *Harris's Case* (9) was approved of in *Brogden v. The Metropolitan Railway Company* (18), and Lord Blackburn, at p. 691, says that both parties are bound when the acceptor has posted his letter. *Duncan v. Topham* (4) is reported in the Law Journal Reports on the argument when the rule *nisi* was made absolute, whereas the report in the Common Bench Reports contains the argument when the rule *nisi* was applied for as well as when it was made absolute; and that explains the difference adverted to by Bramwell, B., in *Colson's Case* (19). If the defendant's contention were to prevail, an acceptor can revoke his acceptance when an offerer cannot, and that is not in accordance with the principles of English law. The posting of the acceptance is constructive notice, and this constructive notice the offerer virtually agrees to hold sufficient—*Thompson v. James* (20). *Taylor v. Jones* (21) shows that *Dunlop v. Higgins* (1) was not rightly interpreted in *The British and American Telegraph Company v. Colson* (8). There is a difference between the Post-office and all other means of communication, for if any messenger or carrier fail, the aggrieved person has a right of action against the defaulting agent, but there is no such right against the Post-office, and besides, a letter once posted cannot in England be recalled, whereas you can recall the private agent.

(18) Law Rep. 2 App. Cas. 666.

(19) 40 Law J. Rep. Exch. 97, at p. 103; s. c. Law Rep. 6 Exch. at p. 120.

(20) 18 Dunlop 1.

(21) 45 Law J. Rep. C.P. 110; s. c. Law Rep. 1 C.P. D. 87.

*Finlay*, in reply, cited *Shackleford's Case* (22).

*Cur. adv. vult.*

The following judgments (on the 1st of July) were read:—

THE SINGER, L.J.—In this case the defendant made an application for shares in the plaintiff company, under circumstances from which we must imply that he authorised the company in the event of their allotting to him the shares applied for, to send the notice of allotment by post. The company did allot him the shares, and duly addressed to him and posted a letter, containing the notice of allotment; but, upon the finding of the jury, it must be taken that the letter never reached its destination. In this state of circumstances Lopes, J., has decided that the defendant is liable as a shareholder. He based his decision mainly upon the ground that the point for his consideration was covered by authority binding upon him, and I am of opinion that he did so rightly, and that it is covered by authority equally binding upon this Court. *Dunlop v. Higgins* (1) is of course the leading case on the subject. It is true that Lord Cottenham might have decided that case without deciding the point in this. But it appears to me equally true that he did not do so, and that he preferred to rest, and did rest his judgment as to one of the matters of exception before him upon a principle which embraces and governs the present case. If so, this Court is as much bound to apply that principle, constituting as it did a *ratio decidendi*, as it is to follow the exact decision itself. The exception was that the Lord Justice General directed the jury in point of law, that if the pursuers posted their acceptance of the offer according to the usage of trade, they were not responsible for any casualties in the Post-office establishment. This direction was wide enough in its terms to include the case of the acceptance never being delivered at all, and Lord Cottenham, in expressing his opinion that it was not open

(22) 35 Law J. Rep. Chanc. 818; s. c. Law Rep. 1 Ch. App. 567.

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to objection, did so, after putting the case of a letter containing a notice of dishonour being posted to the holder of a bill of exchange in proper time, in which case he said (at page 399), "Whether that letter be delivered or not is a matter quite immaterial, because for accidents happening at the Post-office he is not responsible." In short, Lord Cottenham appears to me to have held that, as a rule, a contract formed by correspondence through the post is complete as soon as the letter accepting an offer is put into the post, and is not put an end to in the event of the letter never being delivered.

My view of the effect of *Dunlop v. Higgins* (1) is that taken by James, L.J., in *Harris's Case* (9), where (at page 623, Law J. Rep.; Law Rep. page 592), he speaks of the former case as "a case which is binding upon us, and in which every principle argued before us was discussed at length by the Lord Chancellor in giving judgment, in which he (meaning the Lord Chancellor) arrived at the conclusion that the posting of the letter of acceptance is the completion of the contract, that is to say, the moment one man has made the offer, and the other has done something binding himself to that offer, then the contract is complete, the instant of completion being that in which the letter accepting the offer is delivered to the post, and neither party can afterwards escape from it." Mellish, L.J., also took the same view. He says (at page 627, Law J. Rep.; Law Rep. page 595), "In *Dunlop v. Higgins* (1) the question was directly raised whether the law was truly expounded in the case of *Adams v. Lindsell* (23), and the House of Lords approved of the ruling in that case. Lord Chancellor Cottenham said, in the course of his judgment, that in the case of a bill of exchange notice of dishonour given by putting a letter into the post at the right time had been held quite sufficient, whether that letter was delivered or not; and he referred to *Stocken v. Collin* (24) on that point, he being clearly of opinion that the rule as

to accepting a contract was exactly the same as the rule as to sending notice of dishonour of a bill of exchange. He then referred to the case of *Adams v. Lindsell* (23), and quoted the observation of Lord Ellenborough. That case, therefore, appears to me to be a direct decision that the contract is made from the time when it is accepted by post." Leaving *Harris's Case* (9) for the moment, I turn to *Duncan v. Topham* (4), in which Cresswell, J., told the jury that if the letter accepting the contract was put into the Post-office, and lost by the negligence of the Post-office authorities, the contract would nevertheless be complete, and both he and Wilde, C.J., and Maule, J., seem to have understood this ruling to have been in accordance with Lord Cottenham's opinion in *Dunlop v. Higgins* (1). That opinion, therefore, appears to me to constitute an authority directly binding upon us. But if *Dunlop v. Higgins* (1) were out of the way, *Harris's Case* (9) would still go far to govern the present. There it was held that the acceptance of the offer at all events binds both parties from the time of the acceptance being posted, and so as to prevent any retraction of the offer being of effect after the acceptance has been posted. Now, whatever in abstract discussion may be said as to the legal notion of its being necessary in order to the effecting of a valid and binding contract, that the minds of the parties should be brought together at one and the same moment, that notion is practically the foundation of English law upon the subject of the formation of contracts. Unless, therefore, a contract constituted by correspondence is absolutely concluded at the moment that the continuing offer is accepted by the person to whom the offer is addressed, it is difficult to see how the two minds are ever to be brought together at one and the same moment. This was pointed out by Lord Ellenborough in the case of *Adams v. Lindsell* (23), which is a recognised authority upon this branch of law. But, on the other hand, it is a principle of law as well established as the legal notion to which I have referred, that the minds of the two parties must be brought together by mutual communica-

(23) 1 B. & Ald. 681.

(24) 7 Mec. & W. 515; s.c. 10 Law J. Rep. Exch. 227.

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tion. An acceptance which only remains in the breast of the acceptor, without being actually or by legal implication communicated to the offerer, is no binding acceptance. How, then, are these elements of law to be harmonised in the case of contracts formed by correspondence through the post? I see no better mode than that of treating the Post-office as the agent for both parties, and it was so considered by Lord Romilly in *Hebb's Case* (25), where, in the course of his judgment, he said, "*Dunlop v. Higgins* (1) decides that the posting of a letter accepting an offer constitutes a binding contract, but the reason of that is, that the Post-office is the common agent of both parties." Also Alderson, B., in *Stocken v. Collin* (24), a case of notice of dishonour, and the case referred to by Lord Cottenham, says, "If the doctrine that the Post-office is only the agent for the delivery of the notice were correct, no one could safely avail himself of that mode of transmission." But if the Post-office be such common agent then it seems to me to follow, that as soon as the letter of acceptance is delivered to the Post-office the contract is made as complete and final, and absolutely binding, as if the acceptor had put his letter into the hands of a messenger, sent by the offerer himself as his agent, to deliver the offer and receive the acceptance. What other principle can be adopted short of holding that the contract is not complete by acceptance until and except from the time that the letter containing the acceptance is delivered to the offerer, a principle which has been distinctly negatived? This difficulty was attempted to be got over in *The British and American Telegraph Company v. Colson* (3), which was a case directly on all fours with the present, and in which Kelly, C.B., at page 115, is reported to have said, "It may be that in general, though not in all cases, a contract takes effect from the time of acceptance, and not from the subsequent notification of it. As in the case now before the Court, if the letter of allotment had been delivered to the defendant in the due course of the post he would have become

a shareholder from the date of the letter, and to this effect is *Potter v. Sanders* (10). And hence, perhaps, the mistake has arisen that the contract is binding upon both parties at the time when the letter is written and put into the post, although never delivered, whereas, although it may be binding from the time of acceptance, it is only binding at all when afterwards duly notified." But, with deference, I would ask how a man can be said to be a shareholder at a time before he was bound to take any shares; or, to put the question in the form in which it was put by Mellish, L.J., in *Harris's Case* (9) (at page 628, Law J. Rep.; Law Rep. page 596), how there can be any relation back in a case of this kind as there may be in bankruptcy. "If," as the Lord Justice said, "the contract after the letter has arrived in time is to be treated as having been made from the time the letter is posted, the reason is that the contract was actually made at the time when the letter was posted." The principles laid down in *Harris's Case* (9), as well as in *Dunlop v. Higgins* (1), can really not be reconciled with the decision in *The British and American Telegraph Company v. Colson* (3). James, L.J., in the passage I have already quoted (page 623, Law J. Rep.; Law Rep. page 592), affirms the proposition that when once the acceptance is posted neither party can afterwards escape from the contract, and refers with approval to *Hebb's Case* (25). There a distinction was taken by the Master of the Rolls, that the company chose to send the letter of allotment to their own agent, who was not authorised by the applicant for shares to receive it on his behalf, and who never delivered it; but he at the same time assumed that if, instead of sending it through an unauthorised agent they had sent it through the Post-office, the applicant would have been bound, although the letter had never been delivered. Mellish, L.J., really goes as far, and states forcibly the result in favour of this view. The mere suggestion thrown out at the close of his judgment when stopping short of actually overruling the decision in *The British and American Telegraph Company v. Colson* (3), that

(25) Law Rep. 4 Eq. 9.

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although a contract is complete when the letter accepting an offer is posted, yet it may be subject to a condition subsequent that if the letter does not arrive in due course of post, then the parties may act on the assumption that the offer has not been accepted, can hardly, when contrasted with the rest of his judgment, be said to represent his own opinion or the law upon the subject. The contract, as he says (at page 628, *Law J. Rep.*; *Law Rep.* page 596), is actually made when the letter is posted. The acceptor in posting the letter has, to use the language of Lord Blackburn in *Brogden v. The Metropolitan Railway Company* (18), "put it out of his control, and done an extraneous act which clenches the matter, and shews beyond all doubt that each side is bound." How then can a casualty in the post, whether resulting in delay, which in commercial transactions is often as bad as no delivery, or in non-delivery, unbind the parties or unmake the contract? To me it appears, that in practice a contract complete upon the acceptance of an offer being posted, but liable to be put an end to by an accident in the post, would be more mischievous than a contract only binding upon the parties to it upon the acceptance actually reaching the offerer, and I can see no principle of law from which such an anomalous contract can be deduced. There is no doubt that the implication of a complete, final and absolutely binding contract being formed as soon as the acceptance of an offer is posted, may in some cases lead to inconvenience and hardship. But such there must be at times in any view of the law. It is impossible in transactions which pass between parties at a distance, and have to be carried on through the medium of correspondence, to adjust conflicting rights between innocent parties, so as to make the consequences of mistake on the part of a mutual agent fall equally upon the shoulders of both. At the same time I am not prepared to admit that the implication in question will lead to any great or general inconvenience or hardship. An offerer, if he chooses, may always make the formation of the contract which he proposes dependant upon the actual communication to himself of the acceptance.

If he trusts to the post, he trusts to a means of communication which, as a rule, does not fail, and if no answer to his offer is received by him, and the matter is of importance to him, he can make enquiries of the person to whom his offer was addressed. On the other hand, if the contract is not finally concluded, except in the event of the acceptance actually reaching the offerer, the door would be opened to the perpetration of much fraud, and, putting aside this consideration, considerable delay in commercial transactions, in which dispatch is, as a rule, of the greatest consequence, would be occasioned, for the acceptor would never be entirely safe in acting upon his acceptance until he had received notice that his letter of acceptance had reached its destination. Upon a balance of convenience and inconvenience, it seems to me, applying with slight alteration the language of the Supreme Court of the United States in *Taylor v. The Merchants' Fire Insurance Company* (11), more consistent with the acts and declarations of the parties in this case to consider the contract complete and absolutely binding on the transmission of the notice of allotment through the post, as the medium of communication which the parties themselves contemplated, instead of postponing its completion till the notice had been received by the defendant. Upon principle, therefore, as well as authority, I think that the judgment of Lopes, J., was right, and should be affirmed, and that this appeal should therefore be dismissed.

BAGGALLAY, L.J.—I am of opinion that this appeal should be dismissed.

It has been established by a series of authorities, including *Dunlop v. Higgins* (1) in the House of Lords, and *Harris's Case* (9) in the Court of Appeal in Chancery, that, if an offer is made by letter, which expressly or impliedly authorises the sending of an acceptance of such offer by post, and a letter of acceptance properly addressed is posted in due time, a complete contract is made at the time when the letter of acceptance is posted, though there may be delay in its delivery.

The question involved in the present appeal is whether the same principle should



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be applied in a case in which the letter of acceptance, though duly posted, is not delivered to the person to whom it is addressed.

Mr. Justice Lopes was of opinion that the principle was applicable to such a case, and gave judgment in favour of the plaintiffs, and from such judgment the present appeal is brought. In support of his appeal, the appellant relies upon the decision of the Court of Exchequer in the case of *The British and American Telegraph Company v. Colson* (3), to which, for conciseness, I will refer as *Colson's Case*.

I propose to consider *Dunlop v. Higgins* (1) and *Colson's Case* (3), and *Harris's Case* (9) somewhat in detail, for the purpose of ascertaining whether the decision of the Court of Exchequer in *Colson's Case* (3) is consistent with the decisions of the House of Lords and of the Lords Justices in the other two cases, and with the principles upon which such decisions were based.

The circumstances of *Dunlop v. Higgins* (1) were as follows:—After a preliminary correspondence, Messrs. Dunlop & Co., who were merchants at Glasgow, addressed a letter on the 28th of January, 1845, to Messrs. Higgins & Co., who carried on business at Liverpool, offering them 2,000 tons of iron pigs at 65s. per ton, net. This letter reached Higgins & Co. by 8 a.m. on the 30th of January, and on the same day they replied by letter, duly addressed to Dunlop & Co., in the following terms:—“We will take the 2,000 tons of pig iron you offer us.” It appeared by the evidence that the first post for Glasgow after the receipt by Higgins & Co. of the letter of Dunlop & Co. left Liverpool at 3 p.m. on the 30th, and that the post next following left at 1 a.m. on the 31st, and also that a letter despatched by the former post would, in due course, arrive at Glasgow at 2 p.m. on the 31st, and by the latter in time to be delivered at 8 a.m. on the 1st of February.

The letter so sent by Higgins & Co. was posted after the bags were made up for the 3 p.m. post, and was despatched by the 1 a.m. post on the 31st, and in due course it should have been delivered at Glasgow at 8 a.m. on the 1st of February; but it was not in fact delivered until

2 p.m. on that day, the frosty state of the weather having prevented the train from Liverpool arriving at Warrington in time to meet the down train to Glasgow. It appeared also that Higgins & Co. by mistake dated their letter as of the 31st of January instead of the 30th.

On the 1st of February, after the receipt of the letter of Higgins & Co., accepting the offer, Dunlop & Co. wrote to Higgins & Co.:—“We have your letter of yesterday's date, but are sorry that we cannot now enter the 2,000 tons, our offer of the 28th not being accepted in course.”

The iron was not delivered, and Higgins & Co. brought their action for breach of contract; the defence of Dunlop & Co. was, that their letter of the 28th should have been answered by the first post, viz., by that which left Liverpool at 3 p.m. on the 30th; but that, at any rate, they were not bound to wait for a third post delivered at Glasgow at 2 p.m. of the 1st of February.

On the trial before the Lord Justice General, he admitted evidence to shew that the letter of acceptance, though dated the 31st, was, in fact, written and posted on the 30th of January, and he directed the jury that if Higgins & Co. posted their acceptance of the offer in due time, according to the usage of trade, they were not responsible for any casualties in the Post-office establishment.

It is important to bear in mind the terms of this direction, as it formed the substantial subject of appeal, first, to the Court of Session, and thence to the House of Lords. The jury found for the plaintiffs, that is to say, they found, as a fact, that the letter of Higgins & Co. was posted in due time, according to the usage of the parties in their business transactions, and having so found they, under the direction of the Judge, gave their verdict for the plaintiffs.

Exceptions were thereupon taken by the defendants, and, amongst other grounds of exceptions, they objected to the admission of evidence as to the posting of the letter on the 30th of January, and to the direction of the Lord Justice General, to which I have just referred. The exceptions were overruled by the Judges of

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the First Division, and from their decision the defendants appealed to the House of Lords; the appeal was dismissed, and the ruling and direction of the Lord Justice General were upheld.

Though the question in dispute between the parties was whether Higgins & Co. were responsible for the delay in the delivery of the post, it is to be observed that the direction of the Judge went further, for he ruled that if their letter was duly posted they were not responsible for any casualties in the Post-office establishment.

During the argument Lord Cottenham said, "The question is whether putting in the post is not a virtual acceptance, though by the accident of the post it does not arrive," and, in moving the judgment of the House, he observed, "If a party does all that he can do, that is all that is called for; if there is a usage of trade to accept such an offer, and to return an answer to such an offer, and to forward it by means of the post, and if the party accepting the offer puts his letter into the post on the correct day, has he not done everything he was bound to do—how can he be responsible for that over which he has no control?" There is nothing in the language thus used by Lord Cottenham to suggest any distinction between a case in which there is delay in the delivery of the letter, and one in which the letter is not delivered at all. But Lord Cottenham went on to illustrate his meaning, and did so in the following terms:—"It is a very frequent occurrence that a party having a bill of exchange which he tenders for payment to the acceptor and payment is refused, is bound to give the earliest notice to the drawer. That person may be resident many miles distant from him; if he puts a letter into the post at the right time it has been held quite sufficient; he has done all that he is expected to do as far as he is concerned; he has put the letter into the post, and whether that letter be delivered or not is a matter quite immaterial, because for accidents happening at the Post-office he is not responsible."

Having regard to these passages in Lord Cottenham's judgment, it appears to me impossible to doubt that the proposi-

tion which he intended to affirm, and which was in fact his *ratio decidendi*, was this, that when the letter accepting the offer was duly posted the contract was complete, although it might be delayed in its delivery, or might never reach the hands of the party making the offer. I desire, however, to guard myself against being considered as participating in a view of the effect of the decision in *Dunlop v. Higgins* (1) which has been sometimes adopted, and, as I think, without sufficient reason, namely, that in all cases in which an offer is accepted by a letter addressed to the party making the offer and duly posted, there is a binding contract from the time when such letter is posted. I do not take this view of the effect of the decision of *Dunlop v. Higgins* (1); on the contrary, I think that the principle established by that case is limited in its application to cases in which, by reason of general usage or of the relations between the parties to any particular transactions, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly authorised. In *Dunlop v. Higgins* (1) the previous correspondence between the two firms was, in my opinion, quite sufficient, not only to authorise the sending of the acceptance by post, but to point to it as the only mode in which, under the circumstances, such acceptance could be communicated; and it was in consequence of the jury finding as a fact that Higgins & Co. posted their acceptance of the offer of Dunlop & Co. in due time, according to the usage of their business transactions, that they found a verdict for the plaintiffs under the direction of the Judge.

The principle involved in *Dunlop v. Higgins* (1) was recognised by Mr. Justice Cresswell upon the trial of the action in *Duncan v. Topham* (4). Upon that occasion he directed the jury that if the letter accepting the contract was put into the Post-office and lost through the negligence of the Post-office authorities, the contract would nevertheless be complete; and, upon application in the same case to make absolute a rule *nisi* which had been obtained for a new trial, though the new trial was ordered upon other grounds, Chief Justice Wilde and Mr.

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Justice Maule expressed views to the same effect as the direction of Mr. Justice Cresswell. In that case the letter never reached the hands of the person to whom it was addressed.

I proceed to consider the circumstances of *Colson's Case* (3). They were as follows:—On the 13th of February, 1867, the defendant sent an application to the company, through the post, for an allotment of fifty shares, undertaking by his letter to pay the sum of 2*l.* per share on whatever number should be allotted to him. On the 14th of the same month fifty shares were allotted to him, and a letter informing him of such allotment was posted to his address, as given in his letter of application for shares, namely, 31, Charlotte Street, Fitzroy Square.

Now a letter of application for shares in a public company, expressed in the usual form, must, I think, having regard to the usage in such matters, be considered as authorising the acceptance of the offer by a letter through the post; as was expressed by Mr. Justice Lopes in the case now under consideration, such would be the ordinary mode of transmission of an allotment letter. The defendant, however, swore—and there was no reason to doubt the truth of his statement—that he never received the letters of allotment; that another person of the same name lived opposite to him in the same street; that about this time the numbers in the street were changed, his own being altered from 31 to 87; and that several letters then sent to him had never reached him. On the 28th of February, the plaintiffs, on being informed that the letter of allotment had never reached the defendant, sent him a duplicate, which he refused to accept; the action was then brought by the company to recover the 2*l.* per share. The jury found that the letter of allotment was posted to the defendant on the 14th of February, but that he never received it, and that the second notice was not sent in reasonable time. The learned Judge, Baron Bramwell, thereupon directed the verdict to be entered for the plaintiffs, but gave the defendant leave to move to have it entered for himself on the authority of *Finucane's Case* (5),

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which had then recently been decided by Lord Romilly.

A rule *nisi* was accordingly obtained, and cause was shewn on the 17th of November, 1870, the Court being composed of the Lord Chief Baron and Barons Bramwell and Pigot. Judgment was reserved, and on the 31st of January, 1871, the rule was made absolute to enter the verdict for the defendant. The Lord Chief Baron, in the course of his judgment, expressed himself as follows:—"It appears to me that if one proposes to another by a letter through the post to enter into a contract for the sale or purchase of goods, or, as in this case, of shares in a company, and the proposal is accepted by letter, and the letter put into the post, the party having proposed to contract is not bound by the acceptance of it until the letter of acceptance is delivered to him or otherwise brought to his knowledge, except, in some cases, where the non-receipt of the acceptance has been occasioned by his own act or default." Now, unless the proposition so put forward by the Chief Baron is to be read with some qualification, it can hardly be considered as consistent with the decision in *Dunlop v. Higgins* (1), as such decision has been ordinarily understood. The view, however, taken by him of that decision does not appear to be in accordance with that generally taken, for after alluding to the circumstances of *Dunlop v. Higgins* (1), he proceeded to express his entire concurrence in the decision of the Court of Session, and in the affirmation of it by the House of Lords, upon the ground that in his opinion the acceptance of the offer reached Dunlop & Co. in time, and that the House of Lords had acted upon the same view of the circumstances of the case. The distinction which he recognised between that case and the one then under consideration consisted in this, that whereas the letter of acceptance in *Dunlop v. Higgins* (1) was received by the party making the offer in due time, that in *Colson's Case* (3) never reached its destination. Mr. Baron Pigot did not deliver a separate judgment, but it was stated that he concurred in that of the Lord Chief Baron. Mr. Baron Bramwell

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also commented upon the circumstances of *Dunlop v. Higgins* (1), and referred to several passages in the judgment of Lord Cottenham, including those which I have quoted; and he then expressed himself as follows:—"It seems to me that the correct way to deal with these expressions is to refer them to the subject matter, and not to consider them as laying down such a proposition as the plaintiffs here contend for; but that, when the post may be used between two parties, it must be subject to those delays which are unavoidable."

It would appear, then, that all the learned Judges in the Court of Exchequer treated the case of *Dunlop v. Higgins* (1) as one decided upon its special circumstances, and as not enunciating any general principle beyond what was necessary for dealing with such circumstances. I am unable to concur in this view. It may be that there were special circumstances in the case of *Dunlop v. Higgins* (1) sufficient to have justified the decision of the House of Lords irrespective of the application of the principle involved in the direction of the Lord Justice General; but the decision was not expressed to be based, and apparently was not intended to be based, upon any such ground, but upon the approval and adoption of the direction of that learned Judge. After a careful consideration of the judgments of the Lord Chief Baron and of Mr. Baron Bramwell, I can come to no other conclusion than that the decision in *Colson's Case* (3) is inconsistent with that of the House of Lords in *Dunlop v. Higgins* (1). If I am right in this conclusion, it is not for me to choose between the two; I am bound by the authority of the decision of the House of Lords.

But I pass on to consider the circumstances of *Harris's Case* (9), which came before the Lords Justices in 1872. On the 5th of March, 1866, Lewis Harris, of Dublin, applied to the directors of the Imperial Land Company of Marseilles, by a letter in the usual form, for an allotment of 200 shares, undertaking by his letter to accept that or any less number of shares that might be allotted to him. The directors allotted to him 100 shares, and early on the morning of the 16th of March

posted a letter to him, at his address, as given in his letter of application, which was received by him at Dublin. He had, however, in the interval between the posting and the delivery of the letter giving him notice of the allotment, written to the directors, withdrawing his application and declining to accept any shares. Upon an order being made to wind up the company, Mr. Harris was placed upon the list of contributors in respect of the 100 shares, and a summons having been taken out by him to have his name removed from the list, the summons was dismissed by Vice-Chancellor Malins. From such dismissal Mr. Harris appealed, but the decision of the Vice-Chancellor was upheld. In giving judgment, Lord Justice James said that it appeared to him that the contract was completed the moment the notice of allotment was committed to the post; and a similar view was expressed by Lord Justice Mellish, who, after referring to the decision of the Court of Exchequer in *Colson's Case* (3), and stating that he had great difficulty in reconciling it with that of the House of Lords in *Dunlop v. Higgins* (1), observed, with reference to the last-mentioned case, that the real question then before the House of Lords was whether the ruling of the Lord Justice General was correct, and that the House of Lords held that it was. It is doubtless true, as was observed by both Lords Justices, that the decision in *Harris's Case* (9) was not necessarily inconsistent with that of the Court of Exchequer in *Colson's Case* (3); but it is, I think, clear that although the Lords Justices did not feel themselves called upon to express any dissent from the decision of the Court of Exchequer, as it was not necessary for the decision of the case before them that they should do so, they by no means recognised the propriety of the distinction drawn by the Court of Exchequer between *Dunlop v. Higgins* (1) and *Colson's Case* (3).

I do not think it necessary to refer to *Finnicane's Case* (5) and other cases decided by Lord Romilly, in which he held that the posting of a letter of allotment which never reached its destination was not sufficient to constitute the applicant a contributor, further than to observe that

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in *Finucane's Case* (5) *Dunlop v. Higgins* (1) and *Duncan v. Topham* (4) were not cited, and that in the other two the circumstances were such that the Master of the Rolls deemed himself justified in not following the decision in *Dunlop v. Higgins* (1). Indeed, in one of these cases, *Hebb's Case* (25),<sup>1</sup> he distinctly recognised the authority of the decision in *Dunlop v. Higgins* (1), which he considered to have been decided upon the ground that the Post-office was the common agent of both parties.

For the reasons which I have assigned I am of opinion that the principle established in the House of Lords in *Dunlop v. Higgins* (1) is applicable to the case now under consideration, and that the decision of Mr. Justice Lopes should be affirmed. I desire, however, to add that should I not have felt myself bound by authority, my own convictions were entirely in accordance with the principles which I consider to have been established by authority; and in saying this, I bear in mind as well the very forcible remarks made by the Lord Chief Baron and my present colleague upon the subject of the mischievous consequences that might ensue from an adoption of this principle in certain suggested cases, as the equally forcible remarks made by Lord Justice Mellish as to the like consequences which would ensue in other cases if those principles were departed from.

BRAMWELL, L.J.—The question in this case is not whether the Post-office was a proper medium of communication from the plaintiff to the defendant. There is no doubt that it is so in all cases where personal service is not required. It is an ordinary mode of communication, and every person who gives anyone the right to communicate with him gives the right to communicate in an ordinary and so in this way. And to this extent, that if an offer were made by letter in the morning to a person at a place within half an hour's railway journey of the offerer, I should say that an acceptance by post, though it did not reach the offerer till the next morning, would be in time. Nor is the question whether, when the letter reaches an offerer, the latter is bound and

the bargain made from the time the letter is posted or despatched, whether by post or otherwise. The question in this case is different. I will presently state what, in my judgment, it is. Meanwhile I wish to mention some elementary propositions which, if carefully borne in mind, will assist in the determination of this case.

First. Where a proposition to enter into a contract is made and accepted, it is necessary (as a rule) to constitute the contract that there should be a communication of that acceptance to the proposer—*per* Bryan, C.J., and Lord Blackburn (26).

Second. That the present case is one of proposal and acceptance.

Third. That as a consequence of or involved in the first proposition, if the acceptance is written or verbal, *i. e.*, is by letter or message (as a rule) it must reach the proposer, or there is no communication, and so no acceptance of the offer.

Fourth. That if there is a difference where the acceptance is by a letter sent through the post, which does not reach the offerer, it must be by virtue of some general rule or some particular agreement of the parties. As, for instance, there might be an agreement that the acceptance of the proposal may be by sending the article offered by the proposer to be bought, or hanging out a flag or sign to be seen by the offerer as he goes by, or leaving a letter at a certain place, or any other agreed mode, and in the same way there might be an agreement that dropping a letter in a post pillar box or other place of reception should suffice.

Fifth. That as there is no such special agreement in this case, the defendant, if bound, must be bound by some general rule which makes a difference where the Post-office is employed as the means of communication.

Sixth. That if there is any such general rule applicable to the communication of the acceptance of offers, it is equally applicable to all communications that may be made by post. Because, as I have said, the question is not whether this

(26) Year Book, 17th Ed. 4, fo. 1 and 2, plac. 2, cited in *Blackburn on Sales*, p. 189.

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communication may be made by post. If, therefore, posting a letter which does not reach, is a sufficient communication of acceptance of an offer, it is equally a communication of everything else which may be communicated by post, *e.g.*, a notice to quit. It is impossible to hold, if I offer my landlord to sell him some hay, and he writes accepting my offer, and in the same letter gives me notice to quit, and posts his letter, which, however, does not reach me, that he has communicated to me his acceptance of my offer but not his notice to quit. Suppose a man has paid his tailor by cheque or bank-note, and posts a letter containing cheque or bank-note to his tailor, which never reaches: is the tailor paid? If he is, would he be if he had never been paid before in that way? Suppose a man is in the habit of sending cheques or bank-notes to his banker by post, and posts a letter containing cheques and bank-notes which never reaches, is the banker liable? Would he be if this was the first instance of a remittance of the sort? In the case I have supposed the tailor and banker may have recognised the mode of remittance by sending back receipts, and by putting the money to the credit of the remitter. Are they liable with that? Would they be without it? The question then is, is posting a letter which is never received, a communication to the person addressed, or an equivalent, or something which dispenses with it? It is for those who say it is to make good their contention. I ask why is it? My answer beforehand to any argument that may be urged is, that it is not a communication, and that there is no agreement to take it as an equivalent for or to dispense with a communication; that those who affirm the contrary say the thing which is not; that if Bryan, C.J., had had to adjudicate on the case he would deliver the same judgment as that reported (26). That because a man, who may send a communication by post or otherwise, sends it by post, he should bind the person addressed though the communication never reaches him, while he would not so bind him if he had sent it by hand, is impossible. There is no reason in it. It is simply arbitrary. I ask whether anyone who

thinks so is prepared to follow that opinion to its consequences? Suppose the offer is to sell a particular chattel, and the letter accepting it never arrives, is the property in the chattel transferred? Suppose it is to sell an estate or grant a lease, is the bargain completed? The lease might be such as not to require a deed. Could a subsequent lessee be ejected by the would-be acceptor of the offer because he had posted a letter? Suppose an article is advertised at so much, and that it will be sent on receipt of a Post-office order. Is it enough to post the letter?

If the word "receipt" is relied on, is it really meant that that makes a difference? If it should be said, let the offerer wait, the answer is, may be he may lose his market meanwhile. Besides, his offer may be by advertisement to all mankind. Suppose a reward for information, and information posted does not reach, and some one else gives it and is paid, is the offerer liable to the first man? It is said that a contrary rule would be hard on the would-be acceptor, who may have made his arrangements on the footing that the bargain was concluded. But to hold, as contended, would be equally hard on the offerer who may have made his arrangements on the footing that his offer was not accepted. His non-receipt of any communication may be attributable to the person to whom it was made being absent. What is he to do, but to act on the negative, that no communication has been made to him? Further, the use of the Post-office is no more authorised by the offerer than the "send an answer by hand," and all these hardships would befall the person posting the letter if he sent it by hand. Doubtless in that case he would be the person to suffer if the letter did not reach its destination. Why should his sending it by post relieve him of the loss, and cast it on the other party? It was said, if he sends it by hand it is revocable, but not if he sends it by post, which makes the difference. But it is revocable when sent by post, not that the letter can be got back, but that its arrival might be anticipated by a letter by hand or telegram, and there is no case to shew that such anticipation would not

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prevent the letter from binding. It would be a most alarming thing to say it would, and that a letter honestly but mistakenly written and posted must bind the writer, if hours before its arrival he informed the person addressed that it was coming, but was wrong and recalled. Suppose a false but honest character given, and the mistake found out after the letter posted, and notice that it was wrong given to the person addressed. Then, as was asked, is the principle to be applied to telegrams? Further, it seems admitted that if the proposer said, "Unless I hear from you by return of post the offer is withdrawn," the letter accepting it must reach him to bind him. There is, indeed, a case recently reported in the *Times* before the Master of the Rolls, where the offer was to be accepted within fourteen days, and it is said to have been held that it was enough to post the letter on the fourteenth, though it would and did not reach the offerer till the fifteenth. Of course there may have been something in that case not mentioned in the report. But as it stands it comes to this, that if an offer is to be accepted in June, and there is a month's post between the places, posting the letter on the 30th of June will suffice, though it does not reach till the 31st of July; but that case does not affect this. There the letter reached, here it has not. If it is not admitted that "unless I hear by return the offer is withdrawn," makes the receipt of the letter a condition, it is to say an express condition goes for naught. If it is admitted, is it not what every letter says? Are there to be fine distinctions such as, if the words are "Unless I hear from you by return of post, &c.," it is necessary the letter should reach him, but "Let me know by return of post," it is not, or if in that case it is, yet it is not where there is an offer without those words? Lord Blackburn says that Lord Justice Mellish accurately stated, that where it is expressly or impliedly stated in the offer, "You may accept the offer by posting a letter," the moment you post this letter the offer is accepted. I agree, and the same thing is true of any mode of acceptance offered with the offer

and acted on—as firing a cannon, sending off a rocket, "give your answer to my servant the bearer." Lord Blackburn was not dealing with the question before us; there was no doubt in the case before him that the letters had reached. As to the authorities I shall not re-examine those in existence before *The British and American Telegraph Company v. Colson* (3). But I wish to say a word as to *Dunlop v. Higgins* (1), as the whole difficulty has arisen from some expressions in that case. Mr. Finlay's argument and reference to the case when originally in the Scotch Court has satisfied me that *Dunlop v. Higgins* (1) decided nothing contrary to the defendant in this case. Lord Justice Mellish in *Harris's Case* (9) says so at p. 596, Law Rep. "That case is not a direct decision on the point before us." It is true, he adds, that he has great difficulty in reconciling the case of *The British and American Telegraph Company v. Colson* (3) with *Dunlop v. Higgins* (1). I do not share that difficulty, I think that they are perfectly reconcilable, and that I have shewn so. Where a posted letter arrives, the contract is complete on the posting. So where a letter sent by hand arrives, the contract is complete on the writing and delivery to the messenger. Why not? All the extraordinary and mischievous consequences which the Lord Justice points out might happen if the law were otherwise, when a letter is posted, and would equally happen where it is sent otherwise than by the post. He adds that, "The question before the Lords in *Dunlop v. Higgins* (1) was, whether the ruling of the Lord Justice Clerk was correct," and they held it was. Now Mr. Finlay shewed very clearly that the Lord Justice Clerk decided nothing inconsistent with the judgment in *The British and American Telegraph Company v. Colson* (3). Since that case there have been two before Vice-Chancellor Malins, in the earlier of which he thought it "reasonable" and followed it. In the other, because the Lords Justices had, in *Harris's Case* (9), "thrown cold water on it," he appears to have thought it not reasonable. He says, "Suppose the sender of a letter says, 'I make you an offer, let me have an answer by return of post.' By return the letter

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is posted, and A. has done all that the person making the offer requests." Now that is precisely what he has not done. He has not let him "have an answer." He adds, "there is no default on his part. Why should he be the only person to suffer?" Very true. But there is no default in the other, and why should he be the only person to suffer? The only other authority is the expression of opinion by Mr. Justice Lopes in the present case. He says the proposer may guard himself against hardship by making the proposal expressly conditional on the arrival of the answer within a definite time. But it need not be express nor within a definite time. It is enough that it is to be inferred that it is to be, and if it is to be it must be within a reasonable time. The mischievous consequences he points out do not follow from that which I am contending for. I am at a loss to see how the Post-office is the agent for the parties. What is the agency? As to the sender it is merely to receive. But suppose it is not an answer, but an original communication. What then? Does the extent of the agency of the Post-office depend on the contents of the letter? But if the Post-office is the agent of both parties, then the agent of both parties has failed in his duty, and to both. Suppose the offerer says, "My offer is conditional on your answer reaching me." Of whom is the Post-office the agent then? But how does an offerer make the Post-office his agent, because he gives the offeree an option of using that or any other means of communication? I am of opinion that this judgment should be reversed. I am of opinion that there was no bargain between these parties to allot and take shares, that to make such bargain there should have been an acceptance of the defendant's offer, and a communication to him of that acceptance, that there was no such communication, and that posting a letter does not differ from other attempts at communication in any of its consequences, save that it is irrevocable as between the poster and Post-office. The difficulty has arisen from a mistake as to what was decided in *Dunlop v. Higgins* (1), and from supposing that because

there is a right to have recourse to the post as a means of communication, that right is attended with some peculiar consequences, and also from supposing, that because if the letter reaches it binds from the time of posting, it also binds though it never reaches. Mischievous may arise if my opinion prevails. It probably will not. As so much has been said on the matter that principle is lost sight of, I believe equal if not greater will, if it does not prevail. I believe the latter will be obviated only by the rule being made nugatory by every prudent man saying, "Your answer, by post, is only to bind if it reaches me." But the question is not to be decided on these considerations. What is the law? What is the principle? If Bryan, C.J., had had to decide this, a public post being instituted in his time, he would have said the law is the same now there is a post as it was before, namely, a communication to affect a man must be a communication, i.e., must reach him.

*Judgment affirmed.*

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Solicitors—Worthington Evans, for plaintiffs:  
John Davis, agent for Leyson, Swansea, for defendant.

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[IN THE QUEEN'S BENCH DIVISION.]

1879. } THE QUEEN v. THE JUSTICES OF  
May 8. } WILTSHIRE.

*Poor Rate—Valuation List—Appeal—Union Assessment Committee Amendment Act, 1862 (27 & 28 Vict. c. 39), s. 1—Objection to Valuation List before Rate made—Refusal of Relief by Committee—Publication of Rate—Necessity of Second Appearance before Committee after making of Rate—Next practicable Sessions—Statute 17 Geo. 2. c. 38. s. 4.*

[For the Report of the above case, see 48 Law J. Rep. M.C. 142.]

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[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1878.  
Nov. 22, 23. }  
1879.  
May 30. }

DREW v. NUNN.\*

*Principal and Agent—Authority to pledge Credit—Insanity of Principal—Effect of on Authority of Agent.*

*The defendant having held out his wife to the plaintiff as having authority to pledge his credit, afterwards became insane. The plaintiff, being unaware of the insanity, continued to supply the wife with goods on credit:—Held, that the defendant was liable to the plaintiff for the price of the goods so supplied.*

*Insanity so great as to deprive the insane person of any contracting mind revokes an authority given by him, when sane, to an agent; and an agent who, after knowledge of such insanity on the part of his principal, continues to act on the authority so given, will himself be liable to the person with whom he so deals.*

Appeal by the defendant from a refusal of the Queen's Bench Division to grant a new trial on the ground of misdirection.

The action was brought by a tradesman for the price of goods supplied to the wife of the defendant between April, 1876, and June, 1877. At the trial, before Mellor, J., it appeared that the plaintiff had begun, in 1872, to supply goods on credit to the wife of the defendant, that the defendant had been present when some of the goods were ordered, and had paid for some of them by cheque. In 1873 the defendant fell into ill health, and in November he authorised his agent to pay all his income to his wife, directed his bankers to honour cheques drawn by her, and authorised her to deal with his securities at his bankers. In December he became insane, and was placed under care in an asylum, where he remained until April, 1877.

During the time that the defendant was in the asylum, his wife ordered goods

from the plaintiff, and they were supplied to her on credit. The plaintiff was not aware that the defendant was insane and under care in an asylum, nor did he know that the income of the defendant's estate was paid to the wife of the defendant.

In June, 1877, the defendant, who had in April recovered his reason, revoked the authority which he had given to his wife.

Mellor, J., declined to leave to the jury any question as to the sufficiency of the income received by the wife of the defendant, and directed the jury that the plaintiff was entitled to recover if what Mrs. Nunn did was according to the course pursued while Mr. Nunn lived with her. The jury found a verdict for the plaintiff for the amount claimed.

The defendant applied to the Queen's Bench Division for a rule for a new trial, which application was refused; he then appealed, and the Court of Appeal granted a rule nisi, calling on the plaintiff to shew cause why the verdict should not be set aside, and a new trial had on the ground of misdirection, in that the learned Judge directed the jury that Mrs. Nunn was entitled to pledge the defendant's credit, if what she did was according to the course pursued while the defendant was living with her; and in declining to leave to the jury to find, or as an element for their decision on the question, whether the income received by her from the defendant's estate was sufficient without her pledging the defendant's credit.

*Willis and Lane* (on the 22nd of November), for the plaintiff, shewed cause.—The direction of the learned Judge was right, and the verdict ought not to be disturbed. It is clear that a proper authority was given to the wife of the defendant to act as his agent, and the question is whether this authority was revoked by the subsequent insanity of the defendant. It is contended that the mere fact of the principal becoming insane does not revoke the authority of the agent, and that even if it does, still a person who continues to deal with the agent without knowledge of the insanity of the principal does not lose his rights against the principal, for the prin-

\* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

*Drew v. Nunn* (App.), Q.B.

principal must remain liable unless he revokes the authority of his agent, and also makes the fact of such revocation known to others. The decision in *Jolly v. Rees* (1) is not in point, although the judgment of Byles, J., who dissented, contains *dicta* as to the effect of a private revocation of a given authority, which assist the contention of the plaintiff here. *Ryan v. Sams* (2) shews that the authority of an agent must be very distinctly revoked in order to affect a third party who has been accustomed to deal with him.

As to the effect of insanity upon the principal, it would seem that the rule to be deduced from the decisions is that a person who becomes insane cannot repudiate an executed contract, unless it be shewn that advantage has been taken of his insanity—*Molton v. Camroux* (3), *Baxter v. Portsmouth* (4), *Dane v. Kirkwall* (5), *Brown v. Jodrell* (6). *Niell v. Morley* (7) shews, moreover, that a Court of equity will not set aside a lunatic's transactions unless fraud is established.

It may be that an insane person cannot appoint an agent; but insanity does not, therefore, deprive of his power an agent already appointed. *Stead v. Thornton* (8) would seem to shew that an imbecile assignee cannot appoint an agent; but that was not the basis of the decision, for it was held that the defendant there was a stranger, and not an agent at all. In *Tarbut v. Bispham* (9) Parke, B., said, that the question was, whether there was any proof of an actual accounting with the lunatic or with any representative of the lunatic. In *Read v. Legard* (10) it was held that a husband was liable for necessities supplied to a wife during his

lunacy; and although the present case is not one of necessities, still here there is a course of dealing and a person held out as having authority, and the true principle is that such an authority is not revoked by insanity.

It was held in *Richardson v. Du Bois* (11) that the lunatic was not liable for repairs ordered by his wife because she received all his income and had besides an income of her own; but in *Davidson v. Wood* (12) proof was admitted in a suit for the administration of a lunatic's estate, of money advanced to his wife, even though she had a separate estate. Story lays down (13) that the insanity of a principal might operate as a suspension of an agency; but Bell seems to hold an opposite opinion, and lays stress on the necessity of some public act being done or of notice being given to every individual with whom the agent has dealt that the agency is revoked (14). See also *Manby v. Scott* (15) and the cases in the notes. It is conceded that the authority of the agent during insanity is limited, and must be measured by the authority given to him by the principal while sane, so that in this case Mrs. Nunn could not extend the authority given to her beyond that which the course of dealing, pursued by her before her husband became insane, would warrant.

*H. Payne* (with him *Day*), for the defendant, in support.—The jury have not found that the wife of the defendant ever had express authority to pledge his credit, and there is no means of measuring the extent of the authority, even if it existed at all. It is well established law that an insane person cannot enter into contracts, be a party to a deed, or appoint an agent, and it is submitted that insanity also revokes the authority of an agent who was appointed when the principal was sane. The cases are summed up in *Molton v. Camroux* (3), and the disabilities of an insane person are pointed out in *Howard*

(1) 15 Com. B. Rep. N.S. 628; s. c. 33 Law J. Rep. C.P. 177.

(2) 12 Q.B. Rep. 460; s. c. 17 Law J. Rep. Q.B. 271.

(3) 4 Exch. Rep. 17; s. c. 18 Law J. Rep. Exch. 68, 356.

(4) 5 B. & C. 170.

(5) 8 Car. & P. 679.

(6) 3 Car. & P. 30; s. c. 1 Moo. & M. 105.

(7) 9 Ves. jun. 478.

(8) 3 B. & Ad. 357, cited in note to *Stephens v. Badcock*, 3 B. & Ad. 354.

(9) 2 Mee. & W. 2; s. c. 6 Law J. Rep. Exch. 49.

(10) 6 Exch. Rep. 636; s. c. 20 Law J. Rep. Exch. 309.

(11) 39 Law J. Rep. Q.B. 69; s. c. Law Rep. 5 Q.B. 51.

(12) 1 De Gex, J. & S. 465; s. c. 32 Law J. Rep. Chanc. 400.

(13) *Story on Agency*, section 481.

(14) 1 Bell, Commentaries, section 413.

(15) 2 Smith's L. C. (7th ed.), 479.

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*v. Digby* (16). Parke, B., expressly states in *Tarbut v. Bispham* (9), that a lunatic cannot appoint an agent, and the decision in *Stead v. Thornton* (8) turns on the fact that the assignee being insane was incompetent to appoint an agent. Story lays down (17) that persons not *sui juris* and lunatics are incapable of appointing agents. The analogy between insanity, death or marriage is in this respect very close, and the same consequences must follow; so that the authority must in this case be considered to have been revoked from the time that the defendant became insane—*Blades v. Free* (18); *Smout v. Ilbery* (19).

[COTTON, L.J.—The analogy is not perfect between insanity and death, for in the case of death the power of dealing with the deceased person's property becomes vested by operation of law in some other person.]

If insanity does not revoke the authority, then there is no means of putting an end to an agency, for the insane person cannot do it himself. The American authorities seem to differ from the English law as to revocation by death, and to lay down that notice of revocation is necessary even in the case of death.

*Our. adv. vult.*

BRETT, L.J. (on the 30th of May).—This appeal has stood over for a very long time and principally on my account. It has stood over in order to enable me to make every effort to decide the question involved in it upon some satisfactory principle. But, speaking only for myself, I have found the doctrine applicable, the most difficult and least to be satisfactorily explained doctrine I have ever met with in the English law. The case was tried before Mr. Justice Mellor. The action was to recover the price of boots and shoes supplied by the plaintiff to the wife of the defendant. The facts which were beyond dispute in the case were, that the defendant when sane gave to his wife an absolute autho-

rity to act for him, and held his wife out to the plaintiff as having that authority. I think it must be taken as a fact also that afterwards the defendant became, not incurably insane, but so insane that he could not have contracted with anyone on his own behalf, and so insane that if he had attempted to make a contract with anyone it would have been seen at once by the other person that he was too insane to enter into a contract. In these circumstances the wife ordered the goods from the plaintiff who had no notice of the lunacy, and was supplied with them by him. The husband was confined for a time in a lunatic asylum, but he afterwards recovered his reason, and left the asylum. After his recovery the present action was brought against him, and he defends it on the ground that the mandate or authority which he gave to his wife was put an end to by his subsequent insanity, and therefore that he is not liable for the price of the goods. Mr. Justice Mellor left no question to the jury as to the extent or amount of the insanity of the defendant. It must be taken, therefore, that insanity existed to the extent I have stated. Two questions arise on these facts. The first is, does the insanity of the principal put an end to the mandate or authority of the agent? One would have thought that question would have been found to have been decided on clear principles of law. But when authorities are looked into—and I have looked into *Story on Agency*, and into the Scotch and French authorities—no satisfactory conclusion can be arrived at. If it is held that such insanity as existed here did not put an end to the agent's authority, then clearly the plaintiff is entitled to recover upon that ground. In my opinion, however, such insanity in a principal does put an end to an agent's authority. It is admitted that an agent's authority is terminated by a principal undergoing certain changes of *status*. For instance, if a female principal appoints an agent and afterwards marries, her marriage puts an end to the authority previously given to that agent. The bankruptcy and the death of a principal both determine the authority of an agent, and the reason why the authority

(16) 2 Cl. & F. 634, at p. 661.

(17) *Story on Agency*, s. 6.

(18) 9 B. & C. 167.

(19) 10 Mee. & W. 1; s.c. 12 Law J. Rep. Exch. 357.

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is put an end to is stated to be that the person who otherwise would be liable has become a different person from the giver of the authority. In marriage the husband, in bankruptcy the assignee, and in death the heir or executor would be substituted for the person who gave the authority. If the change of the person who gave the authority were the real ground upon which we had to proceed, then the lunacy of the principal would not put an end to the authority until that lunacy was established by a commission having been held, so that the committee would be liable instead of the lunatic. But I do not think that is a satisfactory principle upon which to base the rule. In bankruptcy the assignee, although he is a different person, is bound to carry out some contracts made by the bankrupt, and in the case of death the executors are the representatives of the dead person for many purposes. I therefore think that the true ground is that the agent being a person appointed, when the principal could act for himself, to act for him, ceases to be able so to act when the principal ceases in law to be able to act for himself. If that be so, then where there is, as in the present case, lunacy so great that the person who suffers from it has no contracting mind, and cannot contract or do any legal act for himself for want of mind, as the principal is in law incapable of doing the act for himself, so his agent cannot do it for him. Such lunacy, therefore, puts an end to the authority of the agent, and if any agent acts for his principal after such lunacy is brought to his knowledge, that agent would be liable to any person with whom he so dealt. If, therefore, the defendant's wife, who must be taken to have known of her husband's lunacy, had dealt with anybody to whom her previous authority had been held out, I should say she would be wrongfully acting as her husband's agent, although being a married woman it would be difficult to make her liable. If she disclosed her husband's lunacy to the person with whom she was dealing, then I should say that the contract would be void as against the supposed principal.

The second question to be considered in this case is on whom does the liability

fall, when, as here, the person who supplies the goods has no notice of the insanity of the principal. An agent may be held out as having authority in one of two ways. Where some instrument, such as a power of attorney, asserts that he has authority, then the fact of the power of attorney having been previously given is an assertion that the person holding it may act for the principal; and if the agent under that power deals with some one according to the intention of that authority, the principal is bound.

Another way in which an agent may be held out as having authority is where the principal has held out his agent to certain parties as having authority to act for him in particular cases. What, then, is the effect of the insanity of the principal on contracts made by the agent after the principal has become insane, but made with persons who being aware of the authority are ignorant of the subsequent insanity of the principal? It seems to me that a person who deals with the agent without knowledge of the principal's insanity is justified in so dealing, and that the insane person is bound, because he has held out the agent as having authority. It is difficult to state what are the grounds upon which this rule is based. It is sometimes said that the right depends on contract. I cannot see it. It is sometimes put on the ground of estoppel. It is somewhat difficult to see how in strictness there can be an estoppel. It is also said that the right depends upon representations made by the principal, upon which a person with no notice to the contrary is entitled to act. There is an elaborate note in *Story on Agency* (20), by the editors of the seventh edition, in which they say the rule is to be defended on the ground of public policy. It is said by others to be useful, as rendering effectual business transactions. To my mind, the better way of stating the rule with its reason is, that the principal is in such a case held liable, because of a representation, made by him when he was sane and could make it, to an innocent party, upon which the latter has a right to act until he is acquainted

(20) *Story on Agency*, s. 481, p. 610.

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with the fact of the insanity. Supposing there is no insanity, but a person holds out someone as his agent, and then of his own accord withdraws the authority. As between the principal and the agent, the right to bind the principal has ceased. But suppose that the agent does a wrongful act by dealing with a third person as though the authority continued, then the rule is that if the agent has been held out to that third person as having authority, and the latter deals with the agent before he has received any notice of the revocation of the authority, the principal is bound, upon the ground that he made representations upon which the third person had a right to act, and that he cannot escape from the consequences of those representations. It is true that if the principal becomes insane, he cannot himself give notice of the cessation of the agency, and he may thus be an innocent sufferer from the wrongful act of the agent. But if the rule were not so, then the other party, who is also innocent, must suffer, and it is a principle of law that when it is a question which of two innocent parties shall suffer, that one must suffer who caused the state of things upon which the other has acted. Therefore, in my opinion, an insane person who recovers his reason cannot, after his recovery, any more than if he had never been insane, say that an innocent person who acted upon representations made by him before he was insane had not a right to do so. A difficulty, no doubt, arises in stating a general principle applicable to such cases as these; but, for my own part, although it is not necessary to decide the question to-day, I should think that the same rule would apply in the case of the principal's death as of his insanity, and that if representations made by a person during his life were acted upon after his death by an innocent party without any knowledge of the death, the principal's estate would be bound. On these grounds, therefore, although in the present case I think that the authority was put an end to by the defendant's insanity, and that the agent had no authority to deal with the plaintiff, I nevertheless think that the plaintiff can recover, because representations were made by the defendant whilst sane to the

plaintiff, upon which the plaintiff was entitled to act until he had notice of the insanity, and no such notice was ever given to him. The rule for a new trial must therefore be discharged.

BRAMWELL, L.J.—I agree with the judgment which my brother Brett has delivered. The defendant in this case acted so as to give the plaintiff an impression that a state of facts existed which was tantamount to his telling the defendant that his wife had authority to act as his agent. When such an authority has been given it must last until duly revoked, and until notice of such revocation has been given to all the interested parties. This is the general and well-established rule. It is, however, urged that this rule does not apply where the principal who gave the agent the authority has become insane, and has, as it is said, thereby revoked the authority. Why so, one may well ask? It is true that it may be hard on the principal, if the authority is not thus revoked; but, in my opinion, it would be even harder on the agent. Insanity is not a privilege, it cannot give the insane person any rights which he would not otherwise have; and I do not see any reason for holding that insanity introduces any exception into the law of principal and agent. I do not think it would be easy, and I do not desire, to lay down any broad rule in any peremptory terms. I think that the case now before us resembles the case of a guarantee. A man says to another that if that person will supply goods to a named person he will pay for them until he revokes that promise. Then suppose that the promisor does intend to, and does attempt to revoke this promise; but that the intelligence of the revocation does not reach the party to whom the promise was made. Surely it must be considered that there was either an agreement between the parties, or else there was a license given by the one to the other, that the person to whom the promise was made may act in a certain way, and this agreement must endure until rescinded, and the license hold good until revoked. I think that my brother Brett has assumed that insanity is necessarily a

*Drew v. Nunn (App.), Q.B.*

revocation of authority; now I am not prepared to say that every case of insanity would revoke the authority of his agent. I should think it would have to be a case of grave insanity amounting to dementia. Where a man is so insane as to have no mind at all, he is then no more capable of contracting than if he were dead. If that were so in this case, then the authority would be revoked. However that may be, I think my brother Brett has shewn that the plaintiff in this case is entitled to recover, and therefore this rule must be discharged.

BRETT, L.J.—I am requested to say that Cotton, L.J., agrees in the conclusion to which we have come; but he desires that it should be understood that he does not wish to pledge himself to a decision that the authority of the agent was here put an end to, or that in cases of insanity an agent's authority can be determined until there has been a finding by a commission of the insanity of the principal. He bases his decision in this case on the fact that there was an authority given, that there was thus a contract between the giver of that authority and the person to whom the recipient of that authority was held out as being clothed with that authority, that that authority had not been, to the knowledge of the third party at all events, revoked, and therefore that the contract still existed. On the basis of that contract, the defendant is liable to the plaintiff.

I may add, that I think that if there was any question of the amount or extent of the insanity of the defendant, that question should have been left to the jury. I understand that it was conceded that the defendant was so insane that he could not enter into any contract. I do not think mere weakness of mind would suffice to bring a case within the rule I have laid down.

*Order discharged and judgment affirmed.*

Solicitors—A. E. Copp, for plaintiff; Blake & Co., for defendant.

[IN THE COURT OF APPEAL.]

1879.

May 8, 9, 14. } LONG v. MILLAR.\*

*Vendor and Purchaser—Agreement for Sale of Land—Contract contained in more than one Document—Connection of Documents by Reference—Statute of Frauds, s. 4.*

*The plaintiff signed the following memorandum—I agree to purchase the three plots of land in R. Street, H., for 310l., and to pay as a deposit and in part payment of the purchase-money 31l.*

*The defendant signed and gave to the plaintiff the following receipt—Received of G. L. 31l. as a deposit on the purchase of three plots of land at H.*

*Held, that the two documents sufficiently referred to one another to constitute a memorandum of the contract within section 4 of the Statute of Frauds.*

Appeal from the judgment of Manisty, J., given on further consideration in favour of the plaintiff.

Claim for damages for breach of a contract by the defendant for the sale of land to the plaintiff, to recover a deposit paid by the plaintiff, and for damages for a false representation by the defendant that he had authority to sell the land for 310l. The defence denied the allegations in the claim, alleged that there was no contract within the Statute of Frauds, and set out facts to shew that the plaintiff knew that the defendant was only an agent; that there was only an incomplete agreement for the sale of the land founded on a mutual mistake; that the defendant's principal had raised the price of the land without informing the defendant; that the defendant had informed the plaintiff of this as soon as he learned it, and had offered to return the deposit to the plaintiff, and payment into Court by the defendant of 31l., the amount of the deposit.

At the trial before Manisty, J., the following facts appeared in evidence:—

The plaintiff, who was a builder, saw a notice board on some land in Richford Street, Hammersmith, stating that the

\* *Coram Bramwell, L.J.; Baggallay, L.J.; and Thesiger, L.J.*

*Long v. Millar (App.), Q.B.*

land was for sale, and giving the name of the defendant as the person to whom application should be made. The plaintiff thereon called at the office of the defendant, and was shewn a copy of the defendant's monthly register which contained the following entry:—"Hammer-smith—Three plots of freehold building land . . . price 310*l.* for the three plots, or 105*l.* each. M." The defendant then informed the plaintiff that these particulars were correct, and that he was prepared to sell the land on those terms. The plaintiff took away with him a copy of the register with a mark placed against the entry set out above, and after some further interviews he signed the following agreement at the defendant's office:—

"Auction and Estate Agency Offices, 8, Wellington Road, Sept. 21, 1877.

"I hereby agree to purchase the three plots, 48 ft. frontage, of freehold land in Richford Street, Hammersmith, for the sum of 310*l.*, and I agree to pay as a deposit and in part payment of the aforesaid purchase-money the sum of 31*l.*, and to complete the purchase and pay the balance of the purchase-money on or before the 5th of October next.

"George Long."

The defendant having received the deposit money gave the plaintiff the following receipt:—

"Auction and Estate Agency Offices,  
"Sept. 21, 1877.

"Received of Mr. G. Long the sum of 31*l.* as a deposit on the purchase of three plots of land at Hammersmith.

"C. W. Millar."

On the 28th of September the plaintiff received the following letter:—

"Land, Richford Street.

"Sir,—The solicitors to the freeholder write me to say that he will not sell this at the original price, he having had to pay for paving, &c. The price he now wants is 450*l.* If you are not disposed to give this sum I shall be prepared to return your deposit in exchange for the receipt I gave you.

"C. W. Millar."

The plaintiff, however, claimed to have

the land at the price originally agreed on, and alleged that he had been treating with the defendant as principal in the transaction, and that no intimation had ever been given to him that the defendant was only acting as agent. After some correspondence had passed this action was brought.

The jury found in answer to certain questions—

That the defendant contracted to sell the land absolutely for 310*l.*

That he contracted as principal as between himself and the plaintiff.

That he represented to the plaintiff that he had authority to sell the land for 310*l.*, and that he had such authority, and they assessed the damages at 70*l.*

The case was reserved for further consideration, when the learned Judge held that the plaintiff was entitled to judgment on the first part of his claim, and the defendant to judgment on the question of the false representation. He also held that the requirements of the Statute of Frauds had been complied with, that there was a binding contract, and gave judgment for the plaintiff with damages 70*l.*

From this judgment the defendant appealed, and he also obtained a rule in the Common Pleas Division for a new trial, on the ground that there was no evidence to support the second finding of the jury, and that the verdict was against the weight of evidence. This rule was afterwards made absolute. The plaintiff appealed from that decision, and this appeal and the appeal of the defendant from the judgment of Manisty, J., were now heard together.

*Holl and Sills*, for the defendant.—The learned Judge gave judgment for the plaintiff on the finding of the jury that the defendant acted as a principal, and for the defendant on the allegation that there had been a misrepresentation of authority. He held also that the provisions of the Statute of Frauds had been complied with, and the defendant now appeals from that judgment. The contention of the defendant is, that there is no memorandum of the contract signed by the party to be charged so as to satisfy

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the Statute of Frauds. There are three documents, but only one of them is an agreement, and that is signed by the plaintiff, so that there is no concluded agreement by which the defendant can be bound. Even if all the documents be taken together, no one of them contains any reference to either of the others. The receipt signed by the defendant does not contain the name of any vendor, nor does it mention the price; the letter written by the plaintiff mentions the price but not the name of the vendor. It may be probable that those documents refer to the same subject-matter, but such a probability will not satisfy the statute. The principle laid down in *Boydell v. Drummond* (1) governs this case. Writings not shewing an obvious connection cannot be connected by parol evidence so as to make a contract. The documents in the present case amount merely to a statement of facts, one term only of the intended contract was fixed, and no binding agreement was entered into—*Smith v. Webster* (2). They do not sufficiently refer to one another to constitute a binding agreement, nor do the terms of the contract appear on the face of the receipt and letter sought to be connected together, and therefore they do not come within the principle laid down in *Ridgway v. Wharton* (3). The documents must refer distinctly to each other so as to enable the subject-matter of the contract to be identified—*Rishton v. Whatmore* (4), *Williams v. Jordan* (5). Moreover, even if it be considered that these documents can be connected, still the defendant cannot be held liable on his signature, for it was not affixed to the document as a signature intended to authenticate a formal contract, nor as intending to bind him as vendor, and a signature affixed *alio intuitu* is not a binding signature within the statute—*Eley v. The Positive Government Life*

*Assurance Company* (6), *Vandenbergh v. Spooner* (7), *Oaton v. Oaton* (8). It is also contended that the defendant was only an agent, and that there was no evidence on which the jury ought to have found that he contracted as a principal, and therefore he is entitled on this appeal to ask for judgment to be entered for him.

*F. Turner (A. McIntyre with him)*, for the plaintiff.—It is not necessary that all the terms of the contract should appear on the face of the instrument signed by the party to be charged, it is sufficient if there is a reference in one document to another—*Allen v. Bennett* (9), *Dobell v. Hutchinson* (10). The agreement to buy signed by the plaintiff refers to a specific subject-matter, and this subject-matter is sufficiently identified and referred to in the receipt and subsequent letter. If the receipt establishes that a purchase had been agreed on, then, if necessary, parol evidence might be given to connect the various documents—*Baumann v. James* (11). It is true that if, notwithstanding the insertion of the names of the parties in a contract, it is also intended that their signatures should be affixed, then there will not be a binding contract until they are so affixed, and that is the principle on which *Oaton v. Oaton* (8) and that class of cases were decided; but that principle does not apply to this case, as here the names of the parties were actually and intentionally attached as signatures to the agreement and receipt, and it is, therefore, a clearer case than was *Jones v. The Victoria Graving Dock Company* (12), where the signature to resolutions pursuant to the Companies Act was held a sufficient signature within the Statute of Frauds.

The jury have found that the defendant

(6) 45 Law J. Rep. Exch. 58, 451; s. c. Law Rep. 1 Ex. D. 20.

(7) 35 Law J. Rep. Exch. 201; s. c. Law Rep. 1 Exch. 316.

(8) 36 Law J. Rep. Chanc. 886; s. c. Law Rep. 2 H.L. 127.

(9) 3 Taunt. 169.

(10) 3 Ad. & E. 355; s. c. 4 Law J. Rep. K.B. 201.

(11) Law Rep. 3 Ch. App. 508.

(12) 46 Law J. Rep. Q.B. 219; s. c. Law Rep. 2 Q.B. D. 314.

(1) 11 East, 141.

(2) 45 Law J. Rep. Chanc. 430, 528; s. c. Law Rep. 3 Ch. D. 49.

(3) 6 H.L. Cas. 238; s. c. 27 Law J. Rep. Chanc. 46.

(4) 47 Law J. Rep. Chanc. 629; s. c. Law Rep. 8 Ch. D. 467.

(5) 46 Law J. Rep. Chanc. 681; s. c. Law Rep. 6 Ch. D. 517.



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contracted as principal, and it is not competent for him to contend that he signed as agent, when there is no statement to that effect on the face of the document signed by him—*Higgins v. Senior* (13). *Jones v. Littledale* (14), *Short v. Sparkman* (15), *Calder v. Dobell* (16).

*Holl*, in reply.

*Our. adv. vult.*

BRAMWELL, L.J. (on May 14).—These appeals must be dismissed. The Divisional Court has directed that there shall be a new trial on the ground that the verdict is not justified by the evidence, and we have not had any grounds pointed out to us sufficiently strong to entitle us to dissent from that opinion, or to lead us to overrule the discretion of the Divisional Court. That disposes of the appeal of the plaintiff.

The appeal of the defendant from the judgment of Manisty, J., raises two questions. The first is the question of the sufficiency of the memorandum in writing which is, in certain cases, required by the Statute of Frauds. I think that there is here a sufficient memorandum, although there is a question about the name of the vendor with which I will deal presently. I think that *Ridgway v. Wharton* (3) and *Baumann v. James* (11) are in point and are decisive. The plaintiff has undoubtedly signed a document, the agreement of the 21st of September, which contained a description of the land and the price to be paid, so that that document signed by him would, if he were the party to be charged, bind him. But the question is whether the defendant, whom it is here sought to charge, has signed a document so as to bind himself. He signed a receipt which mentions the plaintiff, the deposit, and the name of the land, and I think that this receipt contains a sufficient reference to the agreement signed by the plaintiff and that the two, if placed side by side, would suffice to make a complete written agreement. For the word "purchase" in the receipt signed by the

defendant would then be shewn to refer to the agreement to purchase made by the plaintiff and embodied in the document signed by him. *Ridgway v. Wharton* (3) is in point. There a letter referred to another paper which contained the necessary details or instructions, and the instructions so referred to were allowed to be connected with the letter, and parol evidence was admitted to shew what they were. The principle seems to be this. Suppose A. writes to B., "I will give 1,000*l.* for your land," and he also mentions all the terms in detail. B. answers in a hurry and writes—"I accept your offer." In such a case B.'s signature is attached to nothing but the words—"I accept your offer," but afterwards when the two writings are brought together and placed side by side the inference is plain, and the evidence required to shew that the offer referred to in B.'s acceptance is the same offer as that made by A. can be given by parol, without infringing the rule that there must be a memorandum in writing. The case before us is, however, stronger in favour of the plaintiff than the illustration just given.

Then the question may be whether, assuming the memorandum to satisfy the statute in other respects, the name of the seller is mentioned. That comes to this, is the defendant the vendor? If he be, then the vendor's name appears, and if he be not the vendor, then the contract does not satisfy the statute; but this point does not, having regard to the findings with which we have to deal, now arise.

We have been asked to give judgment for the defendant, but as there is some evidence on the part of the plaintiff, and the receipt given by the defendant himself is in some degree in favour of the plaintiff, we cannot do so. The defendant's appeal from the decision of Manisty, J., must be dismissed, and the plaintiff's appeal from the order of the Common Pleas Division must also be dismissed, so that there must be a new trial.

BAGGALLAY, L.J.—I am of the same opinion. I think we are at liberty to read the two documents together, and

(13) 8 Mea. & W. 834.

(14) 6 Ad. & E. 486.

(15) 2 B. & Ad. 962.

(16) 40 Law J. Rep. C.P. 224; s. c. Law Rep. 6 C.P. 486.

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that they form a sufficient memorandum of agreement to satisfy the statute. The defendant may have signed the document on his own behalf, but it is open for him to shew that it was not so, and that he signed it for some one else. But *prima facie* there is a good memorandum within the statute. It appears to me that the true principle is this—it is not necessary that there should be any specific description of the first document contained in the second. It is sufficient if a reference to another document is shewn to be intended, and the identity of the subject-matter of that document is established. It is clear that in the present case such a reference was intended, and the document referred to is sufficiently identified. This appears to be so in the present case, and consequently I am of opinion that the judgment of Manisty, J., was right.

THESIGER, L.J.—The question in this case is whether there is a sufficient memorandum of this contract in writing to satisfy the Statute of Frauds. It is clear, and indeed not disputed, that unless the two documents can be connected, there is no sufficient note or memorandum, and for this reason, that the receipt does not contain one of the terms of the purchase, that is to say the price to be paid for the land. Therefore it is clearly necessary that the two documents should be connected, and it is also clear that if the case of *Boydell v. Drummond* (1) is right, and if we follow it, then that connection cannot be proved by parol, but must appear on the face of the documents. From that case it appears that if the documents in relation to the contract sought to be established are only proved to form part of one continuous transaction, that is not enough to make the documents capable of being read together. But though parol evidence cannot be given to connect them unless they contain in themselves some actual reference to one another, yet it can be given to earmark or identify something referred to in the documents which, if referred to, makes the written documents capable of being read together. That appears from the case of *Ridgway v. Wharton* (3) in the House of Lords. There one of the docu-

ments contained a reference to certain instructions, and it was held that parol evidence might be given to shew that the instructions were in writing, and that the document containing them was the thing referred to as "the instructions" in the other document. The principle is no other than that doctrine of law which admits parol evidence to explain a latent ambiguity in a document. But though parol evidence may be given to identify something referred to in a written document, it must appear on the face of the document that the words used are words which will suit the written document which is produced as the thing referred to. The question is whether the terms used in the written documents here are sufficiently applicable to the receipt.

But considering that the words are not used by lawyers, nor in a technical sense, but in an informal manner, it may be said that under the term "the purchase" the parties may well have intended the agreement of purchase which had been drawn up, and which contained all the terms of the bargain except the name of the vendor. It seems to be no more straining language in this case to say that the words "the purchase" refer to the agreement to purchase than it was in *Allen v. Bennett* (9) a straining of language to hold that an order for goods written and signed by the vendors in a book belonging to the purchaser could be connected with a letter written to an agent and containing the name of the purchaser and with a letter of the purchaser to the vendor claiming performance.

Assuming that the two documents may be connected together, then comes the objection that the name of the vendor is not stated.

I am of opinion that that objection cannot prevail. We are entitled to take into consideration that the two documents are exclusively between two parties and relate to the purchase of land, and that one of the documents signed by one of the parties is in the form of a final agreement, and that under this final agreement a deposit is to be made. When then we find the other party signing a

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receipt for the amount of the deposit, and we note that his signature is in no way limited as a signature by an agent, or as a mere receipt for some purpose other than as purchase-money paid on a sale; when we find such an unqualified receipt and signature, though we are confined within the limits of the two documents, it is a fair interpretation that the signature to the receipt is that of the other party to the memorandum. That being so we are entitled to read the two documents together, and then they form a sufficient memorandum in writing to satisfy the Statute of Frauds. The only remaining question is one of fact. It seems to me that there was some evidence to go to the jury, that though one of the parties was an estate agent and was known to be such, and though the bargain was made at his office, yet he made it with the intention of binding himself personally. Therefore there is not sufficient ground for entering judgment for the defendant. The appeal must be dismissed.

*Appeal dismissed.*

Solicitors—Paterson, Sons & Garner, for plaintiff;  
 Dod & Longstaffe, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1879. { THE QUEEN *on the prosecution*  
 May 7. { of THE GUARDIANS OF THE TAD-  
 CASTER UNION v. THE GUARDIANS  
 OF THE LEEDS UNION.

*Poor—Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 34—Settlement by Residence—Illegitimate Child living apart from Mother—11 & 12 Vict. c. 111. s. 1; 9 & 10 Vict. c. 66. s. 1.*

[For the Report of the above case, see 48 Law J. Rep. M.C. 129.]

[IN THE COMMON PLEAS DIVISION.]

1879. } BURKE v. ROONEY.  
 April 8. } SAME v. SAME.

*Practice—Order XXIX. rule 1—Action dismissed for Want of Prosecution—Appeal from Order—Power to enlarge Time—Order LIV. rule 4—Order LVII. rule 6.*

*The Court or a Judge has power under Order LIV. rule 4, and Order LVII. rule 6, to enlarge the time for appealing against an order of a Master made under Order XXIX. rule 1, dismissing an action for want of prosecution, even after such order has taken effect and the action has become dismissed, and when, as decided by Whistler v. Hancock (47 Law J. Rep. Q.B. 152; s. c. Law Rep. 3 Q.B. D. 83), there is no power to enlarge the time for doing anything in such action.*

The first of these actions was an action for rent which was brought by the plaintiff in the Mayor's Court, London, and was removed by *certiorari* to this, the Common Pleas Division. That action proceeded to a close of the pleadings and was set down for trial at Guildhall on the 27th of last December. The second action was brought by the same plaintiff against the same defendant for dilapidations in respect of the same premises for which the action for rent was brought. Such second action was brought in the Queens Bench Division, and in such second action defendant delivered in February last interrogatories for the plaintiff to answer.

The plaintiff being away in Italy with the documents required for preparing the answers, orders were made from time to time extending the time for answering these interrogatories, and an order was also made transferring the action from the Queen's Bench to this the Common Pleas Division, and consolidating the two actions. Afterwards, on the 26th of March last, an order was made by Master Dodgson which, whether it was an order agreed to or not, was not a consent order in the ordinary acceptation of that term. It was not headed in the two actions but in *Burke v. Rooney*, and the order was that "this action be dismissed with costs, to be taxed

*Burke v. Rooney, C.P.*

and paid to the defendant by the plaintiff for want of prosecution, unless an affidavit in answer to the interrogatories be filed on the 31st of March." The 31st of March was a Monday, and on the Saturday preceding a clerk of the plaintiff's solicitor went to take out a summons to extend the time for answering the interrogatories for a short time longer, as the plaintiff had only just then arrived in England, but being too late owing to the offices closing early on a Saturday, he was unable to get a summons. On leaving the office he met a clerk of the defendant's solicitor and told him what had happened, and according to his account the clerk of the defendant's solicitor stated that he would mention it to the managing clerk, and that no doubt no advantage would be taken of the slip which had been so made. On Monday, the 31st, the summons was taken out, returnable the next day, by which an application was made to extend the time for filing the affidavit. That application was refused on the ground that the order had dismissed the action unless the affidavit answering the interrogatories was filed by the 31st of March, and that therefore the action being gone there was no power to extend the time for filing such affidavit. Thereupon the plaintiff went by way of appeal to Denman, J., at chambers, and applied not only to extend the time for answering the interrogatories but also to extend the time for appealing from the order of Master Dodgson of the 26th of March. The four days allowed by the rules for appealing from such order having elapsed, and the action having been dismissed, it was successfully contended that the whole proceedings were at an end, and there could therefore be no appeal. The application to the learned Judge accordingly failed, and the defendant's solicitor afterwards went to Guildhall with the order dismissing the action and presented it there to the Associate, and so got the action which had been set down for trial struck out of the list. The plaintiff now appealed from the decision of Denman, J., at chambers.

*Watkins Williams and Reid*, in support of the motion. The plaintiff seeks to

vary or set aside the order of Master Dodgson of the 26th of March, and he now asks to extend the time for so appealing against such order. The cases of *Whistler v. Hancock* (1) and *Wallis v. Hepburn* (2) were cited and relied on at chambers on behalf of the defendant as authorities to shew that there was no jurisdiction to grant the application of the plaintiff, inasmuch as the action was gone by virtue of the order of the 26th of March. The action cannot be at an end for all purposes, or else there would be no power to issue execution for the costs. The Court can always exercise power over its own process—*Cocker v. Tempest* (3).

[LORD COLERIDGE, C.J.—We shall feel bound to act according to *Whistler v. Hancock* (1), and therefore the only question is whether that case applies here.]

That case is distinguishable from the present one, where the plaintiff is seeking to appeal against the order of the 26th of March dismissing the action. It would destroy the right of appeal from such an order if no appeal would lie after the action had been dismissed, for the order might dismiss the action at once, or before the four days allowed by Order LIV. rule 4 for appealing from the Master's order had elapsed. There would be great injustice if the plaintiff could not here appeal, for the pleadings in the first action had been finished and the cause properly entered for trial, and yet the defendant got such action stayed by shewing the order of the 26th of March to the associate.

[*Willis*, for the defendant, stated that the two actions had been made one action and so treated by the parties.]

The order of the 26th of March could only properly refer to the second action, and there is therefore good reason why the plaintiff should be allowed to appeal. Then under Order LVII. rule 6 the Court or a Judge has power to enlarge the time for appealing, although the four days

(1) 47 Law J. Rep. Q.B. 152; s. c. Law Rep. 3 Q.B. D. 83.

(2) Law Rep. 3 Q.B. 84, note.

(3) 7 Mea. & W. 502; s. c. 10 Law J. Rep. Exch. 195.

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given by Order LIV. rule 4 for appealing from a Master's order have expired.

[LOPES, J.—Does it not come to asking for time in an action which is dead, and therefore is it not within *Whistler v. Hancock* (1)?]

No, for otherwise there would be an end to all appeals against such orders.

*Willis and Moulton*, contra.—This case cannot be distinguished from that of *Whistler v. Hancock* (1). This is an application to extend the time for appealing against the order of the Master after the four days have elapsed, and after the order took effect, and the action has been dismissed. There is therefore no action in existence between these parties, and *Whistler v. Hancock* (1) applies.

[LOPES, J.—You say the order was interlocutory up to the end of the four days allowed for appealing against it, but that when that time had elapsed it was final.]

Yes, and the action being gone, this Court has no longer any jurisdiction in the matter. Even if this Court has power to give leave to appeal, yet after the time limited by the rules for appealing has expired, the Court of Appeal has refused to do so unless there be very special circumstances for granting it, and a mistake or misunderstanding of the rules is not such a special circumstance as will induce the Court to enlarge the time—*The International Financial Society v. The City of Moscow Gas Company* (4) and *Krehl v. Burrell* (5). Next, there is no ground for appealing. By the consolidation order there was in fact only one action and only one action was set down for trial.

[GROVE, J.—If the order of the 26th of March was so worded as to apply to the two actions so that the first action which was simply for rent, was thereby dismissed, it must have been wrong.]

The order applied only to the second action, but the actions had been consolidated as they might be by Order LI. rule 4. In Mr. Wilson's note to that rule at page 291 of his book on the Judicature Acts and Rules he says: "The term, consolidation of actions, is used in two senses

—First, if the plaintiff brings two actions against the same defendant for matters which might properly be consolidated in one action, and the double proceeding is shewn to be vexatious, the Court in the exercise of its ordinary power to prevent any abuse of its own process will consolidate the actions. That is to say, will stay proceedings absolutely in one action, and require the plaintiff to include the whole of the claims in the other."

*W. Williams* replied.

LORD COLERIDGE, C.J. [After stating the facts as above detailed, his Lordship proceeded as follows]—The matter now comes before this Court on an application amongst other things to extend the time for appealing from the order of Master Dodgson, and the first and most important answer to this is that there is no jurisdiction to give further time, and the decision of the Queen's Bench Division in *Whistler v. Hancock* (1) is cited as an authority to that effect, followed as it has been by the Exchequer Division in *Wallis v. Hepburn* (2). Now if that case of *Whistler v. Hancock* (1) applied to the present case I should certainly act in accordance with it whatever might otherwise be my opinion in this matter, but it appears to me that that case is not only distinguishable from, but, when properly looked at, has no application whatever to the present case. If I may be allowed to say so, the learned Judges were perfectly right in deciding *Whistler v. Hancock* (1) as they did, and if that case had come before me I should have decided it in the same way as they did. The great distinction between that case and the present is this, that in *Whistler v. Hancock* (1) the order dismissing the action was unappealed against and in force, and what the Queen's Bench Division decided was, that whilst there remained unappealed an order dismissing the action everything done afterwards in the action was without jurisdiction. In the report of the case in the Law Journal Reports this more fully appears, and it is there shewn that the ground which both the learned Judges took in giving their decision was that the plaintiff in that case had not done the very

(4) 47 Law J. Rep. Chanc. 258; s. c. Law Rep. 7 Ch. D. 241.

(5) 48 Law J. Rep. Chanc. 252; s. c. Law Rep. 10 Ch. D. 420.

*Burke v. Rooney, C.P.*

thing which he is now seeking to do. In the statement of that case in the Law Journal Reports it is said: "On the 15th of December the defendant obtained an order from a Master under Order XXIX. rule 1, dismissing the action for want of prosecution, unless statement of claim be delivered within a week. The plaintiff did not comply with this order, *nor appeal against it*, but on the 22nd of December took out a summons to set aside his appearance in the action." It appears that failing on that summons the plaintiff afterwards on the 1st of January obtained an order from a Master giving further time for delivering statement of claim, and that that last order was rescinded by a Judge. The plaintiff then appealed against this decision of the Judge. It must be remembered that the order dismissing the action was still standing, and accordingly in giving judgment the Lord Chief Justice says: "I think the learned Judge was right in rescinding this order, which the Master had no jurisdiction to make. If before the expiration of the time limited by the order of the 15th of December, and before the plaintiff fell under the operation of that order, he had obtained an order calling on the defendant to shew cause why the appearance should not be set aside, he might have succeeded upon the merits, but he did not do this while the action was in existence. Therefore before he could make good any ground against the defendant's right to appear, the plaintiff himself ceased to have any right to go on with his action." With every word of this I entirely concur. Then my brother Manisty puts his finger on the very point which from the first I thought distinguished that case from the present one. He says: "The mistake made by the plaintiff was in not including in his summons to set aside the appearance a summons to set aside the order of the 15th of December. As he did not do this, the latter took effect, and I think the learned Judge at chambers was quite right in holding that the Master had after that no jurisdiction to make the order which he assumed to make on the 1st of January."

The case of *Wallis v. Hepburn* (2) was

exactly the same as *Whistler v. Hancock* (1), and was one in which the plaintiff attempted to extend the time for taking a step in the action whilst the order dismissing the action was in force. Neither of those cases conflicts with what we are now deciding; but, on the contrary, they both strongly shew that the learned Judges who decided them would in such a case as the present one decide as we are now deciding. Here there is an order made by a Master affecting the plaintiff. It is true it is an order dismissing the action, but it is nevertheless an order within the meaning of rule 4 of Order LIV., and consequently the plaintiff, being a person affected by such order, may appeal therefrom. Within what time? Why "within four days after the decision complained of, or such further time as may be allowed by a Judge or Master." To make that rule conclusive against the plaintiff in the way contended for on behalf of the defendant there must be added to it these words, "except where the order sought to be appealed from is an order dismissing the action, and the four days have elapsed." I decline to insert any such words. Then Order LVII. rule 6, states that "A Court or a Judge shall have power to enlarge" the time "for doing any act or taking any proceeding upon such terms (if any) as the justice of the case may require," and that may be done "although the application for the same is not made until after the expiration of the time appointed or allowed." It has been urged on the part of the defendant that at the time of the application to extend the time for answering the interrogatories there never was any intention to appeal against the order. No doubt there was not, and if the defendant had not taken advantage of the slip made by the clerk to the plaintiff's solicitor, no appeal would have been sought. But for that very reason, where there has been an attempt to do injustice it would be a proper case within Order LVII. rule 6, for enlarging the time. An additional reason for applying that rule to this case is that by so doing we shall be assimilating the practice to what it was before the Judicature Act, when a judgment, though regularly signed, could always have been

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set aside on such terms as the Court thought just. At all events the present case comes within Order LVII. rule 6, and I see no reason why the time for appealing against the order of the 26th of March should not be enlarged, and I decline to put any limiting words which should exclude orders dismissing actions from the power of enlarging the time of appealing from them. With regard to the merits I say nothing. The Judges of the Court of Appeal in the cases of *The International Financial Society v. The City of Moscow Gas Company* (4) and *Krehl v. Burrell* (5), to which we have been referred, do not limit the discretion of the Court, but only lay down certain rules for guiding the Court in the exercise of that power. The only point which remains for me to notice is that this is a consolidation action. The difficulty in the way of Mr. Willis was the form of the order of the 26th of March, because if that was made in both actions it was plainly wrong as regards the first action, since in that action the plaintiff was in no way in fault, and therefore Mr. Willis was obliged to contend that the actions had been consolidated into one action. There is, however, no authority for shewing that the Court has any power to extinguish an action and to create another, but the defendant himself got the order in the second action, and treated the two actions as separately existing, for he got the first struck out. I am of opinion, for the reasons I have given, that this order of my brother Denman refusing to extend the time for appealing, on the ground that he had no jurisdiction, was wrong. The matter must now go back to the Master to be decided on its merits.

GROVE, J.—I am of the same opinion. I have nothing to add to what my Lord has stated with regard to *Whistler v. Hancock* (1). There there was an attempt to take a step in an action when that action was gone, which is very different from the question whether a party should be allowed to appeal against an order dismissing his action. The difficulty in this case was in saying when there should be no appeal, at what time would the order dismissing the action be absolutely final. Suppose the order said that the

action should be now dismissed, could there be no appeal? or when did the action become dead? The answer according to Order LIV. rule 4, was that there were four days after the order within which the plaintiff might appeal, but if so, why should it be said that after those four days it became final and there could be no appeal, if a Court or Judge thought fit to grant further time? Order LIV. rule 4, states four days "or such further time as may be allowed by a Judge or Master," and Order LVII. rule 6, enables a Court or Judge to extend the time after the time allowed has expired. Then why should a different rule prevail respecting an order dismissing an action than in the case of any other order? Mr. Willis failed to shew any reason why there should be a different rule, and I do not see why such an order should stand on a different ground from any other order. Then the next question is, whether there has been shewn sufficient reason in this case to induce us to extend the time. I think there has, first, because the clerk of the plaintiff's solicitor was told that no advantage would be taken of the mistake he had committed in being too late on the Saturday to take out the summons—for if advantage had not been taken of this the Master would have granted a day or two longer to answer the interrogatories, and so there has been a miscarriage—and, secondly, because the order dismissing the action was drawn up in this form, namely, "that this action be dismissed," leaving it uncertain whether it meant both actions or which action. The defendant treated it as meaning both actions, for he thereby got rid of both actions. Now the first action was perfectly regular, and therefore if the order dismissed both actions it was clearly wrong, and there ought to be power to appeal against it. We do not, however, now decide the appeal. We only give time to appeal, and I think that there is ample reason why we should in the exercise of our discretion give time to appeal.

LOPES, J.—For some time I have been unable to distinguish this case from that of *Whistler v. Hancock* (1), although I have had every desire to do so, as the

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merits of the present case are with the plaintiff. Upon looking more carefully into *Whistler v. Hancock* (1) I think there is a difference between that case and the present; there the order sought for was an extension of time for delivering a statement of claim after the action had been dismissed, while here it is an application to extend the time for appealing, and I think that it comes within Order LIV. rule 4 and Order LVII. rule 6, and therefore the decision of my brother Denman was wrong.

*Rule absolute accordingly.*

Solicitors—Billing & Kent, for plaintiff;  
Rooks & Co., for defendant.

*Cur. v. Stubbs 50 L.J. 2167.*

[IN THE QUEEN'S BENCH DIVISION.]

1879.	}	KING v. DAVENPORT.
May 30.		
June 11.		

*Practice—Default of Pleading—Order dismissing Action in Default of Delivery of Statement of Claim within a Specified Time—Consent of Parties—Judicature Act, 1875, Order XXIX. r. 1.*

*An order was made on the 6th of May, dismissing an action for want of prosecution, unless the plaintiff delivered his statement of claim within fourteen days, which expired on the 20th of May. On the 19th of May the plaintiff took out a summons to extend the time, but the summons was not served on the defendant until the 20th of May, the day on which it was made returnable, when it was agreed in writing between the parties that it should be adjourned till noon the following day. Accordingly, the summons came on for hearing before a Master on the 21st of May, and an order was made extending the time for delivery of the statement of claim:—Held, that the order made on the 6th of May could not be enlarged by the mere consent of the parties, that the action was dead,*

*and that the Master, therefore, had no jurisdiction upon a subsequent application to grant the plaintiff further time for delivering a statement of claim.*

This was an appeal from an order of Pollock, B., made at chambers, reversing an order made by a Master, on the 21st of May, giving further time to the plaintiff to deliver his statement of claim in an action.

The writ in the action was issued on the 12th of March, and appearance was entered on the 20th of March. On the 1st of May the time expired for the delivery of the statement of claim, and, on the 5th of May, the defendant took out a summons (under Order XXIX. rule 1) to have the action dismissed for want of prosecution. On the 6th of May an order was made dismissing the action unless a statement of claim should be delivered within fourteen days. On the 19th of May the plaintiff took out a summons to have the time extended, but owing to the fault of a clerk the summons was not served on the defendant until the following day. On the 20th of May, the day on which the summons was returnable, such summons was by the written consent of both parties adjourned till the following day at noon. On the 21st of May the summons was heard by a Master, and an order made that the plaintiff should have seven days peremptory to deliver his statement of claim. Pollock, B., reversed the decision of the Master.

*Winch*, for the plaintiff.—The Master had jurisdiction to make the order of the 21st of May. *Whistler v. Hancock* (1) is distinguishable, for here the plaintiff had till the 20th of May to deliver his statement of claim, and the summons to extend the time was taken out before the expiration of the time limited by the order of the 6th of May. The defendant consented in writing that the summons should not be heard until the 21st of May, and such consent was sufficient to extend the time of the first order for another day—*Ambrose v. Evelyn* (2).

(1) 47 Law J. Rep. Q.B. 162; s. c. Law Rep. 3 Q.B. D. 88.

(2) Weekly Notes of the 24th of May.



*King v. Davenport, Q.B.*

*Dickens*, for the defendant.—The Master acted without jurisdiction, inasmuch as the action was dead on the 21st of May, when the further order was made extending the time for the delivery of the statement of claim—*Whistler v. Hancock* (1). The mere consent of the parties could not of itself avail to enlarge the order of the Court.

PER CURIAM (3).—This appeal against the order of Pollock, B., must be dismissed. The action came to an end when the day fixed by the order of the 6th of May expired, and that order could not be enlarged by the mere consent of the parties. The order of the Master, therefore, made on the 21st of May was without jurisdiction, and was properly reversed by the Judge.

*Appeal dismissed.*

Solicitors—Brook & Chapman, for plaintiff;  
A. Diggles, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1879. }  
June 19. } HARGREAVES v. SIMPSON.

*Corrupt Practices (Municipal Elections) Act, 1872* (35 & 36 Vict. c. 60), sec. 3—*Treating—Refreshment to Voters—Municipal Election—Corrupt Practices Prevention Act, 1854* (17 & 18 Vict. c. 102), sec. 23.

*The Corrupt Practices (Municipal Elections) Act, 1872, incorporates the provisions of section 23 of 17 & 18 Vict. c. 102, and makes it an offence to give refreshment to voters at a municipal election.*

In this case a rule *nisi* had been obtained calling on the County Court Judge of Cumberland and the defendant to shew cause why the County Court Judge should not proceed to hear and determine eight complaints brought by the

plaintiff against the defendant in the County Court. In each of the complaints, the plaintiff sued for a penalty of forty shillings, for illegal treating by the defendant at a municipal election. The proceedings were taken under the Corrupt Practices Prevention Act, 1854 (17 & 18 Vict. c. 102), sec. 23, but the County Court Judge thought that he had no jurisdiction to hear the case, being of opinion that the Act was not applicable to municipal elections, notwithstanding the provisions contained in 35 & 36 Vict. c. 60. sec. 3.

*Day and Tennant* shewed cause.—The provisions of the 23rd section of the Corrupt Practices Prevention Act, 1854 (17 & 18 Vict. c. 102), are not applicable to municipal elections. By the Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 72), sec. 3, "the offences of bribery, treating, undue influence and personation shall be deemed to be corrupt practices at an election for the purposes of this Act. The terms "bribery," "treating," "undue influence" and "personation" shall respectively include anything committed or done before, at, after or with respect to an election, which if done before, at, after or with respect to an election of members to serve in Parliament, would render the person committing or doing the same liable to any penalties, punishments or disqualifications for bribery, treating, undue influence or personation, as the case may be, under any Act for the time being in force with respect to election of members to serve in Parliament." The terms "bribery," "treating" and "undue influence" are respectively defined in 17 & 18 Vict. c. 102. sect. 4. sub-sect. 3, 4 & 5; and "treating" is an offence which can only be committed by a candidate, and which renders him liable to a penalty of 50*l*. The 23rd section of the same Act enacts that "the giving or causing to be given to any voter on the day of nomination or day of polling, on account of such voter having polled or being about to poll, any meat, drink or entertainment, by way of refreshment, or any money or ticket to enable such voter to obtain refreshment,

(3) Cockburn, L.C.J., and Mellor, J.

*Hargreaves v. Simpson, Q.B.*

shall be deemed an illegal act, and the person so offending shall forfeit the sum of forty shillings for each offence to any person who shall sue for the same, together with full costs of suit." But this provision is entirely distinct from treating as defined in section 4; it extends to all persons, is quite independent of a corrupt motive, and the penalty is only forty shillings. The term "treating," as used in 35 & 36 Vict. c. 60. sect. 3, relates only to treating as defined by 17 & 18 Vict. c. 102. sect. 4, and consequently the 23rd section of the latter Act has no application to a municipal election.

*Hunter* supported the rule.—The Legislature intended that the same law, which governed parliamentary elections with reference to corrupt practices, should apply also to municipal elections. It is quite true that the doing of certain things may be an offence independently of a corrupt motive, but the title of the Act of 1854 shews what the object of the Act was. If the contention on the other side is allowed, there can be no penalty at all for treating at a municipal election unless it be by a candidate.

COCKBURN, L.C.J.—I think that this rule must be made absolute. It seems to me, having regard to the general scope of the Corrupt Practices (Municipal Elections) Act, 1872, that it was intended to embrace the 23rd section of the Act of 1854 relating to parliamentary elections. It is true that the offence created by section 23 is not in terms called a "corrupt practice" or "treating," but I think that the object of the Legislature was to consider it as such, though certainly it is not so serious an offence as it would be if it came within the provisions of section 4. I cannot bring myself to believe that the Legislature could ever have intended that an offence under section 23 at a parliamentary election could be less an offence with regard to a municipal election. Accordingly I think the County Court Judge was wrong in refusing to hear the case.

LUSH, J.—I think it is clear that, under the Act of 1872, municipal elections were intended to be put on the same footing as

parliamentary elections. The only question therefore for us is whether the Legislature have used words sufficiently explicit to give effect to their intention. I think that they have, and that this case ought to go back to be heard by the County Court Judge.

MANISTY, J.—I am of the same opinion.

*Rule absolute.*

Solicitors—J. R. Tindale, agent for T. Johnson, Carlisle, for plaintiff; Sharpe & Ullithorne, agents for E. & E. L. Hough, Carlisle, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1879. } MELLOR (*appellant*) v. DEN-  
March 26, 29. } HAM (*respondent*).

*Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 74—Factory, Education of Children employed in—Bye-laws of School Board compelling Attendance.*

[For the report of the above case, see 48 Law J. Rep. M.C. 113.]

[IN THE QUEEN'S BENCH DIVISION.]

1879. { THE SCHOOL BOARD FOR LONDON  
May 7. { (*appellants*) v. HARVEY (*respondent*).

*Elementary Education—39 & 40 Vict. c. 79. s. 12. sub-sect. 2—Attendance Order—Non-compliance, Second Case of—Previous Conviction for Non-compliance—Evidence—34 & 35 Vict. c. 112. s. 18.*

[For the report of the above case, see 48 Law J. Rep. M.C. 130.]

[IN THE QUEEN'S BENCH DIVISION AND  
IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1879.

Feb. 27, 28.

March 8.

April 23, 24,

25, 26, 27,

28, 29, 30.

May 30.

THE QUEEN v. THE BISHOP  
OF OXFORD.

*Church Discipline Act (3 & 4 Vict. c. 86), s. 3—Meaning of the Words "It shall be lawful"—Obligation on Bishop to issue a Commission or to send the case to the Provincial Court—Complaint by Parishioner against Clerk for alleged Ecclesiastical Offence—Writ of Mandamus—Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85).*

*A parishioner of the parish of O. made a complaint to the Bishop, under the Church Discipline Act (3 & 4 Vict. c. 86. s. 3), in respect of offences committed by the rector of the parish against the laws ecclesiastical. By 3 & 4 Vict. c. 86. s. 3, it is provided that, "in every case of any clerk in Holy Orders who may be charged with any offence against the laws ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the said laws, it shall be lawful for the Bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or if he shall think fit of his own mere motion to issue a commission . . . for the purpose of making inquiry as to the grounds of such charge or report." By section 13 it is further provided that "it shall be lawful for the Bishop, if he think fit," to send the case, by letters of request, to the Court of Appeal of the province, there to be heard and determined. The Bishop declined to issue a commission or to send the case to the Provincial Court, not on the ground that the matters complained of were not offences against the ecclesiastical law or were of too unsubstantial a character to call for inquiry, but on the ground that the rector was of advanced age, and that the complaint was made in opposition to the expressed wishes*

*of the great majority of the parishioners. A writ of mandamus was then applied for, directed to the Bishop, commanding him to issue a commission to inquire into the matter of the complaint, or to send the case to the Provincial Court by letters of request:—Held, by the Queen's Bench Division, that the rule for the mandamus must be made absolute, inasmuch as the words "it shall be lawful," in 3 & 4 Vict. c. 86. s. 3, imposed a duty which required the exercise of the power in the circumstances contemplated by the statute.*

*The refusal of the Bishop was founded not on the nature of the complaint or on the right of the applicant to seek redress, it being admitted that there had been such a substantial departure by the rector from the established ritual as amounted to an offence against the ecclesiastical law:—Held further, that, under these circumstances, the Court ought not, in the exercise of its discretion, to refuse to issue the writ.*

*Held, by the Court of Appeal reversing the decision of the Queen's Bench Division, that the words "it shall be lawful" are in this section permissive, not compulsory, and confer on the Bishop a discretion, so that he can, under section 3 of 3 & 4 Vict. c. 86, refuse to allow any proceedings to be instituted against a clerk who has offended against the laws ecclesiastical.*

*Under the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), which applies also to offences such as formed the subject matter of the complaint by the applicant, there is no provision for the summoning of a commission of inquiry, but three parishioners can set the Bishop in motion, who then has an arbitrary discretion to determine whether the suit shall proceed or not. It is further provided by section 18 that, where sentence has been pronounced against an incumbent for an offence under 3 & 4 Vict. c. 86, he shall not also be proceeded against under the later Act, and vice versa:—Held, by the Queen's Bench Division, and by the Court of Appeal affirming the decision of the Queen's Bench Division, that the Public Worship Regulation Act, 1874, does not repeal the earlier statute and does not preclude a promoter from applying to the Bishop to take proceedings under it; for that the Public*

*The Queen v. The Bishop of Oxford (App.), Q.B.*

*Worship Regulation Act was intended to provide a more expeditious and a more simple procedure in criminal ecclesiastical suits.*

*Judgment of WIGHTMAN, J., in The Queen v. The Bishop of Chichester (29 Law J. Rep. Q.B. 23), approved and followed.*

This was an application by Dr. Julius, a parishioner of Clewer, a parish in the diocese of Oxford, for a mandamus to the Bishop of Oxford commanding him to issue a commission, under 3 & 4 Vict. c. 86 (1), to enquire into a complaint against the Rev. T. Carter, the rector of the parish, which charged him with the adoption of illegal practices in the celebration of the Holy Communion, and with the use of unauthorised vestments, or to send the case by letters of request to the Provincial Court.

The complainant applied to the Bishop to issue the commission on the 11th of July, 1878, and on the 10th of August

(1) By 3 & 4 Vict. c. 86, the Church Discipline Act, section 3, it is enacted,—

"That in every case of any clerk in Holy Orders of the United Church of England and Ireland who may be charged with any offence against the laws ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the said laws, it shall be lawful for the Bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or if he shall think fit of his own mere motion, to issue a commission under his hand and seal to five persons, of whom one shall be his vicar-general, or an archdeacon or rural dean within the diocese, for the purpose of making inquiry as to the grounds of such charge or report, provided always that notice of the intention to issue such commission under the hand of the Bishop, containing an intimation of the nature of the offence, together with the names, condition and residence of the party on whose application or motion such commission shall be about to issue, shall be sent by the Bishop to the party accused fourteen days at least before such commission shall issue."

By section 13 the Bishop of the diocese within which the accused clerk holds preferment, or if he hold no preferment, then the Bishop of the diocese within which the offence is alleged to have been committed, is empowered "in any case if he shall think fit either in the first instance or after the Commissioners shall have reported . . . to send the case by letters of request to the Court of Appeal of the province . . ."

his solicitors received the following letter from the Bishop :—

"Gentlemen,—In reply to your letter, I can only say that I have not yet been able to satisfy myself as to the best way of dealing with the complaint to which it refers. The repeated occurrence of failures during the last few years in the conduct of legal proceedings of this kind has had a tendency to cover all persons concerned in them with ridicule, and to bring on the Church itself some contempt which I would not willingly increase. In this case I have further to consider that the complaint is made in opposition to the strongly expressed wish of the great majority of the parishioners, and that the person complained of is a clergyman in advanced years, generally respected and even beloved by those who know him. I mention these considerations not as affording an answer to your client's complaint, but as reasons which impose on me the duty of taking unusual care in deciding on the course which I ought to adopt."

Application was again made to the Bishop on the 22nd of October, when he replied that while certain appeals were pending in the Queen's Bench Division, he "was unwilling to add to the large amount of costly and abortive litigation from which the Church has already suffered so much discredit."

On a further application being made on the 12th of November, 1878, the Bishop referred the complainant to his last letter.

The complainant then applied to the Queen's Bench Division for a rule for a mandamus.

A rule *nisi* having been granted,

The Bishop of Oxford appeared to shew cause in person.—The question turns upon the construction to be placed on the 3rd section of the Church Discipline Act. I contend that the words of this section do not take away the discretion of the Ordinary as to permitting or refusing his office to be promoted.—*Phillimore's Ecclesiastical Law*, p. 1320. The words, "it shall be lawful for the Bishop, on the application of any party complaining, or, if he shall think fit, on his own mere motion, to issue a commission," mean

*The Queen v. The Bishop of Oxford (App.), Q.B.*

that a Bishop might do it on his own mere motion without an application, and that he *might* do it on an application. The third section was simply intended to confer a power to be exercised at discretion and not to impose a duty; the natural grammatical meaning is that the Bishop is to be at liberty to issue the commission in either of the two cases. The identical question came before this Court in 1859 in *The Queen v. The Bishop of Winchester* (2). In that case the Court refused to entertain the application for a mandamus, and though it was refused by two Judges on another ground, Wightman, J., was of opinion that there was a discretionary power in the Bishop as to the issuing a commission of enquiry. In *Bennett's Case* (3) Lush, J., expressed his concurrence with the view taken by Wightman, J., in the *Bishop of Winchester's Case* (2), that the Bishop had a discretion to grant or refuse the commission. Lush, J., there said, "We think we ought not to compel the Bishop to institute proceedings in this matter when he, in the exercise of his discretion, has arrived at the conclusion that he ought not to do so;" and again, "We think we ought not to force the Bishop to exercise a jurisdiction which he, in the exercise of a mature judgment, thought he ought not to exercise and refused to exercise." The effect, therefore, of the decision was that the Bishop had a discretion and ought not to be interfered with in the exercise of it. Then again, in the case of *Ex parte Edwards* (4) Selborne, L.C.—"The statute has imposed upon the Bishop the duty of issuing a commission on any case which he might consider a proper case. . . . Doubtless it was for him to exercise a discretion whether he will or will not issue the commission when he had received the application." The clear effect of these decisions is to establish that the Bishop has a discretion. If the contention of the applicants is well founded, the practical result would be to compel the Bishop to issue his commission in any

case of scandal or ill-report, however ill-grounded it might appear to him to be.

[COCKBURN, L.C.J.—The clause might mean that if there was an application on a *prima facie* case the Bishop would be bound to issue a commission; but that in acting of his own mere motion he must exercise his discretion.]

If the Bishop has no alternative but to issue the commission it will be in the power of every idle or vindictive person in a parish to institute proceedings, and the Bishop would be powerless though he might see it was all vindictiveness, and the matter of complaint was merely taken advantage of.

[COCKBURN, L.C.J.—If a Bishop had a discretion to refuse the commission, there might be one state of things in one diocese and a different state of things in another.]

On the other hand, he might have a whole diocese distracted with quarrels and suits. No doubt there are inconveniences in both views, but the Legislature has, I submit, placed a discretion in the Bishop in the belief that it would be exercised wisely. The Act is not confined to ritual excesses, but would equally apply to any case of ecclesiastical delinquency, a scandal however slight, e.g. a young clergyman at a cricket match or some festive occasion overtaken by inebriety, and so causing a scandal.

Again, the Church Discipline Act (3 & 4 Vict. c. 86) has been virtually abrogated by the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), which is *in pari materia* as regards offences relating to ritual, and inconsistent with the former Act. The Public Worship Regulation Act, 1874, entitled an Act for the better administration of the laws respecting the regulation of public worship, requires the concurrence of three parishioners, or in the case of cathedral or collegiate churches, three inhabitants of the diocese, and places an absolute discretion in the hands of the Bishop, and makes him the sole person who shall determine whether or not the suit is to proceed. See 37 & 38 Vict. c. 85. s. 8. [His Lordship also contended that if he had a discretion he had not exercised his discretion willingly.]

(2) 2 E. & E. 209; s. c. 29 Law J. Rep. Q.B. 23.

(3) Shaw's Special Report, 1869.

(4) 43 Law J. Rep. Chanc. 350; s. c. Law Rep. 9 Chanc. 138.

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A. Charles and Phillimore appeared to argue for the Rector of Clewer.

[COCKBURN, L.C.J.—What is your *locus standi*? No commission has yet issued, and the Rector of Clewer is therefore not a party to the proceeding.]

If the commission issues on the ground that there is a *prima facie* case, and the report is to that effect, then the proceedings must go on, and there must be a prosecution instituted. The rector, therefore, has a *locus standi* to oppose the mandamus to issue the commission, as no subsequent opportunity of opposition would be afforded him.

[COCKBURN, L.C.J.—The Court are willing that counsel should be heard on behalf of the rector, inasmuch as the practice appears to be unsettled, but it must not be understood that this permission is *ex debito justitiæ*.]

A. Charles and Phillimore then argued for the rector.—Under the old law there was a discretion as to instituting criminal suits against clergymen, that is to say, a discretion to enquire whether it was a proper case to be tried—*Ray v. Sherwood* (5). Again, in *Elphinstone v. Purchas* (6) the Judicial Committee of the Privy Council, after referring to *Sherwood v. Ray* (5), said that the office of the Judge could not be promoted *ex debito justitiæ*. See also *The Duke of Portland v. Bingham* (7), where Sir W. Stowell said that a criminal suit could only be instituted by leave of the Court.

[MANISTY, J.—How does that shew that if a proper case be made out he would not have been bound to allow it?]

It shews the settled practice of the Court that the Judge was to exercise his discretion.

[COCKBURN, L.C.J.—In *Sherwood v. Ray* (5) Sir Herbert Jenner said, "Any person may promote the criminal suit, all persons having an interest in putting a stop to a public scandal."]

That is not disputed; still, there was a discretion in the Judge, and if he exer-

cised it erroneously nothing further could be done. *Sherwood v. Ray* (5) was the last authority upon the subject before the Church Discipline Act was passed, and the last-mentioned Act must be understood to have been passed with reference to the practice as decided in *Sherwood v. Ray* (5).

[COCKBURN, L.C.J.—*Prima facie* the words "it shall be lawful" mean "he must," and it lies on the defendant to shew that they have not that meaning in the 3rd section of the Church Discipline Act.]

It is contended that the practice in vogue prior to the passing of the Act shews that the words "it shall be lawful" have, in the present instance, a meaning merely permissive, and not compulsory or obligatory. For the purpose of enquiry the Bishop is a judicial officer, and if he comes to the conclusion that the suit is not a proper one to be instituted, it is not a fit subject for a *mandamus*. The application is not to compel the Bishop to exercise his discretion, but to exercise it in one of two specified ways.

Again, the present case is really governed by *The Queen v. The Bishop of Chichester* (2), where it was expressly decided that the 3rd section of the Church Discipline Act simply confers a power to be exercised at discretion. That case was argued in this Court before four Judges, namely, Lord Campbell, Wightman, J., Erle, J., and Hill, J.; two of the Judges only gave judgment, namely, Wightman, J., and Hill, J., and discharged the rule for a *mandamus*, the *ratio decidendi* of Wightman, J., being on the express ground (in which it would appear Lord Campbell and Erle, J., concurred) that this section conferred a discretionary power, which could not be controlled by *mandamus*.—See *Ohitty's Statutes*, vol. i. p. 573, note b, and head note to Law Journal Report. In *Re Newport Bridge* (8) Crompton, J., affirms the judgment of Wightman, J., as also did Lush, J., during the argument of the *Bennett Case* (3) before the Court in 1869.

(5) 1 Curt. 193; s. c. *nomine Sherwood v. Ray*, 1 Moo. P.C. 353.

(6) 39 Law J. Rep. Eccles. 28, and 124; s. c. Law Rep. 3 Adm. & Eccles. 66, and Law Rep. 3 P.C. 245.

(7) 1 Hagg. Consist. 157.

(8) 2 E. & E. 377; s. c. 29 Law J. Rep. M.C. 52.

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[COCKBURN, L.C.J.—In the *Bennett Case* (8) there was another proceeding already pending, and it was on that ground that this Court declined to interfere.]

Again, the Public Worship Regulation Act, 1874, has repealed the older statute under which this application is made, and has provided a special course of proceeding for such cases, requiring the concurrence of three parishioners, superseding the commission of enquiry, and giving, as is admitted, an absolute discretion to the Bishop. It cannot have been the intention of the Legislature that both statutes should remain in full force, and that while the later Act gives the Bishop an absolute discretion to determine whether a suit should proceed, it should still be open for any individual under the earlier Act to compel the Bishop to institute proceedings. They also cited and referred to the following authorities—*Ex parte Denison* (9), *Elphinstone v. Purchas* (6), *The Queen v. The Archbishop of Canterbury (Denison's Case)* (10), *Maidman v. Malpas* (11), *The Procurator-General v. Stone* (12), *Orake v. Powell* (13), *The Queen v. The Justices of Cumberland* (14), *Chick v. Ramsdale* (15), *Sheppard v. Bennett* (16).

*Stephens and Jeune*, for the complainant, appeared to support the rule.—It is admitted that there was a *prima facie* case made out against the rector of Clewer, and it must be taken that the facts set forth in the letter of complaint were true, as they were not disputed or denied. The question therefore really is, whether the parishioners had the right to put the law in force to enforce the Act of Uniformity, or whether it was left entirely to the arbitrary and uncontrolled authority of the Bishop. The Act defined the authority of the Bishop, as only an authority

to enquire into the grounds of complaint, and the commission was a mere means of informing his mind as to the foundation for the report. The Ecclesiastical Courts are the Queen's Courts, and no case can be produced in which a criminal complaint has been rejected where the promoter shewed an ecclesiastical offence, gave security for costs and produced proper articles. No doubt, *ex abundanti cautela*, it was necessary that the Court should take care that there was a sufficient charge, and also that the promoter was responsible for costs, and further, that proper articles should be presented; but all these were matters done in open Court and not in private. Again, a clergyman may be prosecuted by anyone for violation or neglect of duty—*Stone's Case* (12), *Carr v. Marsh* (17). The commission is the only means of enquiring whether there were grounds for instituting a charge, and here the Bishop has refused to issue a commission in a case in which a serious breach of the law ecclesiastical has been shewn.

[COCKBURN, L.C.J.—Suppose the Bishop, in the honest exercise of his discretion, comes to the conclusion that the facts do not constitute a *prima facie* case, is he bound to issue a commission?]

Probably not, but that does not arise here.

[COCKBURN, L.C.J.—But suppose the Bishop thinks the promoter is actuated by sinister motives only?]

That is a matter which the Bishop has no power to enquire into. If the complaint accurately describes an offence against the laws ecclesiastical, and the promoter is able to give proper security, the commission must be issued.

The other side have relied on the *Chichester Case* (2) as being an opinion on the express point, and shewing that the Bishop has an absolute discretion. No doubt *Wightman, J.*, did so hold, and stated that *Lord Campbell* and *Lord Chief Justice Erle* concurred in discharging the rule. Still he omits to state on what grounds they concurred, which is an important matter, inasmuch as *Hill, J.*, differed altogether from *Wightman, J.*,

(9) 4 E. & B. 292; s. c. 24 Law J. Rep. Q.B. 34.

(10) 6 E. & B. 546; s. c. 25 Law J. Rep. Q.B. 346.

(11) 1 Hag. Cons. 205.

(12) 1 Hag. Cons. 424.

(13) 2 E. & B. 210; s. c. 21 Law J. Rep. Q.B. 183.

(14) 1 M. & S. 190.

(15) 1 Curt. 34.

(16) 38 Law J. Rep. Eccles. 42; s. c. Law Rep. 3 Ad. & Ecc. 167.

(17) 2 Phill. 198.

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as to the grounds for discharging the rule. Moreover, it appears from the short-hand notes in *Sheppard v. Phillimore* (18), before the Judicial Committee, that although Sir William Erle concurred in the conclusion arrived at, to refuse the application, he did not adopt all the opinions expressed by Wightman, J., on the question.

[COCKBURN, L.C.J.—Sir William Erle has written to me to the same effect.]

It is said also that the view adopted by Wightman, J., was approved by Lush, J., in the case of Mr. Bennett, where a *mandamus* was applied for against the Bishop of London. The point, however, did not directly arise, the rule being discharged on other grounds, and though Lush, J., certainly did, during the argument as well as in his judgment, make remarks which tended to shew that he concurred in the view taken by Wightman, J., in *The Queen v. The Bishop of Winchester* (2), he did so, it is submitted, under the false impression that the same opinion had been expressed by Lord Campbell, J., and Lord Chief Justice Erle. The words "it shall be lawful" in statutes relating to the administration of justice primarily import a duty which is obligatory, and the result of holding them to be permissive would lead to different practice in the different dioceses.

Lastly, the Church Discipline Act is not repealed by the Public Worship Regulation Act. Had the Legislature intended by the latter Act to supersede the provisions contained in the Church Discipline Act with reference to the institution of proceedings for ecclesiastical offences, nothing would have been easier than to have said so; whereas section 5 of the Public Worship Act expressly says that "nothing in this Act contained shall, except as herein expressly provided, be construed to affect or repeal any jurisdiction which may now be in force for the due administration of ecclesiastical law."—See also section 18 securing incumbents from penalties of the Act where sentence has been pronounced under 3 & 4 Vict. c. 86. s. 3.

[FIELD, J.—Under the Public Worship

Regulation Act the Bishop has a discretion to stop the proceedings. Why should he not have a similar power under the Church Discipline Act?]

Because the Public Worship Regulation Act dispenses with the commission which is required under the Church Discipline Act. Moreover, the later Act was intended to give a more speedy and summary remedy, and required no formal pleadings and no preliminary enquiry. The Legislature gave a discretionary power to the Bishop, but required him to state his reasons.

*Our. adv. vult.*

The judgment of the Court (19) was (on March 8) delivered by

COCKBURN, L.C.J.—This was an application for a writ of *mandamus* to the Lord Bishop of Oxford directing him to issue a commission, under the 3rd and 4th Vict. c. 86, to inquire into the matter of a complaint of Frederick G. Julius, Doctor of Medicine, a parishioner of the parish of Clewer, in the county of Berks, and a member of the Church of England, against the Rev. Thomas Thellusson Carter, rector of the said parish, for offences against the laws ecclesiastical in respect of unauthorised deviations from the ritual of the Church in the Communion Service and the use of unauthorised vestments. The complaint was in due form; and, looking to the law as laid down in the decisions of the Judicial Committee of the Privy Council, it must be taken that the instances of alleged departure from the established ritual set forth in the complaint were offences against the ecclesiastical law, and, therefore, within the statute. The Bishop has declined, however, to issue the commission as required, assigning as a reason, not that the matters complained of were not offences against the ecclesiastical law or were of too unsubstantial and trivial a character to call for inquiry, but resting his refusal on the ground that the repeated failures which had occurred during the last few years in legal proceedings of this kind had had a tendency to cover those concerned in them with ridicule

(18) 38 Law J. Rep. Eccles. 42 & 49; s. c. Law Rep. 2 P.C. 450.

(19) Cockburn, L.C.J.; Field, J.; and Manisty, J.



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and to bring the Church itself into contempt, as well as on the advanced age of the incumbent, the respect and love in which he was held, and the fact that the complaint was made in opposition to the expressed wish of the great majority of the parishioners.

The writ of mandamus being applied for under these circumstances, three questions present themselves—First. Assuming the Church Discipline Act, 3 & 4 Vict. c. 86, the statute upon which this application is founded, to be still in force in such a case, is it obligatory on the Bishop, as a matter of statutory duty, to issue a commission as prayed for, with the alternative of sending the cause to the Court of Arches in the first instance; or is it in his discretion to refuse to institute any further proceeding? Second. Is the Act in question still in force, or has it been superseded by the Public Worship Regulation Act of 1874? Third. If the Church Discipline Act is still in force and applicable to the present case and the exercise of the power conferred by the statute is obligatory on the Bishop, is the present case one in which this Court should exercise the discretion which it possesses in the matter of mandamus and refuse the writ? With a view to these questions, it becomes necessary in the first place carefully to consider the Church Discipline Act under which this application is made, not only with reference to the third section, on which the application is immediately founded, but also with reference to the general scope and purpose of the statute. The 3rd and 4th Vict. c. 86, superseding the former modes and proceeding against clerks in orders, in section 3, enacts that “in every case of any clerk in Holy Orders of the United Church of England and Ireland who may be charged with any offence against the laws ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the said laws, it shall be lawful for the Bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or if he shall think fit of his own mere motion, to issue a commission under his

hand and seal to five persons, of whom one shall be the vicar-general or an arch-deacon or rural dean within the diocese, for the purpose of making inquiry as to the grounds of such charge or report.” The commissioners so appointed are to examine witnesses on oath for the purpose of “ascertaining whether there be sufficient *prima facie* ground for instituting further proceedings.” Having taken the evidence, the commissioners are to transmit the depositions of the witnesses to the Bishop, and to report to him whether in the opinion of the majority there is sufficient *prima facie* ground for further proceeding. If the commissioners report that there is sufficient *prima facie* ground for further proceeding, and if the Bishop or the party complaining shall thereupon think fit to proceed against the party accused, articles are to be drawn up, which, with the depositions, are to be filed in the registry of the diocese. The Bishop is then to cite the party accused to appear to make answer to the articles. If he appears and admits the truth of the articles, the Bishop or his commissary specially appointed for the purpose is to pronounce sentence according to ecclesiastical law. If the party fails to appear, or, appearing, makes any other answer than an unqualified admission of the truth of the articles, the Bishop is to proceed to hear the cause with the assistance of three assessors specially qualified by the Act, and, having heard the cause, is to determine the same and pronounce sentence thereupon according to the ecclesiastical law. There is, however, a special provision that before issuing the commission, or after the report of the commissioners, provided it be before the filing of the articles, “it shall be lawful for the Bishop, if he shall think fit,” to send the case by letters of request to the Court of Appeal of the province, there to be heard and determined.

Such being the method of proceeding provided by this statute, the first question which presents itself is whether the enactment in the 3rd section, which says that on a complaint against a clerk in orders of an offence against the ecclesiastical law, “it shall be lawful” for the

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Bishop to issue a commission of inquiry, simply confers a power to be exercised at discretion, or imposes a duty which requires the exercise of the power in the circumstances contemplated by the statute. It is said that the question is settled by authority, there having been a decision of this Court to the effect that the Act simply confers a power to be exercised at discretion, in the case of *The Queen v. The Bishop of Winchester* (2). But when that case comes to be looked at it appears extremely doubtful whether such was the ground of the decision of the majority of the Court. The argument on the rule having been heard before Lord Campbell, Mr. Justice Wightman, Mr. Justice Erle, and Mr. Justice Hill, before judgment was delivered, Lord Campbell had become Lord Chancellor, and Mr. Justice Erle had become Chief Justice of the Common Pleas; for which reason the only judgments delivered were those of Mr. Justice Wightman and Mr. Justice Hill, who, while they concurred in discharging the rule for a mandamus, proceeded on different grounds, Mr. Justice Wightman no doubt expressly holding that the Bishop had a discretionary authority which could not be controlled by mandamus, while Mr. Justice Hill, declining to act on this view, concurred in discharging the rule solely on the ground that the applicant not being a parishioner, and therefore not interested in the performance of the service in the church in question, the case was not one in which the Court, having a discretionary authority in the matter of mandamus, ought to issue the writ. It is true that Mr. Justice Wightman at the close of his judgment adds that Lord Campbell and Lord Chief Justice Erle concurred in thinking that the rule should be discharged; but he does not say on which of the two grounds they so concurred, which makes it, to say the least, extremely doubtful whether it was in concurrence with his own view; for there being a difference of opinion between himself and Mr. Justice Hill, had his own view been borne out by the opinion of the other two Judges, or either of them, it may reasonably be inferred that he would have said so.

It also appears from the statement of Dr. Stephens, derived from his own recollection of what occurred in the case of *Sheppard v. Phillimore* (18), before the Judicial Committee of the Privy Council, and which is fully borne out by the shorthand notes, that in the latter case Sir William Erle disclaimed having acted on the ground taken by Mr. Justice Wightman. To which we may add that we have been recently informed by Sir William Erle that he did not authorise Mr. Justice Wightman to say more on his behalf than that he concurred in discharging the rule for a mandamus. It is true that in *The Newport Bridge Case* (8), which occurred in the same year, Mr. Justice Crompton expresses his concurrence in the view taken in the previous case by Mr. Justice Wightman; but it is to be observed that Mr. Justice Crompton had not been a party to the judgment in that case, or to the discussion which had been held upon it.

The same question came again before this Court, in the case of Mr. Bennett, on an application for a mandamus to the Bishop of London, a report of which case has been published, and from which it no doubt appears that a strong intimation was thrown out, in the course of the argument, as well as in giving judgment, by Mr. Justice Lush of concurrence in the view of Mr. Justice Wightman, in the Bishop of Winchester's case, founded mainly, however, on what we cannot but believe to have been a mistake—namely, that Lord Campbell and Lord Chief Justice Erle had concurred in discharging the rule in that case on the ground taken by Mr. Justice Wightman. It became, however, unnecessary to decide as to the construction of the statute in Mr. Bennett's case; and Mr. Justice Lush and the other Judges expressly disclaim all intention of doing so; inasmuch as, there being already a proceeding pending against Mr. Bennett, under a commission issued by the Bishop in respect of similar doctrines contained in a former publication, the Court, in the exercise of its discretion, refused to grant the mandamus as unnecessary and uncalled for.

In this state of uncertainty we feel ourselves at liberty to form our own

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judgment as to the construction to be put on the enactment in question; the more so as, for reasons which will be explained further on, the ground on which the opinion of Mr. Justice Wightman was founded appears to us open to very serious question. The question turns on the true sense of the term, "it shall be lawful" (as used in the 3rd section of the Church Discipline Act)—a term frequently used in statutory language, perhaps, owing to its ambiguity, too frequently, as it is one which admits of no less than three different meanings, in all of which it occurs in this very statute. First, it may be used to confer a right or privilege, to be exercised for the benefit of others or not, at the option of the party to whom it is given; second, it may be used to confer a power or authority, to be exercised for the benefit of himself at the discretion of the party on whom it is conferred; or third, while it confers a power or authority, it may, at the same time, impose the duty of exercising the power or authority so conferred. Besides which the general sense of these words is sometimes restricted by some qualifying expression, such as "if he shall think fit," "if it shall appear to him right," or the like, which plainly indicate that the exercise of the power is to be subject to the discretion of him who is authorised to exercise it. In the absence of any such qualifying expression, the meaning of the words must be sought in the context of the particular enactment, or of the other sections of the statute, or by reference to its general purpose, and the alteration in the existing law which it was intended to effect, as also in certain canons of construction applicable to this and similar expressions in statutes of a particular class.

In the statute before us the term "it shall be lawful" occurs, in the several meanings in which it can thus be used, and in two of them more than once. It is used to confer a right or privilege, to be exercised at the option of the party, in the 4th section, which provides that "it shall be lawful for the party accused, or his agent, to attend the proceedings of the commission, and to examine any of the witnesses;" and again in the 15th

section, which provides that "it shall be lawful for any party who shall think himself aggrieved by a judgment pronounced by the Bishop, or in the Court of Appeal of the province, to appeal from such judgment." It is used in the sense of conferring a discretionary power or authority in the 6th section of the Act, where it is said that where proceedings have been commenced under the Act "it shall be lawful" for the Bishop, the written consent of the clerk accused and of the party complaining having first been obtained, to pronounce sentence without further proceedings. Three instances occur in which the words are used as imposing a duty. Thus, when in section 4 it is said that "it shall be lawful for the commissioners to examine on oath or solemn affirmation, and that such oath or affirmation shall be administered by them to all witnesses who may be tendered to them, either in support of the charge or by the party accused, as well as to all witnesses whom they may deem it necessary to summon, for the purpose of fully prosecuting the inquiry," there can be no doubt that the duty of so examining the witnesses is thereby imposed; and the same observation applies to the use of the same words in section 17, which has reference to the evidence of witnesses and documents in every stage of the inquiry. Equally clear is it that when by section 9 it is provided that, when the commissioners shall have reported that there is sufficient *prima facie* ground for instituting proceedings, "it shall be lawful for the Bishop, by writing under his hand, to require the party to appear, by himself or his agent, to make answer to the articles," a judicial duty is cast upon the Bishop which he has no alternative but to discharge.

Three instances occur in which the effect of these words is restricted by qualifying expressions. Thus, section 13 provides that "if it shall appear to the Bishop that great scandal is likely to arise from the party accused continuing to perform the services of the Church, or that his ministration will be useless while the charge is pending, it shall be lawful for the Bishop to inhibit the clerk from

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performing any service till the sentence shall have been given." It is obvious that the exercise of the power here given must depend on the view taken by the Bishop. So when, in section 13, it is provided that "it shall be lawful" for the Bishop, "if he shall think fit," at any time before articles are filed, instead of hearing and deciding the cause under section 11, "to send the case by letters of request to the Court of Appeal of the province, to be there heard and determined according to the law and practice of that Court," it is plain that this is a discretionary power. It may be material to observe in passing that these instances shew that the framers of this Act were sensible of the necessity, where the authority conferred was intended to be discretionary, of appending words of limitation to the phrase in question. Of this a still more striking instance is to be found in the very section which we are called upon to construe, which, after providing that "it shall be lawful for the Bishop to issue a commission on the application of any party complaining," proceeds to add, "or, if he shall think fit, of his own mere motion." Here the words "if he shall think fit" would appear to have been introduced for the purpose of preventing the preceding words, "it shall be lawful," from precluding the exercise of the discretionary power which in the alternative it was intended to confer on the Bishop.

We now proceed to consider the rules of construction to be applied in determining the sense in which the words "it shall be lawful," in the 3rd section of the Church Discipline Act, are to be taken. In doing this we start with a settled canon of construction, that in statutes of a certain class, of which the statute under consideration is one, these words have acquired a settled meaning, unless controlled by the context of the particular enactment, or by the sense in which they are used in other parts of the statute, or by what, on the purview of the statute, is its apparent purpose; as to the latter of which, the prior state of the law, and the end which the statute was intended to effect, may no doubt have to be considered. Whether or not these words

are to be considered as simply conferring a discretionary power, or as imposing the duty of exercising the power conferred, when its exercise is called for, must depend in the first place on the subject-matter of the statutory enactment. In the ordinary run of statutes these words import, generally speaking, a faculty or power, to be exercised at the option or discretion of those on whom it is conferred: and such, it seems, is to be taken to be their *prima facie* meaning where the subject matter will admit of it, or where the exercise of the power may depend on contingencies on which a judgment has first to be formed. Thus, in the case *In re Newport Bridge* (8), which was an application for a mandamus under 43 Geo. 3. c. 59. sec. 2, which with reference to county bridges, enacted that where any such bridge was narrow and inconvenient it should be lawful for the justices of Quarter Sessions to order the same to be widened and improved, Mr. Justice Crompton, after saying that "the meaning to be attributed to the phrase 'it shall be lawful' in a statute must depend on the subject-matter in every instance," goes on to say, "*Prima facie* those words import a discretion, and they must be construed as discretionary unless there be anything in the subject-matter to which they are applied, or in any other part of the statute to shew that they are meant to be imperative." "In the present statute," he says, "not only does it not appear that the Act was intended to be compulsory upon the justices, but it appears from the subject-matter that it was intended to be left to their discretion. It seems to me that the Legislature must have so intended when I consider the nature of the Court which has to decide whether the act shall be done, and the many questions of expense and expediency which may arise before the act can be prudently determined on."

Mr. Justice Hill dwells more fully on the circumstances to be thus taken into consideration. Mr. Justice Blackburn says—"The words 'shall and may be lawful' are to be taken in their primary sense as permissive, and not compulsory, unless there be anything in the subject-matter of the enactment requiring that

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they shall receive a different construction. For a time I thought that the present enactment did require that the imperative construction should prevail, and that the object of the Legislature was that upon the one fact appearing that the bridge was narrow and incommodious, it should be widened as a matter of course. I now, however, agree in what has fallen from my brother Hill—that the justices have other matters, such as he has pointed out, to take into consideration, besides the narrowness of the bridge, before they decide whether or not to order it to be widened. That being the case, it is quite clear that the Legislature must have intended to leave them the discretion which the language of the statute *prima facie* imports.” But though the rule thus laid down may hold good in the case of statutes in general, in those of the class to which the Church Discipline Act belongs a different rule has prevailed for a very great length of time, and is now fully established. So long ago as the year 1693, it was decided in the case of *The King v. Barlow* (20), that when a statute authorises the doing of a thing for the sake of justice or the public good, the word “may” means “shall;” and that rule has been acted upon to the present time. In *Bacon’s Abridgment*, Title Statute (I.), the rule is so laid down, as also in *Dwarris on Statutes* (p. 264). Speaking of facultative words, it is there stated that where a statute directs the doing of a thing “for the sake of justice” or “for the public benefit,” the word “may” shall be construed as “shall” or “must,” and, of course, the same rule will apply to the words “it shall be lawful.” Such a construction was put on these words by the Court of Common Pleas in the case of *Mac Dougall v. Paterson* (21) in which it was held that the word “may” in the County Courts Extension Act, 13 & 14 Vict. c. 61, which provides that in certain cases the Court, or a Judge at Chambers, may by rule or order direct that the plaintiff shall recover his costs, is not used to give

a discretion but to confer a power, and that the exercise of such power depends not upon the discretion of a Court or Judge, but upon the proof of a particular case out of which such power arises. In that case Lord Chief Justice Jervis says:—“When a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorised to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having the right to make the application.” “For these reasons,” continues the Chief Justice, “we are of opinion that the word ‘may’ is not used to give a discretion, but to confer a power upon the Court and Judges; and that the exercise of such power depends, not upon the discretion of the Court or Judge, but upon the proof of the particular case out of which such power arises.”

A similar construction was put on the words “it shall be lawful” in the case of *Morrisse v. The Royal British Bank* (22), in which it was held, that these words, in the 13th section of 7 & 8 Vict. c. 113, the Joint Stock Bank Act, were compulsory, and left no discretion to the Court or Judge. The case of *Orake v. Powell* (13) is to the same effect. But it is unnecessary to multiply cases in support of this position. “It has been so often decided,” says Mr. Justice Coleridge, in the case of *The Queen v. The Tithe Commissioners* (23) “as to have become an axiom, that in public statutes words only directory, permissive or enabling may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice.” It may, however, be satisfactory to observe that the same sense has been ascribed to these words in the Courts of the United States. In the case of *The Supervisors v. The United States* (24), Mr. Justice Swayne, in delivering the judgment of the Supreme Court after referring to the English and American cases, says as follows:—“The conclusion to be deduced

(22) 1 Com. B. Rep. N.S. 67; s. c. 26 Law J. Rep. C.P. 62.

(23) 14 Q.B. Rep. 459; s. c. 19 Law J. Rep. Q.B. 177, at p. 182.

(24) 4 Wall. Rep. 435. at p. 446.

(20) 2 Salk. 609.

(21) 11 Com. B. Rep. 755; s. c. 21 Law J. Rep. C.P. 27.

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from the authorities is that where power is given to public officers, in the language of the Act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is, in fact, peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depository to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless."

Now the statute we are considering unites both the properties which have been referred to. It has reference to the administration of justice in the matter of ecclesiastical offences; and, as it relates to the maintenance of the doctrines and ritual of the established religion, for upholding the uniformity of which so many Acts of Parliament have been passed, it cannot be held to be other than matter of national interest and concern. Moreover, it is the undoubted right of every inhabitant of every parish in the kingdom, desirous of frequenting the parish church, to have the services of the Church performed according to the ritual of the Church, as established by law, without having his religious sense shocked and outraged by the introduction of innovations not sanctioned by law or usage, and which may appear to him to be inconsistent with the simplicity of the Protestant worship and to pertain to a religion which he believes to be erroneous, and the ritual of which is not that of the Church of England. It cannot admit of doubt that a statute, by means of which a right so important to the general sense of mankind was alone to be capable of being enforced and upheld—since it abolished the previous jurisdiction of the Ecclesiastical Courts in the matter of Clerks in Orders—is one of general interest and concern, in the construction of which the rule referred to would be applicable.

This being so, we have next to see whether we find anything in the language or purpose of the statute which shews that the words were intended to

have a less authoritative meaning. So far from this being the case, as regards the language of the 3rd section, we find, as has already been pointed out, that between that part of it which relates to the power of the Bishop to issue a commission on a complaint addressed to him, and which enacts that it shall be lawful for him so to do, and that part which enables him to do so of his own mere motion, independently of any complaint, the words "if he shall think fit" are interposed. It is here obvious that if the words "it shall be lawful" had been intended to confer a discretionary power, as these words would, in the absence of the words "if he shall think fit," have governed and controlled the whole sentence, the latter words would have been wholly superfluous. They can only have been introduced, therefore, for the purpose of qualifying the previous expression. Taken as a whole, it therefore seems to us from the collocation of the words that the passage affords the key to its own interpretation, and indicates the sense in which the words in question are to be taken. It was suggested on the part of the Bishop that the words "if he shall think fit" in section 3 should be rejected as superfluous. To this we answer that in so doing we should violate a settled canon of construction—namely, that a statute ought to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant (*Bac. Abr.*; title, "Statute" 1, sub-section 2).

But this is not all. The words are significant, as indicating the sense in which the words "it shall be lawful" in the preceding part of the section had been used by the framers of the Act. They would in any point of view have been idle, if not introduced to qualify the effect of the words "it shall be lawful" as imposing a duty. Mr. Justice Wightman, it is true, in *The Queen v. The Bishop of Winchester* (2), arrived at the opposite conclusion, derived from the enactments of the section in question. His opinion was founded on the ground that the power to issue a commission in the 3rd section applied as much to a case of "scandal or evil report of having

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offended against the ecclesiastical law" as to one of an offence charged to have been actually committed; and he argues, *ab inconvenienti*, that it cannot have been the intention of the Legislature to put it in the power of a prosecutor to call upon a bishop to issue a commission, and so initiate proceedings on what may turn out to be unfounded rumours; the more so as, according to the learned Judge, as the law before stood, "the office of the Judge could only have been promoted in the case of some direct and positive charge of an offence against the laws ecclesiastical, and no proceeding upon the ground of scandal or evil report of having offended against these laws would have been admissible." But, in the latter assumption, the learned Judge is, we cannot but think, in error. Public report or scandal was a ground of accusation in the ecclesiastical procedure, whether the proceeding was by inquisition, that is, when the proceeding was taken by a bishop or an archdeacon, *ex officio mero*, or was founded on presentment by churchwardens, or on the complaint of a party promoting the office of the judge. In the proceedings by inquisition the articles, Oughton tells us ("*Ordo Judic.*" Tit. 141, sec. 1), were to contain, "*Tam causas conventionis (i.e. in jus vocationis) quam famam publicam.*" Again, he says (*Ib.* note f. par. 7) "*Etsi reus non tenetur respondere positioni criminose, tenetur tamen respondere positioni continenti famam publicam criminis articulati. Igitur in his articulis fama publica objecti criminis est alleganda et obijcienda.*" Nay, so material was public scandal or evil report deemed to be as founding a charge against a party, that the Judge was bound to summon and examine the fellow-parishioners of the accused as to its existence. "*Si reus negaverit crimen objectum et famam,*" says Oughton ("*Ordo Judic.*" Tit. 145, section 1), "*tunc, si crimen objectum fuerit notorium et publicum, ac de eodem publica vox et fama, Judex producere et examinare curabit parochianos rei, vel alios quoscunque, ad famam probandam, eosque ad perhibendum testimonium, si rogati recusaverint, per censuras ecclesiasticas compellere.*" Even though the proof of

the alleged offence failed, if the evil report was established the accused might be sentenced to clear himself by purgation—that is, by producing a certain number of *compurgators*, who were to swear they believed the report to be unfounded. "*Si fama confessata vel probata fuerit,*" says Oughton (Tit. 144, section 7), "*Judex potest purgationem indicere.*" If the accused failed in his purgation, he might be enjoined to do public penance. (*Ib.* 147, section 2.)

The same thing occurred on presentments by churchwardens (see Tit. 152), termed by the civilians *Denunciatio*. Here, again, as appears from Conset, Oughton, and the 115th canon, public scandal and report became part of the enquiry, it being, according to the old law, part of the duty of the churchwardens to present those against whom, whether minister or parishioners, such scandal or report prevailed. Nor was this confined to the proceedings by inquisition or by presentment. On an accusation by a party promoting the office of the Judge, the articles in like manner alleged the *publica fama* of the imputed offence; and here again it is laid down (Oughton, Tit. 150, sects. 7 and 8), "*Si actor probaverit famam publicam, vel præsumptiones vehementes, ob quas purgatio parti ree indicta fuerit, vel indici possit et debisset, quamvis non probaverit crimen objectum, tamen obtinebit sententiam purgationem esse indicendam, et reus est in expensis illius litis condemnandus. Nam reus, negando famam, causavit actorem litigare, et expensas facere circa probationem ejusdem.*" It thus appears that public scandal or report did play an important part in penal suits in the Ecclesiastical Courts, and was of itself sufficient to place the party against whom it was brought forward under the necessity of clearing himself by oath; and it is, we think, going too far to say that if a strong case of public scandal had been brought before the Judge as the ground for allowing the office of the Judge to be promoted, the application would have been refused. We think it not unlikely that the intention being, as presently will be more fully shewn, to leave the substantive law as it stood, changing only

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the method of proceeding, these words were introduced as applicable to the cases in which public report might have formed matter of judicial enquiry. At all events, we think the argument well founded, that in the passage in question the words "if he shall think fit," give, as seems to us, the key to the words "it shall be lawful" in the earlier branch of the sentence, and that the inference arising from the collocation of the words is far stronger than any which can be drawn from the supposed intention of the Legislature, which, after all, can only be matter of surmise. The language of the section, though it might have been more explicit, is, we think, too clear to warrant us in speculating on the legislative intention. It is, moreover, obvious that if it had been the intention of the Legislature that the issuing of a commission should be at the discretion of the bishop, nothing would have been easier than to say so, as has been done in the Public Worship Regulation Act. By placing the words "if he think fit" in an earlier part of the sentence, immediately after the words "it shall be lawful," all ambiguity would have been removed.

We next proceed to consider the purpose of the statute as a whole. On the purview of it, especially when looked at by the light of the report of the Ecclesiastical Courts Commissioners, which preceded it, and of the preamble, which is confined to the recital that "the manner of proceeding in causes for the correction of clerks required amendment," it appears plain that it has reference, not to the substantive law, but simply to the procedure applicable to a suit against a clerk in orders for an ecclesiastical offence. It leaves the law as to what shall constitute an offence under that law as it stood before. It nowhere professes to abridge or interfere with any existing right of instituting proceedings against a clerk in orders for an ecclesiastical offence. It is the method of proceeding alone with which the statute deals. Thus, by the effect of the 23rd section, it takes from the bishop the power of instituting proceedings by way of inquisition, as was held in *The Dean of York's Case* (25), and (25) 2 B.B. Rep. 1; s. c. 10 Law J. Rep. Q.B. 306.

makes it necessary for the Bishop, if he desires to prosecute *ex mero officio*, either to issue a commission under section 3, if he desires to prosecute the suit in his own Court, or to send the cause in the first instance to the metropolitan Court, by letters of request under section 13. And whereas, in a penal suit instituted by a party promoting the office of the Judge, leave to promote the office must first have been applied for and obtained in the Court of the Bishop, and leave to promote the office of the Judge having been obtained, articles would have been at once exhibited and the suit proceeded with—a matter generally involving much expense, and sometimes the vexatious harassment of the defendant—the statute, on an accusation of an ecclesiastical offence being brought forward, requires a complaint to be addressed to the Bishop himself, and, except in the case just put, where the Bishop thinks proper to exercise the power vested in him by the 13th section, and, dispensing with any preliminary enquiry, sends the cause at once by letters of request to the Court of the province, interposes, before the suit can be further prosecuted, a preliminary enquiry as to the facts by means of a commission, on whose report whether a *prima facie* case for further proceedings has been made out it depends whether the suit shall proceed—an institution analogous to the finding of a grand jury on a bill of indictment.

In other respects, when the commissioners have reported that there is *prima facie* ground for further proceedings, the jurisdiction of the Bishop remains very much as it was before, except that he may have to exercise the functions of a Judge himself, instead of the cause being tried before his appointed Judge. If the party admits the truth of the articles, the Bishop, or his commissary appointed for the purpose, may at once pronounce sentence. If the facts are denied, the Bishop can either try the cause himself, with the assistance of three assessors specially qualified under the Act, and himself determine it—this mode of trial being substituted for the trial in the diocesan Court by the Bishop's Judge—or the Bishop, as he might have done before, on



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a suit being instituted in his own Court, may send the suit by letters of request to the metropolitan Court. In all this there is manifestly nothing which affects the right to institute proceedings, though the mode of initiating the suit is changed, and the party desirous of prosecuting a clerk in orders for an ecclesiastical offence, instead of obtaining leave to promote the office of the Judge, must now prefer a complaint to the Bishop, and, unless the Bishop thinks proper to send the case at once to the provincial Court, must abide by the report of a commission as to whether the suit shall be proceeded with. But, subject to this, the statute does not profess to deal with the right to prefer a charge against a clerk in orders, if the offence charged amounts to an offence against the ecclesiastical law; and it therefore becomes material to consider how the law stood in respect of the right of instituting proceedings against a clerk in orders prior to the passing of the statute.

Two conflicting views have been pressed upon us: the one that though, in order to promote the office of the Judge, it was necessary to obtain leave of the Court, yet this was, practically speaking, merely matter of form, and that the leave could be claimed as of right, provided the offence proposed to be prosecuted was one of ecclesiastical cognisance, and the promoter was of ability to pay costs, if defeated in the suit. On the other hand, it was contended that to allow the office of the Judge to be promoted was not a matter of form, but one on which the judgment of the Judge had to be exercised; from which it was argued that, in the present statute, it must have been intended to leave a like discretion to the Bishop. In support of the first proposition, the old authorities, Conset and Oughton, are cited. Thus, Conset ("Practice," part 7, c. 2) says, "If any hath committed any crime (whereof the spiritual Courts have cognisance), and is not detected, denounced or presented for the same, or if the Bishop or archdeacon have not proceeded against him by way of inquisition, yet any person (who offers himself ready to pay the party to be convened his charges, if he

doth not prove the matters objected) hath interest voluntarily to implore and promote the office of the Judge, and may call the delinquent to answer articles, and may administer articles to him when he appears, in the name of the Judge, and of his office promoted, and may accuse the delinquent." So Oughton, following Conset, says ("Ordo Judiciorum," tit. 150), "1. Si quis crimen, ad fori ecclesiastici cognitionem spectans, commiserit, et de eodem non fuerit detectus, denunciatus, vel presentatus, vel Episcopus, vel Archidiaconus non processerit contra eum, perinquisitionem; quolibet tamen persona (si fuerit solvendo (*sic*) expensas parti conveniendæ, si objecta non probaverit) habet interesse (quoniam Reipublicæ interest ut delicta puniantur) et Judicis officium implorare, et voluntarie promovere; et delinquentem, ad respondendum articulis, ex officio Judicis promoti, ministratis, in jus vocare potest, et parti comparenti articulos (nomine Judicis, et ex ejus officio promoti) objicere, et ministrare, et delinquentem accusare."

That this principle continued to be acted on appears from several *dicta* of ecclesiastical Judges. In *Argar v. Houldsworth* (26) Sir George Lee says, "A clergyman may be prosecuted by anyone for neglect of his clerical duty." In the case of *The Procurator-General v. Stone* (12) Sir William Scott says, "This is a prosecution originating in a citation in the name of the Bishop of London, though the Bishop might be personally ignorant of the existence of such a suit. It is the constant style of the Court, and it is not in the power of the Bishop by any intervention on his part to refuse the process of the Court to anyone desirous to avail himself of it in a proper manner." In *Turner v. Meyers* (27) the same learned Judge had said, "The criminal suit is open to everyone; the civil suit to anyone shewing an interest." These *dicta* were, however, only incidentally made, and were not necessary to the decision of the cases in which they were pronounced. What was said by Sir John Nicholl in *Carr v. Marsh* (17) is more directly to the point. The suit being *in pœnam*, in

(26) 2 Lee 515.

(27) 1 Hag. Cons. 414.

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which the office of the Judge was promoted against a clergyman for officiating in a chapel licensed by the Bishop, but without the consent of the incumbent of the parish, it was urged that, the defendant having acted with the sanction and approbation of the Bishop, the promoter ought not to be allowed to promote the office of the Judge in the Bishop's own Court. Sir John Nicholl, however, says, "It is said that there is a discretion in this case, and that the Court should not allow the office of the Judge to be promoted in such a cause. But the cause must be tried before we arrive at this conclusion, otherwise we enter on the merits prematurely. Application is always made to the Judge before a citation issues in a cause in which the office is promoted; but that is not for the purpose of considering the merits of the case, but from the nature of the suit, whether it be of ecclesiastical consueance or the fitness of the person to be made responsible for costs to the other party."

But dicta of an opposite tendency were brought forward on the other side. Thus in *Maidman v. Malpas* (11), Sir William Scott, speaking of a suit in which the office of the Judge is promoted, says, "The leave of the Court should be first obtained, since it is a part of the ecclesiastical jurisdiction which is not to be exercised without discretion or to be left entirely to the judgment or passions of private persons." In *Lee v. Matthews* (28), which was a case of brawling in a vestry, Sir John Nicholl certainly uses language which tends to shew that it is in the discretion of the Judge in certain cases to allow his office to be promoted or not as he may think right. "This being," he says, "a case of office, the whole transaction should have been fairly and candidly stated at once in order that the Judge might have an opportunity of considering whether both parties being involved *in pari delicto* he ought to allow his office to be promoted." "Had all the facts appeared in the articles," he continues, "I doubt whether, considering that the promoter is not a disinterested officer of the parish proceeding in his official capacity,

*ob publicam vindictam*, but a private individual proceeding for an offence committed against himself, I should have allowed the case to have gone on." It is, however, here to be observed that this by no means shews that if the suit had been promoted by a proper party and *in publicam vindictam* the office of the Judge could have been properly withheld. The language of the same learned Judge in *Carr v. Marsh* (17) would lead us to think that under such circumstances the permission to promote the office of the Judge would have been granted as of course.

In *Sherwood v Ray* (5), in a civil suit instituted by a father to annul the marriage of his daughter as incestuous, and which came before the Judicial Committee on appeal, the objection having been urged that the father had no civil interest to enable him to maintain the suit, Baron Parke, in delivering the judgment of the Court, of which Sir J. Nicholl had been a member, as a ground for holding that the possibility of having to support the offspring, if legitimate, under 43 Eliz. c. 2, was a sufficient interest to entitle him to sue, observes that, "this may be the only form in which any individual can question the marriage as matter of right." "For," says the learned Judge, "to promote the office of Judge in a criminal suit requires the authority and consent of the Court; and though this is obtained without difficulty in ordinary practice, it cannot be demanded *ex debito justitiæ*." But it is here to be observed that this was not the point to be determined in the cause, nor had it been adverted to in the argument, but appears to have been resorted to by the Court as a technical, certainly not being a substantial, ground for holding that the very remote possibility of having to maintain the issue, if legitimate, furnished a sufficient interest to sue to annul the marriage. Though, technically speaking, it might be true that the office of the Judge could not be claimed as of right *ex debito justitiæ*, no one can doubt that it would have been allowed as of course to a father seeking to set aside the incestuous marriage of his daughter. Moreover, one is at a loss to see how the absence of a right

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to sue criminally could be any reason for holding that the party had a civil interest entitling him to sue.

Lastly, in *Elphinstone v. Purchas* (6), also a case before the Judicial Committee, it is said by Sir Robert Phillimore, in delivering the judgment of the Court, "It was decided by their Lordships in the case of *Sherwood v. Ray* (5), which was one of great importance, and very carefully considered by the eminent Judges who sat upon it, among whom was Sir John Nicholl, perfectly acquainted with the practice of the Ecclesiastical Courts, that the promotion of the office of the Judge, though generally permitted as a matter of course, cannot be demanded *ex debito justitiae*." There is here, we cannot help thinking, some mistake. As has been observed, the point was not decided in *Sherwood v. Ray* (5); it was only thrown in by way of argument; but the language of Sir Robert Phillimore shews that he, himself an eminent authority, and the other members of the Judicial Committee who sat in *Elphinstone v. Purchas* (6) took the same view of the question as had been incidentally expressed in the former case.

Looking to these authorities, it appears to us that neither of the conflicting propositions thus put forward is tenable to the full extent to which it has been urged. The result of the authorities as to the former law appears clearly to be that although, as may be gathered from *Maidman v. Malpas* (11) and other cases, it was necessary for a party desirous of proceeding in a penal suit in an Ecclesiastical Court to obtain leave to promote the office of the Judge, yet if the charge involved an offence against the ecclesiastical law, and there was no reason for doubting the *bona fides* of the complaint, and the complainant was a proper person to institute the suit and of ability to pay costs if he failed in it, the leave was never withheld, but, on the contrary, was always granted as a matter of course, we had almost said of right, without any precognition of the case as to its intrinsic merits, or reference to the position of the accuser, whether parishioner or otherwise, beyond his fitness to carry on the suit. Theoretically it may be correct to say that leave

to promote the office of the Judge could not be claimed *ex debito justitiae*, and that if it had been refused the party would have been without redress, at all events, so far as the remedy by *mandamus* was concerned. But it is, nevertheless, plain that to refuse it, except in very special cases, would have been a denial of justice, to which we may presume that no ecclesiastical Judge would have been a party.

This being so, we do not feel warranted in assuming, in the absence of positive enactment, that, in transferring the jurisdiction of the Ecclesiastical Court to the Bishop, the Legislature can have intended to place a party desirous of prosecuting a clerical offence in a less advantageous position than he would have been in before the statute. We find nothing in the provisions of the statute which has, or, so far as appears, can have been intended to have the effect of taking away the right of instituting a suit against a clerk in orders where it existed previously, all that the statute does being to alter the mode of proceeding. Instead of obtaining leave to promote the office of the Judge from the Bishop's Court, the prosecutor must now apply directly to the Bishop, who under the terms of the third section, would have to see, as the Judge had before, that the complaint involved an offence of ecclesiastical cognisance, it being to such only that the enactment applies. But with this limitation we see nothing that alters or affects the right of a party desirous to prosecute, or which debars him from calling upon the Bishop, thus substituted for the Judge, to set the law in motion by either issuing a commission under the 3rd section, or at once sending the complainant to the Court of the province under the 13th section. It is difficult to suppose that if the intention of the Legislature had been so to modify the right of a party desirous to prosecute as to make it contingent on the will of the Bishop, it would not have said so in clear and unambiguous terms. Of course nothing would have been easier than to do this. The mere transposition of the words "if he shall think fit" in the 3rd section so as to make them govern the whole instead of prefixing them to the action of the Bishop *ex proprio motu*,

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would obviously have had that effect, whereas their present collocation leads strongly to the opposite conclusion.

But we are invited to follow the history and origin of this legislation in order the better to apprehend the meaning and intention of the enactment in question. It is true that the Ecclesiastical Courts Commissioners, in their report of 1832, having pointed out the evil of the great delays and expenses attendant on the prosecution of penal suits in the Ecclesiastical Courts, and which had been strikingly exemplified in certain recent suits which had caused considerable scandal, recommended that the proceedings in the prosecution of offences against clerks in orders should be transferred to the Bishop. But they further proposed as part of their scheme, as a protection against vexatious suits, that there should be a preliminary enquiry on oath before the Bishop, with a view to his allowing or disallowing the suit to proceed, with, in case of his disallowing it, an appeal to the Archbishop. The first part of this recommendation was adopted, but not the remainder.

It was not till some years afterwards that, in 1840, the Government carried through Parliament the Church Discipline Act, in which, for the preliminary hearing before the Bishop recommended by the Commissioners, was substituted the Commission to be appointed under section 3, by whose report the Bishop, except where he chose at once to institute proceedings by letters of request, was to be guided as to allowing the suit to proceed. We see nothing in the circumstances under which this statute was passed to lead us to think that it was intended to do more than to afford the accused clerk the protection of the preliminary inquiry by the Commission. For the discretion proposed by the report of the Ecclesiastical Commissioners, to be given to the Bishop to be exercised, it must be remembered, after enquiry on oath, was substituted the enquiry by the Commission, upon whose decision the further prosecution of the suit was to depend. It is also, perhaps, not altogether beside the question to observe that the suits to which the Commissioners were

referring were for the most part suits against clergymen for immorality. The movement in the Church with respect to doctrine and ritual of a Roman Catholic tendency had not then as yet arisen, and it may well be doubted whether, if that movement could have been foreseen, the Legislature would have placed any additional restraint on the right of parishioners to bring innovations of such a nature to the test of legal decision. Far, therefore, from affording any proof of the intention of the Legislature to give an absolute and unfettered discretion to the Bishop, the prior state of the law and the origin of the statute have rather a contrary tendency. But, instead of speculating on the legislative intention by reference to extraneous circumstances, we think it safer to found our view on the internal evidence afforded by the statute itself.

Now, finding nothing in the enactments or language of the third section or other parts of the Church Discipline Act which should have the effect of controlling or qualifying the words "it shall be lawful," but, on the contrary, finding the language of the section pointing, as it seems to us, the contrary way, we can see no ground which would justify us in giving to those words any other than the meaning which the established canon of construction has assigned to them—a canon of construction so thoroughly settled that Mr. Justice Coleridge speaks of it as an axiom—and by which, in construing this statute, we deem ourselves absolutely bound. With this rule before us, we do not deem ourselves called upon to enter into the subject of the inconvenience on which the Lord Bishop dwelt in his argument as likely to result from withholding from a Bishop the free exercise of his discretion. These considerations, if well founded, might be well worthy the attention of the Legislature, but they cannot prevail against the Act as it stands. Moreover, if the legislation were to be reconsidered it might possibly be thought that any such inconveniences would be outweighed by the object to which so much legislation has been directed—namely, the maintenance of uniformity of doctrine and ritual in the

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Church. It should be observed that this construction of the statute will not take from the Bishop the discretion which the Judge previously possessed and exercised, on the application for leave to promote the office of the Judge, of judging whether the facts complained of constitute an ecclesiastical offence or not. For, as we have said, it is only to complaints of such offences that the Act relates; and the constitution of the commission, one member of which must be the Bishop's officer, or an archdeacon or rural dean of the diocese, and the rest of his own selection, will insure a careful consideration of the case and protect an accused clergyman against frivolous and vexatious charges. When it is said on the part of the Bishop that if he is not invested with the discretionary power for which he contends he must issue a commission in every case in which it is applied for, no matter how frivolous or vexatious the proceeding may be, the answer is that no such consequence will follow. For if the application be of the character alluded to, this Court, in the exercise of its discretion, would refuse to issue a mandamus. And that this Court has the right to exercise such discretion cannot be doubted. See *The Queen v. The Bishop of Chester* (29), and *The Queen v. The Bishop of Chichester* (2).

On the whole, therefore, the only conclusion at which we can arrive is that a duty is here cast upon the Bishop, where complaint is made of that which constitutes in a clerk in orders an offence against the ecclesiastical law, of issuing a commission, unless he thinks proper—and herein he undoubtedly has a discretion—to send the case at once by letters of request to the provincial Court. The view we take of the enactment in question is confirmed by the opinion of the late Dr. Lushington, we need not say a great authority in all matters of ecclesiastical law. His opinion on this point appears from a report of a case of *Ditcher v. Denison* (30), a proceeding against the Archdeacon of Taunton, in which Dr. Lushington acted as assessor to the Archbishop

of Canterbury, and which was cited by Dr. Stephens on an application to this Court for a mandamus to the Bishop of London in the case of Mr. Bennett. Referring to the 3rd section of the Act, Dr. Lushington there says, "It is perfectly clear that if a Bishop under this statute thinks fit, he has a discretion which he is entitled to exercise whether he will himself of his own mere notion direct proceedings to be commenced. It is not so with reference to an application made to the Bishop, and for various reasons. If it were so, the ancient law of the Church would have been subverted by this statute, which there was no intention to do." Having cited the judgments of Lord Stowell and Sir John Nicholl with respect to the former state of the law, Dr. Lushington proceeds, "What would be the consequence, if the Archbishop or Bishop had a purely discretionary power to order the commencement of the proceedings according to his own judgment, or, I might also say, according to his fancy? Why, in every bishopric within a province or within the whole kingdom of England, it would rest entirely in the power of a single Bishop either to permit a prosecution against any ecclesiastic for any alleged unsound doctrine or immoral conduct, or, according to his own mere opinion, he might prevent any discussion taking place and any charge, however serious, from being considered. The consequences of which would be that the uniformity which now happily prevails among the clergy of this country would be destroyed or subverted." In this view we entirely concur, and it is materially confirmed by the fact that the uniformity on which Dr. Lushington congratulated his hearers has unhappily ceased to exist. If the construction contended for by the Bishop should prevail, looking at the wide differences of opinion prevailing among the clergy in reference to rites and ceremonies, it might well be that in a short time uniformity in the realm might disappear, and diocesan uniformity take its place, which again would be liable to vary with each succeeding ordinary. Whereas if the law is to be enforced, any doubtful or disputed question of doctrine or ritual may be brought to the test of

(29) 1 Term Rep. 396, and Brodrick's Eccles. Judgments in P.C. 156.

(30) Special Report, 1857.

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legal decision, if necessary by the appellate tribunal in the last resort.

This being, in our opinion, the construction to be put on the Act of 1840, the question already adverted to presents itself, whether this statute has not been virtually abrogated by the Act of 1874, commonly called the Public Worship Regulation Act, the two statutes being *in pari materia*, and apparently inconsistent with one another. That the two statutes are *in pari materia* as regards offences relating to ritual is clear. Both were passed for the purpose of establishing a new method of proceeding in the trial of offences committed by clergymen in substitution for the previously existing procedure; the only difference in this respect being that, while the earlier Acts refer to "any offence against the laws ecclesiastical" committed by any clerk in holy orders, the later statute enumerates the particular offences to which it is applicable—namely, "firstly, where any alteration in, or addition to, the fabric, ornaments or furniture of a church without lawful authority, or any desecration forbidden by law, has been introduced into it; secondly, where the incumbent has within the preceding twelve months used or permitted to be used in a church or burial-ground any unlawful ornament of the minister of the church, or neglected to use any prescribed ornament or vesture; or, thirdly, where the incumbent has failed to observe, or to cause to be observed, the directions contained in the Book of Common Prayer relating to the performance, in such church or burial-ground, of the services, rights and ceremonies ordered by the said book, or has made, or permitted to be made, any unlawful addition to, alteration of, or omission from such services, rites and ceremonies."

It is, therefore, plain that, so far as relates to offences, committed in the observance of the established ritual, both statutes apply to the offences which form the subject-matter of the complaint in the present instance. If the enactments of the two statutes are inconsistent, the rule would apply that where two statutes are *in pari materia*, and their enactments cannot stand together, the later statute

shall prevail, as being the later exponent of the legislative will. Now when we turn to the later statute we find an entirely new and different system and scheme of proceeding. Though the charge is still to be addressed to the Bishop in the form of a representation, it can no longer, unless when it is preferred by the archdeacon or a churchwarden, be made by a single individual, whether a parishioner or not, but requires the concurrence of three parishioners, or, in case of cathedral or collegiate churches, of three inhabitants of the diocese. The commission of enquiry, which was at once the creation and the distinctive feature of the Act of 1840, is entirely superseded, while an absolute discretion is given to the Bishop, who is required to further the suit in the manner prescribed by the Act, "unless he shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation;" in which case he is to state in writing the reasons for his opinion, which statement is to be deposited in the registry of the diocese, apparently without any ulterior consequences, thus making the Bishop the sole judge and arbiter whether the suit shall proceed, not merely with reference to the nature of the offence charged, or the facts on which the charge may be founded, but enabling him to take into account collateral circumstances, in themselves affording no answer to the accusation, or satisfaction to the parishioners complaining that the public worship is conducted otherwise than according to the ritual of the Church as by law established.

It seems at first sight difficult to conceive, in the face of so entire a change in the system of proceeding, that the Legislature can have intended that the two statutes should stand together and the two modes of proceeding remain equally open to parties desirous of prosecuting such a suit, or that while three parishioners are needed under the later Act to set the Bishop in motion, who then has an arbitrary discretion to determine whether the suit shall proceed or not, under the earlier Act it shall still remain open to a single individual, whether parishioner or

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not, to compel the Bishop, however unwilling, to put the statutory process in motion. We should, therefore, have been disposed to hold, with reference to the rule just referred to, that the earlier statute was virtually repealed, and, consequently, that it was not open to the complainant to insist on its application in the present instance. But we are met by the positive enactment contained in the fifth section of the later statute—"that nothing in this Act contained, except as herein expressly provided, shall be construed to affect or repeal any jurisdiction which may now be in force for the due administration of ecclesiastical law." Now, not only was the jurisdiction given by the Church Discipline Act in force when the Public Worship Regulation Act passed, but, with the exception of the appellate jurisdiction of the Judicial Committee of the Privy Counsel in ecclesiastical suits, to which this saving provision can scarcely have been intended to apply, it was the only jurisdiction in penal matters then in force.

And the 18th section of the later statute is conclusive, for it expressly provides that where sentence has been pronounced against an incumbent for an offence under the Act of 3 & 4 Vict. c. 86, he shall not be proceeded against under this Act, and where any judgment has been so pronounced under this Act, he shall not be liable to be proceeded against under the former statute; thereby conclusively indicating that an offence within the Public Worship Regulation Act may still be proceeded against under the earlier statute. This apparently conflicting legislation may, however, be reconciled. The purpose and effect of it appears to be this:—The proceeding by commission and the cumbersome procedure by articles in a formal suit being deemed too dilatory in cases of flagrant ritualistic excesses, a more expeditious mode of proceeding and a simpler procedure were made available, subject, however, to more rigorous conditions. If the more expeditious process of the Public Worship Regulation Act, in which preliminary enquiry is dispensed with, is invoked, the stricter conditions of the Act as to the number of the complainants and their subjection to the absolute dis-

cretion of the Bishop must be complied with.

But it still remains open to a party who is willing to adopt the more elaborate process to claim under the former Act the remedy which it affords. All that remains to be considered is whether, the writ of mandamus being a discretionary writ, we should, in the exercise of the discretion which we are undoubtedly at liberty to exercise, decline to issue the writ in this instance. We cannot but be sensible of the incongruity which is involved in the interference of a temporal Court between a bishop and one of his clergy, in a matter of ecclesiastical discipline. But it must be remembered that there is a third element in the case which must not be lost sight of. In these questions of doctrine or ritual the laity are interested, and deeply interested, as well as the clergy. As an institution endowed and maintained by the State, the Church exists for the benefit of the laity. It is the right of the latter, being members of the Church, to take part, under the ministration of the clergy, in the public worship, as well as to have the benefit of the various rites and services of the Church, according to the ritual of the Church as by law ascertained and established. One of their most sacred and valued rights is infringed when they are driven to abandon their churches by the introduction of a ritual which is not that of the Church, and which appears to them to be an advance towards a religion which is not that of the Reformation. It is unnecessary to express any opinion as to the decision which was come to in this respect by this Court in the case of *The Queen v. Bishop of Chichester* (2), further than that, as it must be taken to be clear that, prior to the passing of the Church Discipline Act, a stranger would have had no difficulty in obtaining permission to promote the office of the Judge in such a suit, as one of the public, in a matter of so much concern to the community as the maintenance of the public worship of the Church, as by law established, if the case of a stranger applying for a mandamus should again occur, we might think it necessary to reconsider the matter before we should be prepared to follow the pre-

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cedent set in that case. But in this case we have no such difficulty as there presented itself. We have here a parishioner, who, as such, has an undoubted right to have the services of the Church performed in the church of the parish to which he belongs, according to the law of the Church as established by the rubric, the canons and the Acts of Uniformity, complaining that by reason of unlawful practices introduced into the Communion Service, his religious sense is so offended that he cannot conscientiously take part in the administration of the Sacrament and demanding enquiry.

There cannot be a doubt that a person so circumstanced would, prior to the Church Discipline Act, have been admitted to prosecute as of right, or that his application to promote the office of the Judge, the *bona fides* and substantial character of his complaint not being open to doubt, would have been granted as matter of course. We are of opinion that under such circumstances we have no alternative but to grant the writ. It would be a very different thing if the Bishop had declined to grant a commission on the ground that the complaint was frivolous and vexatious or that it had been prompted by sinister or unworthy motives. Under such circumstances we should have felt ourselves justified in refusing the writ; but nothing of the kind exists here. It is admitted that there has been such a substantial departure by the incumbent from the established ritual as amounts to an offence against the ecclesiastical law. It is not denied that the practices complained of were such as might give offence to the religious conscience of a member of the Established Church, and deter him from partaking in the service of the Communion when thus administered. The refusal of the commission by the Bishop was founded, not on the nature of the complaint, or the claim of the applicant to redress, but on collateral and extraneous circumstances which do not alter or affect the offence, but are founded on considerations of expediency, or such as have reference to the person of the party against whom the application is made.

Now, not only do we think that, on the

construction of the statute, the Bishop had no discretion in this matter, but we are further of opinion that, the purpose of this legislation being to maintain uniformity of doctrine and ritual, and it being the right of the parishioners to have the services of the Church performed according to the law of the Church, even if the bishop had discretionary authority in such a case, he ought, having here a judicial, or, at all events, a *quasi-judicial* duty to discharge, to have used it to allow an enquiry to take place. We do not think, therefore, that we should be justified as matter of discretion in withholding the writ. But it was suggested that the Public Worship Regulation Act having made the concurrence of three parishioners necessary to found a complaint to the Bishop, we ought not, in the exercise of our discretion, to give effect by mandamus to the complaint of one. But the obvious answer is that if the Legislature had intended that any change in this respect should be made in the Church Discipline Act, which it advisedly keeps alive, it could have introduced such a provision in the later Act. If it was incumbent on the Bishop to entertain the complaint on the application of a single parishioner—and we think he had no discretion in the matter—it cannot be open to us as a matter of discretion to withhold the redress which the applicant seeks at our hands. The rule for a mandamus to the Bishop to issue a commission, or send the case at once to the Court of Arches by letters of request, must therefore be made absolute.

The Bishop of Oxford and Mr. Carter both appealed.

*O. Bowen (M. Mackenzie with him)*, for the Bishop of Oxford (on April 23) (31).—If the Court should be of opinion that the correspondence shews that the Bishop has ever definitely refused to do what the complainant desires, then the question to be decided is, whether the words "it shall be lawful" in section 3 of the Church Discipline Act (1) are imperative or

31 *Coram Bramwell, L.J.; Baggallay, L.J.; and Thesiger, L.J.*



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permissive. The appellants contend that they give the Bishop a discretion. That this is the true construction will be manifest, if the old law and the history and practice of the Ecclesiastical Courts before the Church Discipline Act was passed, be considered, and the distinction between the object of Ecclesiastical suits and Common Law actions be remembered. It is admitted that the acts complained of by the promoter in this case are ecclesiastical offences of which the Bishop can take cognizance if he chooses; but there never has been any right in any one save the Bishop to institute, as of right and without leave, a suit against a clerk who may offend against the laws ecclesiastical. Common Law actions are instituted to enforce rights, to prevent the recurrence of or to get compensation for wrongs; whereas the object of ecclesiastical suits has always been the reformation of the offender, they were always instituted *pro salute animæ*—*Caudrey's Case* (32); *Phill. Eccles. Law*, 1088.

The Courts in which these suits were prosecuted were the Bishops' Courts, the procedure was borrowed from the civil law; and from the decision of the Bishop or his commissary there was an appeal to the Archbishop—*Consett's Practice*, p. 6; *Coke's Institutes*, 4, cap. 74, p. 337. Before the Reformation Archbishops used to compel Bishops to proceed against offending clerks—*Gibson*, p. 1007, cited in *Burn's Ecclesiastical Law* (9th ed.), vol. iii. p. 255.

The various statutes which were passed after the so-called "year of schism" retained the old law, and the appeal, if any, from the refusal of the Bishop to proceed has ever been to the Archbishop or the delegates, and there has never been any right to apply to the temporal Courts.

After the 20th year of Henry 8th various statutes were passed for the regulation of the Ecclesiastical Courts, and it will be found that the general tendency of those statutes was to restrain and not to spur on the Ecclesiastical Courts. The Statute of Citations (23 Hen. 8. c. 9) provided

that persons should not be cited out of their own dioceses, and so limited the power of the Archbishop. 24 Hen. 8. c. 12 was an Act "for the restraint of appeals," and 25 Hen. 8. c. 19 extended the provisions of the Act passed in the preceding year. The first Act of Uniformity (2 & 3 Edw. 6. c. 1) provided for the trial at assizes of offences against its provisions, and enabled the Bishops to associate themselves with the Judges on the trial. All these Acts were repealed by 1 & 2 Phil. and Mary, c. 8, but many of their provisions were restored by 1 Eliz. c. 1, [which repealed the statute of Phil. and Mary,] and by the now existing Act of Uniformity, 1 Eliz. c. 2, provision was made, as was the case in the statute of Edw. 6, for the trial at assizes of offences within its purview, and it empowered the Bishops to join the Judges in hearing such trials. It is to be noted that unless the Bishop had a discretion prior to the Church Discipline Act, this anomaly might exist, that if the offence were tried at the assizes the Attorney-General could enter a *nolle prosequi*, whereas if it were made the subject of a suit in the Bishop's Court, the Bishop would have no discretion, but must let the suit proceed, and this when even the Crown can only grant a pardon in ecclesiastical suits of a criminal nature if no costs have been incurred—*Hall's Case* (83). The conclusion to be drawn from the old books of practice and from the records of the Bishops' Courts is the same, namely, that the office of the Judge was precarious, that is to say, that the Bishop could proceed *ex officio mero* or *ex officio promoti*; but that in the latter case the office of the Bishop could not be promoted without permission, and the intending promoter had "*Judicis officium implorare*."—*Consett's Practice*, part vii. cap. 1, 2, 3; *Oughton's Ordo Judiciorum*, vol. i. tit. 150, p. 225; *Clarke's Praxis*, tit. 309, *et seq.*; for the old system of *accusatio* was never in force in this country. Ayliffe in his *Parergon*, at p. 395, describes the nature and meaning of the "*officium*" of the Judge. The Bishops appointed chancellors, but they did not thereby ex-

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clude themselves from their own Courts or resign the power of exercising their own discretion—1 Still, 330. The chancellors were indeed at first only assessors, and though in later times they sat alone, still the Bishop sat in person to pronounce sentence—*The Procurator-General v. Stone* (12).

The cases which were decided before the Church Discipline Act came into force shew that such leave was required, for in *Argar v. Houldsworth* (26), which is relied on by the promoter, it is clear that the Judge had previously allowed his office to be promoted, and the question was as to the admission of certain articles. *The Duke of Portland v. Bingham* (7) is no authority to the contrary, for if that cause was allowed to proceed without leave, it was so allowed as a matter of grace, as is shewn by the note to *Maidman v. Malpas* (11), where at page 209 the rule is stated to be clear, that a personal application for leave to proceed must be made when the promoter is a private individual, and in this latter case the first citation was dismissed on the ground that leave had not been obtained. There is a *dictum* in *Turner v. Meyers* (27) to the effect that the criminal suit is open to every one, but this must be taken in the qualified sense that the application for leave to proceed may be made by anyone, and that interest is not necessary in a criminal suit in the same sense that it is in a civil suit. The question to be decided in *The Procurator-General v. Stone* (12) was, whether it was necessary that the Bishop should sit personally in the Court and hear all such applications in person. *Carr v. Marsh* (17) shews that application is always made to the Judge before a citation issues. *Pelling v. Whiston* (34) lays down that the Bishop on request may cite, and *Lee v. Matthews* (28) tends to the same conclusion. *Sherwood v. Ray* (5) was the last case decided before the passing of the Church Discipline Act. It was a civil suit in which, therefore, the question of interest arose and was argued; but the judgment of Parke, B., clearly lays down, at page 396, that the suit in a criminal form requires the

permission, the consent and the authority of the Court, and that it cannot be demanded *ex debito justitiæ*. In *Cory v. Byron* (35), it is clearly laid down that the Judge has a discretion as to allowing his office to be promoted, and he refused to allow it in that case, which was decided in 1840, because several persons had joined together to promote the suit, a course which the Judge thought undesirable.

The Church Discipline Act of 1840 was preceded in 1832 by a report of Commissioners appointed to enquire into the whole subject, which collects and summarises much important information on the subject of the numerous Ecclesiastical Courts then in existence, and throws no little light on the condition of those Courts, and consequently on the intention of the Legislature in passing the new Act; and that report shews, at p. 57, that it was the intention of the Act to restore the Bishops to their Courts, and to give them again the personal pastoral authority, jurisdiction, and discretion which they undoubtedly once had; but which it is possible in the general confusion and carelessness as to such matters of the earlier Hanoverian period they might have lost, or the proper exercise of which might have become rare. The various provisions of the Church Discipline Act will be found intelligible and capable of harmonious operation if they are considered, regard being had to a discretion existing in the Bishop of each diocese, and this discretion renders easy of comprehension the very general words used in section 3 (1). The words, "it shall be lawful," are *prima facie* permissive—*Re Newport Bridge* (8), and there is nothing in the context to render them imperative; but on the contrary, the proviso at the end is insensible unless the Bishop has a discretion, for he could by omitting to send the notice render the proceedings void. The contention of the promoter is that the Court is bound to get all the possible compulsory force out of every word of a clause which is *prima facie* permissive and optional; but it is submitted that that is not a sound canon

(34) 1 Comyn, Rep. 199.

(35) 2 Curt. 396.

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of construction, and that in the interpretation of the present clause, considerations such as the possible triviality of the alleged scandal, the possible fact that the complainant may be utterly untrustworthy and irresponsible, the absence of any provision in the Act for the costs of the commission, the want of any power to compel the complainant to attend and prosecute the charge, the necessity of the continuance of the suit when once the commission has issued, however much all parties but one may desire to arrest the case, as is clear from *The Queen v. The Archbishop of Canterbury* (10),—such considerations all point to the necessity and probability of the Bishop having a discretion, and the only answer that is suggested is that the Court would not issue a mandamus in a case of an unsubstantial nature, the effect of which argument is in fact to concede that a discretion exists, but that it has been taken away from the Bishop and transferred to the High Court of Justice. It is also to be noted that this statute was not passed for the correction of offences against ritual; charges of such offences being in 1840 scarcely ever thought of, although they are now frequent.

The intention of the Legislature to travel on the lines of the old ecclesiastical procedure is further shewn by such a section as section 19, which keeps alive the voluntary promoter and the provisions of the Statute of Citations of Henry 8.

The weight of the authority of the cases decided since the Church Discipline Act came into force is in favour of the appellants. In *Head v. Sanders* (36) it is said that there is no means of compelling the Bishop to issue the commission. *Ex parte Denison* (9) shews that the Court thought the Bishop would have discretion in cases where he was not patron of the living, and during one of the stages of *Archdeacon Denison's Case* (30) Lord Campbell expressed a wish that the Archbishop had exercised his power to refuse the commission.

*Ex parte Medwin* (37) proves that the

(36) 4 Moo. P.C. 186.

(37) 1 E. & B. 609; s. c. 22 Law J. Rep. Q.B. 169.

Court is still a Bishop's Court, even though the Chancellor sits as Judge, and though by special provision the Bishop can sue in it. Dr. Lushington, indeed, when sitting at Bath as assessor to the Archbishop of Canterbury in the case of *Ditcher v. Denison* (30), held that the Bishop had no discretion under section 3 of this Act. But it is to be observed that no argument had been addressed to him on that point, and that his construction of that section was not adopted by the Privy Council in *Ditcher v. Denison* (38). The judgment of Wightman, J., in *The Queen v. The Bishop of Chichester* (2) is an express decision on this section, and is in favour of the appellants, and his reasoning is approved of by Crompton, J., in *The Queen v. Newport Bridge* (8) decided shortly after, and by Lush, J., in the application for a mandamus to compel the Bishop to issue a commission in *Bennett's Case* (3), besides which, the reasons of Wightman, J., appear to have been those of the majority of the Court which heard the case argued.

In *Martin v. Mackonochie* (39), the Court citing *The Queen v. The Bishop of Chichester* (2) and *Sherwood v. Ray* (5), reaffirms the existence of a discretion in the Bishop, and this was the opinion of the Court in *Sheppard v. Bennett* (3) when an application for a rule directing the Bishop to issue a commission was, in 1869, refused; the same doctrine is enunciated in *Elphinstone v. Purchas* (6), and repeated by Lord Selborne in *Ex parte Edwards* (4) and adopted in *Lee v. Fagg* (40).

To this consensus of authority may be added the opinion of the Lord Chancellor as expressed in a speech addressed by him to the House of Lords on the third reading of the Public Worship Regulation Act, 1874.

[BAGGALLAY, L.J.—Can we listen to a speech delivered in either House of Parliament, and consider it in order to interpret a statute?]

(38) 11 Moo. P.C. 324.

(39) 37 Law J. Rep. Eccl. 17; s. c. Law Rep. 2 A. & E. 116.

(40) 43 Law J. Rep. Eccl. 17; s. c. Law Rep. 6 P.C. 38.

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The speech is cited not for the purpose of interpreting the Public Worship Act, but it is relied on as an authoritative exposition of the law addressed by the highest legal authority in the kingdom to the House of Lords on the occasion of the consideration of a bill intended to change the law.

[BRAMWELL, L.J.—The Court must hear the counsel for the promoter on this point.]

*Stephens*, for the promoter.—It is submitted that the report of the speech should not be admitted, for it was not a speech delivered to the House sitting in its judicial but in its legislative capacity. There are no means of knowing whether that view of the law was adopted by the majority of the House, and the Court cannot even be satisfied that the report of the speech is correct. Such a speech cannot carry as much weight as a text book by a living writer, and such books are not relied on by Courts, nor can it be said to be equivalent to an *obiter dictum* by a Judge at Nisi Prius, for the sanction of a judicial proceeding, and the protection of the possibility of review is altogether absent.

[BRAMWELL, L.J.—The Court is prepared to listen to the quotation.]

The Lord Chancellor, on the 25th of June, 1874, stated that under the Church Discipline Act the Bishop had a discretion, as he would have under the new Act, as to whether he would proceed or not (41).

If, however, it should be considered that the Church Discipline Act does not give the Bishop a discretion, then it is submitted that the Public Worship Regulation Act, 1874, must be held to have impliedly repealed the earlier Act, for the two Acts are in many respects *in pari materia*, and as to all the offences covered by both, the provisions of the later Act must prevail, for an implied repeal is always held to take place when two statutes aiming at the same object contain inconsistent provisions and different procedure. It is a rule that different statutes on the same subject are to be read, as far as possible, as one statute, and the power

to proceed under section 3 of the Church Discipline Act must be held to be repealed by the provisions for a complaint being made by three parishioners given by the Public Worship Regulation Act, 1874—*Michell v. Brown* (42), *Ex parte Baker* (43), *McWilliam v. Adams* (44). If this argument cannot prevail, then it is contended that the discretion given by the Public Worship Regulation Act is copied from that which the Legislature believed, in consequence of uniform decisions, to be given by the earlier Act, so that it amounts to a legislative declaration of the meaning of the earlier Act—*The Queen v. Smith* (45). The express preservation in sections 5 and 18 of the Public Worship Act of the right of the Bishop to proceed *mero motu*, and of the power to pass sentence by consent, lends force to the contention that it was intended to repeal all the procedure given by the Church Discipline Act which is not expressly reserved.

The judgment of the Court below assumes that the putting in force the ecclesiastical law is a matter of right for the public benefit; but, if as is submitted is the case, the history of the ecclesiastical law, the records of the Courts and the authority of decided cases, shew that this is not the correct theory, then the decisions referred to as establishing that permissive words may have a compulsory force, do not apply here, as they are all based on the theory of there being a public right and a duty to be performed for the public benefit. With regard to the case of *The King v. Barlow* (20) it also is to be observed that the report in Salkeld says that the statute contained the word "may," whereas it in fact contained the word "shall." The appellants also contend that even if the Bishop has not the discretion which is claimed, still that the Queen's Bench Division has not in this case rightly exercised its discretion

(42) 28 Law J. Rep. M.C. 53.

(43) 2 Hurl. & N. 219; s. c. 26 Law J. Rep. M.C. 155.

(44) 1 Macq. Sc. App. 120.

(45) 4 Term Rep. 419; *Maxwell on Statutes*, 277.

(41) Hansard, vol. 220, p. 394.

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in issuing the writ, and that the appeal should be allowed.

*Charles* (with him *Phillimore*), for Mr. Carter.—The judgment of the Queen's Bench Division assumes that, if the Church Discipline Act did give a discretion to the Bishop, it created a discretion which had not before existed, so that the enquiry into the practice of the Courts before 1840 is material. Of the three forms of suit known to the old canon law, *accusatio* was practically never known in England, *denunciatio* and *inquisitio* prevailed; but the accuser, in the sense of one who suffered punishment if he failed to prove the charge, was not known, nor was there ever a right in every and any person to promote, without leave, a criminal suit against a clerk. The Bishop could always refuse to allow his office to be promoted if he did not think the promoter a suitable person, as for instance, unless he gave security for costs. Reliance is placed by the promoter on *Argar v. Houldsworth* (26) and *Turner v. Meyers* (27), but those cases merely contain *dicta* as to the criminal Courts being open to all. *The Procurator-General v. Stone* (12) only decided that when once the office of Judge has been promoted the Bishop cannot then interpose and stop the suit, and in *Carr v. Marsh* (17) the learned Judge did not profess to give an exhaustive list of all the cases in which a discretion existed. *Lee v. Matthews* (28), *Sherwood v. Ray* (5) and *Maidman v. Malpas* (11) lay down that the Bishop has a discretion, that the leave of the Court must be obtained, and that the character of the promoter may be the subject of enquiry, and that leave to prosecute a criminal suit could not be demanded *ex debito iustitiæ*. So that the cases before 1840 are at all events not conclusive against the appellants. The Church Discipline Act did not alter the principles upon which ecclesiastical suits were based, it only varied the manner of procedure, so that under section 3 the Bishop has a discretion which cannot be controlled, or which if controlled at all is only to be controlled by an appeal to the Archbishop under the reserved power contained in section 19. It is objected that the words "if he shall think fit" must, in this

view, be superfluous; but as they are undoubtedly unnecessary in other sections, as in sections 6, 7 and 13, that objection cannot prevail. If the words "it shall be lawful" are held to be compulsory, many anomalies may arise, for section 3 applies to all clerks, and in the case of a complaint being made against a clerk who holds no preferment, or against one who holds preferment in one diocese while the alleged offence is committed in another, great complexities may ensue in the application of the provisions of sections 7, 9 and 13. *The King v. Barlow* (20) was relied on in the Court below, but the argument drawn from the object of ecclesiastical suits, and from the absence of any right existing in any private person to promote a suit, without leave, destroys the application of that decision in the present case; and the same remark applied to *Morrisse v. The Royal British Bank* (22), also cited in the judgment of the Court below. Moreover, it is clear that in that case the Court could have no discretion. The only stage at which the Bishop can exercise any discretion is when the request is made to him to issue a commission, for if once the commission be issued the proceedings must go on. The commissioners have only power to say whether or not an offence has been committed, and cannot advise as to the propriety of not taking further proceedings—*The Queen v. The Archbishop of Canterbury* (10), *Ditcher v. Denison* (38). This case is really concluded by the authority of *The Queen v. The Bishop of Chichester* (2), and the judgment of Wightman, J., in that case is followed in *Head v. Sanders* (36), *Ex parte Denison* (9), *The Queen v. The Archbishop of Canterbury* (10) and in *Elphinstone v. Purchas* (6). Even if the decision in *The Queen v. The Bishop of Chichester* (2) does not approve itself to this Court, the Court will hesitate to overrule it after so long a time has elapsed, during which it has been received as unquestioned law, and when the Legislature has never interfered to alter the law as laid down—*The Anna* (46),

(46) 46 Law J. Rep. Adm. 15; s. c. Law Rep. 1 P. D. 253.

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*Morgan v. Crawshaw* (47). *Elphinstone v. Purchas* (6) is cited in the Court below as though it had been decided before 1840, whereas it was a decision under the Church Discipline Act, and on this section. In the first case of *Sheppard v. Bennett* (3) the Bishop had refused to consider the application at all, and had ignored it, so that a *mandamus* was granted to compel him to exercise a discretion, but that was all, and when the second application was made for a *mandamus*, to direct the Bishop to take a certain course, it was refused, and although there was no decision on section 3, the opinion of the Court expressed during the argument was in favour of the discretion claimed by the Bishop in this case.

The Public Worship Regulation Act, 1874, deals with a number of offences which were not before the mind of the legislature when the Church Discipline Act was passed, and the only way of harmonizing the legislation is to treat both Acts as giving a discretion, it is further submitted that the Court would be slow to issue a *mandamus* to enforce a construction of an earlier Act which is inconsistent with the provisions of a later Act relating to the same subject matter, especially when the section of the Act thus proposed to be enforced, has received a judicial interpretation long acquiesced in and opposed to that now sought to be put upon it. Moreover, the provisions of the later Act giving a discretion should guide the Court in the exercise of its discretion, as they certainly point to an intention to enlarge rather than to restrict the powers of the Bishop. The offences now complained of might all be the subject of an indictment under the Act of Uniformity, and it is a well established rule that a *mandamus* will not be granted if there is another and an equally convenient legal remedy.

*Stephens* and *Jeune*, for the promoter. —The appellants strive to distinguish between the spiritual and temporal Courts; but all Courts derive their authority from the Crown, the diocesan Courts are

the Queen's Courts, and the spiritual Judges are the Queen's Judges when they exercise coercive jurisdiction, for there can be no coercive jurisdiction unless it be granted by the State. The Acts of Uniformity, the authorities cited in *Burn's Ecclesiastical Law*, vol. ii. p. 30e, 4 *Coke's Institutes*, c. 74, p. 321, *Hooker's Ecclesiastical Polity*, b. viii. c. 2, establish this. The appellants claim for the Bishop, under section 3 of the Church Discipline Act, an uncontrolled discretion; but even if the Bishop had such a discretion before the Reformation it was taken away then. It is not denied that the Bishop has a discretion as to certain matters, but he has no such discretion as is claimed by the appellants, he cannot limit the rights of the laity by holding his hand altogether, and by refusing either to issue a commission or to send the case to the provincial Court; he has a discretion to enquire whether the case be of ecclesiastical cognisance, to decide which course he prefers to pursue, but this discretion is a purely judicial discretion, to be exercised according to well established rules, and not according to personal notions and private fancies; it is a ministerial discretion not a discretion dependent on his individual will.

No such discretion as is now sought to be claimed existed before 1840, for prior to that year any person not under civil disabilities could prosecute an offending clerk, and although it was necessary, as a matter of form, to obtain leave, yet leave was never refused if the complaint was of ecclesiastical cognisance, this preliminary leave being only required for that purpose, *Coot's Ecclesiastical Practice*, 148, and also possibly for the purpose of seeing that the accuser was a fit person to promote the suit. This application was made subject to the rules of judicial procedure. No personal control was ever exercised, for the control was exercised according to well-known formal rules of stereotyped practice, and so formal were the proceedings, that, as may be gathered from the note in *Maidman v. Malpas* (11), they were not seldom omitted altogether, so that the restoration of the practice of enforcing those rules was a practical novelty.

(47) 40 Law J. Rep. M.C. 202; s. c. Law Rep. 5 H.L. 304.

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With regard to the three old forms of ecclesiastical suit, cited in *Oughton* and *Ayliffe*, it is doubtless true the *accusatio* with its *lex talionis* had fallen into disuse, while *inquisitio*, or the institution of the suit by the Bishop of his own mere motion and *denunciatio* or presentment remained, but *denunciatio*, as is clear from *Ayliffe's Parergon*, 210, applied not only to officers of the church, in which shape it survives in presentments by churchwardens, but that it was the form under which any private person could, without incurring any personal risk, call for the judgment of the Court *ad publicam vindictam*. After the abolition by 13 Car. 2. c. 12. s. 4 of the *ex officio* oath there grew up a mixed practice deduced from *accusatio*, but without the old penalties, and this with *inquisitio* lasted till 1840. The law and practice prevailing in the Ecclesiastical Courts from 1640 to 1840 discountenance the idea of there being any power inherent in the Court or Bishop to prevent a criminal suit from being instituted or from proceeding, and no case shews that the formal leave, to which reference has been made, was ever refused when the cause was of ecclesiastical cognisance, and the promoter acted *bona fide*.

Before 1840 the Bishop had personally no power of preventing any proper person instituting a suit, for he was obliged to appoint a Chancellor, and he could not interfere with him—*Ayliffe*, 160, 2 *Phillimore's Ecclesiastical Law*, 1212. If he failed to appoint, the Archbishop could appoint one for him, and the Bishop could not sit in the Court, just as the Sovereign cannot sit in the Queen's Bench; and as the Crown sued in that Court by its officer, so the Bishop could sue in his own Chancellor's Court—*Ex parte Medwin* (37). Such facts as these are hardly consistent with the theory of personal knowledge and individual pastoral supervision contended for by the appellants. If it be said that the remedy, if any, is by appeal to the Archbishop on the ground that section 19 of the Church Discipline Act preserves the provisions of the Statute of Citations, the answer is that the Statute of Citations (23 Hen. 8. c. 9) was

aimed at the power of the Archbishop, who claimed at that time a concurrent jurisdiction with the Bishops over every diocese, and as the power of the Bishop to convent is gone, so the power of the archbishop is gone, for the issuing of a commission is not conventing, and the only power that can be reserved to the Archbishop is the power in section 4 of the Act of Henry 8 to cite for heresy; the Archbishop, therefore, could not have interfered in the present suit unless the Bishop had been patron of the living, when under section 24 of the Church Discipline Act the Archbishop takes the place of the Bishop.

Even if there might possibly be an appeal to the Archbishop from the refusal of the Bishop, still that is not now a practical legal remedy, so that the *mandamus* would still issue, for that remedy, even if in theory it exists, is in practice obsolete, nugatory, and lost through non-user, consequently the effect is as though the statute which gave it had been repealed, so that the Court will not hesitate to give the promoter the only enforceable practical remedy of to-day—*The Queen v. Stafford* (48), *The Queen v. Nottingham* (49). Before the Church Discipline Act the letters of request went from the Judge of the inferior to the Judge of the superior Court, so that the Bishop was in no way, save by way of formal title, brought in, and the only discretion to be exercised was a judicial discretion.

In *Pelling v. Whiston* (34), the question was, whether the case, it being one of heresy in a peculiar, ought to be tried by the Bishop, or whether he, having no jurisdiction within the peculiar, could send the case to the provincial Court. *Turner v. Meyers* (27), *Argar v. Holdsworth* (26), and *The Procurator General v. Stone* (12), are express decisions to the effect that the criminal suit is open to every one, and that the Bishop cannot refuse his office provided always that the cause be one of ecclesiastical cognisance. In *Lee v. Matthews* (28), the argument was on the

(48) 3 Term Rep. 646, at p. 652.

(49) 6 Ad. &amp; E. 355; s. c. 6 Law J. Rep. Q.B. 89.

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admission of articles, to which objections can always be tendered, for the Judge always had a discretion in the matter of articles. In *Sherwood v. Ray* (5), the suit was a civil suit, so that the question of interest was open. In *Head v. Saunders* (36), an earlier commission had been issued by the Bishop *ex mero motu*, and so he could not be compelled to allow a promoter, who came in afterwards, to proceed.

Such being the law and practice before 1840, the Church Discipline Act was passed, not to prevent the institution of frivolous suits, but to render the procedure simpler and more certain. It practically abolished all the numerous small ecclesiastical Courts, and only so far restored the Bishop to his Court as to enable him by section 11 to sit with assessors in a particular event. It did not create a discretion which had not existed before, nor did it put obstacles in the way of ecclesiastical suits, it only gave the Bishop a discretion as to the summoning and formation of the tribunal, for if the Bishop be able to investigate and finally decide the matter, as, in fact, the appellants claim that he should, where is the reason for the appointment of the commissioners? The object aimed at, was the obtaining of a local, impartial, speedy and inexpensive tribunal. The contention that the discretion in the Bishop may be deduced from a theory that the Bishop of the diocese would have personal knowledge of the clerk against whom a complaint might be preferred, and that therefore he is the person to whom the legislature would naturally give the discretion, cannot prevail; for it is merely accidental that in this case the Bishop applied to, was the Bishop in whose diocese the clerk was beneficed, and if the complaint had been of an heretical work published in another diocese, the application would have been made to that Bishop. The commissioners have all necessary powers for protecting the clergy from frivolous complaints, and by section 13 have to report whether or not there is "sufficient *prima facie* ground" for further proceedings, so that they can exercise a certain discretion given them by the statute; for the com-

mission is the special feature of the Act, it is not the outcome of the old power to promote the office of the Judge, but a new creation of the statute.

The Bishop has, as has been conceded, a discretion in certain matters, and if, e.g., the promoter be not aggrieved or be not connected with the diocese, the Bishop will be upheld by the Court in refusing to interfere—*The Queen v. The Bishop of Chichester* (2). It is truly said that the commissioners shewed in their report in 1832 a desire to change the law; but the Act was not passed till 1840, and the legislature did not adopt all their suggestions. The Bishop has no power to take evidence on oath, such as he would possess if he could enquire into the matter himself, no appeal lies from him to the Archbishop, he can appoint a commission and then he is *functus officio*.

It is argued that the cases which shew that words *prima facie* permissive are obligatory when they relate to a public duty are not in point; but if the position be good, that the laity have a right to enforce the observance of the law by clerks, and if the opinion expressed by Dr. Lushington, at Bath, in 1856 (30), which has been approved of by the Court below, be correct, then all those cases are of the closest importance, and the well known rule laid down in *The Queen v. The Tithe Commissioners* (23), in *Mac Dougall v. Paterson* (21), *Morris v. The Royal British Bank* (22), and *Ex parte Jarman* (50), is most pertinent.

If the Church Discipline Act be examined it will be found that the words of the statute may be permissive when, as in the latter part of section 4, in section 6, in section 13, in section 15, a private right or personal privilege is being conferred; but that the same words are compulsory when, as in the earlier part of section 3, in the first part of section 4, in section 9, as interpreted in *The Queen v. The Archbishop of Canterbury* (10), in sections 14 and 17 the subject matters of the enactment are public rights, public justice, and duties to be performed for the benefit of the public.

(50) 46 Law J. Rep. Chanc. 486, at p. 486; s. c. Law Rep. 4 Ch. D. at p. 838.



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Wightman, J., expressed in *The Queen v. The Bishop of Winchester* (2), a contrary opinion as to the meaning of section 3. That opinion was not necessary for the decision of the case and was not adopted by Hill, J. Whether it was the view of the majority of the Court is not certain, but it is clear that Wightman, J., misapprehended the effect of the old ecclesiastical law as to scandal being a ground for promoting the office of the Judge; he thought it was not, whereas it is plain it was, and this led him to suppose the enactment in section 3 of the Church Discipline Act was new, whereas it was but a re-enactment and renewal of the old procedure—*Ayliffe*, 277; *Consett*, 386; and to the contrary is the opinion of Mellish, L.J., in *Ex parte Edwards* (4). *Ex parte Denison* (9) was really only a decision on the power of the Archbishop, where the Bishop was patron of the living held by the accused clerk.

*Martin v. Mackonochie* (39); *Sumner v. Wise* (51), and *Lee v. Fagg* (40) do not advance the argument for the appellants, for the Judge who decided them had not to consider this point, and *Elphinstone v. Purchas* (6) was decided on the prior authorities, attention not being specially directed to this statute. In the first case of *Sheppard v. Bennett* (3) the Court granted a mandamus to compel the Bishop to receive and consider the complaint, and the result was a duly constituted suit; and in the second case the Court in the exercise of its discretion refused the mandamus probably because the first suit was at that time proceeding; but no decision was given on section 3 of this Act.

The Public Worship Act, 1874, does not repeal the earlier statute, for section 4 impliedly preserves it, while sections 5 and 18 do so expressly. The provisions of the two Acts differ. They are not, however, contradictory or incongruous; the later Act provides simpler machinery and gives the Bishop aids which are necessary, as he has no commission to act for him, but he has imposed on him for the first time a personal responsibility,

and he can for the first time exercise a personal discretion. The result must be that the earlier Act is continued and not repealed, for the law does not favour repeals by implication unless there be a plain repugnance between the two statutes—*Dwarris*, 533. Recourse may be had to either; but proceedings carried out under the one are a bar to proceedings under the other on the same facts.

To the objection that the Bishop cannot stop the case when once the commission has reported, the reply is that the Bishop cannot pardon. The *nolle prosequi* of the Attorney-General is merely anticipatory of the power of the Crown to pardon. The statute does not provide for costs, because the Arches Court can require a bond and award a sum *nomine expensarum*, and the intention was that all cases of complexity should be sent there. It is suggested that these offences could all be made the subject of an indictment, but besides the fact that the punishment which must follow a conviction is heavy, what the promoter here seeks is not the punishment of the individual but the correction of the offence, as when in a civil case it is sought to have something done, not to have damages for non-performance, and therefore he is entitled to have the *mandamus* issue—*The Queen v. Bristol* (52). The Bishop's reasons for refusing to take steps are not reasons which can be held good in law. If by an act a power is given, those to whom that power is given cannot refuse to exercise it, because their opinion is that it will in certain cases work injustice—*The Queen v. Boteler* (53). *Interest reipublice quod crimina prementur*, and *mandamus* is the only substantial remedy here. Moreover, if the question be one of the discretion of the Court, then a Court of Appeal will not, following the well-known rule, interfere with the discretion of the Court below.

*Bowen* in reply.

*Cur. adv. vult.*

The following judgments were read on May 30:—

(52) 10 Law J. Rep. Q.B. 346; s. c. Law Rep. 2 Q.B. 64.

(53) 33 Law J. Rep. M.C. 101.

(51) 39 Law J. Rep. Eccles. 25; s. c. Law Rep. 3 A. & E. 58.

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BRAMWELL, L.J.—I am of opinion that this appeal must be allowed; that our duty is marked out for us. There is from the time the Church Discipline Act passed until now, such an amount of authority as to its construction, that in my judgment we are bound to follow it. It was decided in *The Queen v. The Bishop of Chichester* (2) that it was not compulsory on the Bishop under section 3 to issue the commissions there mentioned. I have the authority of Sir R. Phillimore for saying that Lord Campbell told him he had concurred in the judgment and the reasons of Wightman, J. The same was decided by the Privy Council in *Elphinstone v. Purchas* (6) in 1870. Before and between the times of the two decisions, beginning in 1842, there is a vast amount of expression of well-considered opinions to the same effect. There are, indeed, some expressions of doubt; not, as I think, indicating a contrary opinion, but indicating a doubt whether the statute was or was not obligatory. There is also one clear expression of opinion that it was, by one whose authority I desire to treat with the greatest respect—I mean the opinion of Dr. Lushington in *Ditcher v. Denison* (30). Of this, however, it may fairly be said that it was not necessary for the judgment, was expressed as a defence for the Archbishop in answer to complaints against him for having proceeded, and was founded on what certainly was, as I think, an erroneous belief of the opinion of Lord Stowell and Sir John Nicholl as to the state of the law before the statute. But giving all weight to these doubts and to this decision, they are not to compare with the authorities the other way. The last of them was the decision of *Elphinstone v. Purchas* (6), a decision of the Privy Council, the ultimate Court of Appeal in causes ecclesiastical. It is remarkable that in the judgment appealed from, this case is only referred to in examining the state of the law before the Church Discipline Act. It is, however, a decision on this very Act, and on the very question before the Court below, and now before us. In my opinion we are bound to follow it, and should be, even if not preceded by the other cases and authorities I have referred to. Taken

with them, with all respect to those who have thought otherwise, I cannot but think that we are concluded. The decisions and opinions are such and so many that we ought to follow them. This is my conviction. I think that at least none but the ultimate Court of Appeal should overrule opinions so expressed, even if that should; as to which I content myself with observing that where the law has been laid down, and generally supposed and taken to be correctly laid down and acted on, great Judges have doubted much whether, if wrong, the remedy was in the judicature. I do not examine the authorities in detail, as Baggallay, L.J., in his judgment has done so, and I entirely agree in all he has said on these cases on this head, and also on those relating to the state of the law before the Church Discipline Act. But there is one matter on which I wish to say a word. Both my learned brothers have discussed our admission of the opinion given by the Lord Chancellor to the House of Lords on the occasion of the third reading of the Public Worship Regulation Act, 1874. I really do not know that there is any definite rule as to what may or may not be cited and acted on as authority. No doubt, we must act on general principles, and I suppose they would exclude what is said in debate in either House of Parliament. But to reject the opinion of the head of the law as to what is the law, given to advise the highest Court of judicature in the country, sitting indeed in its legislative capacity, and at the same time to admit the *obiter dictum* of a Judge at Nisi Prius either in our own or an American Court, seems somewhat strange, more especially as it is certain that if it ought to be excluded, any Judge knowing of it and excluding it, would as soon as he left the Court consult the Hansard he had before rejected. I cannot think it was wrong to admit it.

I am prepared, then, on this ground to reverse the decision of the Court below, and I am not sure that I ought to say more. If the law is laid down, it is immaterial for our purpose whether it is rightly laid down or not. We must follow it. To discuss may seem to doubt its correctness. However, as I cannot

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but think that if unaided by previous expressions of opinion I should have come to the same conclusion, I wish to say why. The question is whether section 3 of the Church Discipline Act makes it compulsory on the Bishop to issue a commission on a complaint made to him of an offence against the laws ecclesiastical committed by a clerk in his diocese. To determine this it is admitted by both sides that it is desirable to ascertain what was the law in relation to such matters before the Church Discipline Act; whether the Bishop was bound to allow the office of Judge to be promoted, or whether it rested within his discretion. Now, it does appear to me most clear that the latter is the truth; positively the whole authority is one way, the few expressions that might seem contrary referring to the duty of the Bishop to exercise his discretion in favour of allowing the office to be promoted when a proper case was presented to him. The opinion of Lord Stowell is express, that it is not enough that a *prima facie* case is made out. The motives and design of the would-be promoter must be looked to. It was attempted to make out that there is something midway between a discretion and no discretion. It is certainly true that where one man affirms a thing to exist and another affirms it not to exist, neither may make out his proposition; nevertheless one of those propositions is inevitably true. And if in order to construe a statute we must see what the law was before it, we must find that it was or that it was not as the one or the other party alleges. It cannot be, and not be, or anything between the two. No doubt there may have been a discretion in the Bishop, so that allowing the promotion of the office of Judge was not *ex debito justitiæ*, and yet there may have been a practice, and in a sense of duty, a moral duty, or duty of imperfect obligation, to permit it in a proper case. But if that is the middle term—if it was only “almost of right,” and not quite—it was not of right; and then it remains that it was not an enforceable duty; that the law would not compel its performance, that it was not *ex debito justitiæ*, and that the Bishop had a discretion, and, if not re-

strained by his conscience, could, that is, had power to refuse it even improperly, and could properly and rightfully refuse it in all cases where his conscience told him he ought to do so. I can have no doubt this was the case before the statute. I do not understand the Court below to have held otherwise, or I should not speak so confidently. Of course, it does not settle the question before us. The Legislature may have thought that the proceeding was so much of course that it might be made compulsory with no practical alteration. But supposing there was a discretion before the Church Discipline Act as to allowing the office of Judge to be promoted, is there anything to shew that that discretion should cease, and none be substituted for it? I cannot see anything to that effect. The statute is to alter procedure. It still leaves it discretionary whether the Bishop will not in certain cases send the case by letters of request to the Metropolitan Court; and this strange consequence would follow from holding the section to be compulsory, that if the Bishop should think that nothing ought to be done, but that if any step was to be taken it would be better it should be by letters of request, he could not be compelled to take that step, but could be compelled to take the other though he thought it the worst of the two. But whatever was the former law or practice, let us examine the section. There is no provision regulating who is to be the complainant: it may be any one, man, woman, or child, churchman or other, for aught I can see. There is no provision how the complaint is to be made, by writing or verbally; no provision how, if at all, it is to be verified; no provision that the complainant shall undertake to prosecute, or shall be liable to costs; no provision as to the character or nature of the offence, how far its prosecution may be desirable in the interests of religion or morality; not a word as to its being possibly an isolated offence, and unintentional and atoned for; nothing as to the motives or object of the complainant. I can only understand the omission of all these matters by the Legislature having given a discretion to the Bishop to refuse to

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issue a commission unless it was asked in a proper case by a proper person, properly substantiated, and with some satisfactory assurance it would be properly prosecuted, and possibly with a liability to costs. Of course, I am aware that on general principles the complaint must be *bona fide*, but how is the Bishop to determine this unless he has some discretion? It is said as to this, and as to the other matters I have mentioned, that the Queen's Bench would not issue a mandamus except in a proper case; but what is that but to transfer the discretion from the Bishop to the Queen's Bench Division, and with this singular consequence, that if a bishop refused to issue a commission on the ground that the matter complained of was not an offence ecclesiastical, the Queen's Bench must sit in judgment on him, and if they hold it is, order him to issue the commission. Now I have too much regard for the Common Law not to prefer it and its Judges to all other, but I cannot think that it is desirable it should have such a duty as this put on it. If it should be said that it has often to lay down for inferior tribunals a law which it has not to administer, I admit it; but it is a law within its cognizance and competency, depending on the Common Law or statute. It is said that the mischiefs here pointed out are obviated by this, that the commissioners have a discretion, and, if they think it undesirable to proceed with the case, may report that there is no *prima facie* ground for so doing. I am by no means clear that they ought to do so. The inclination of my opinion is that they are to inquire whether the case is *prima facie* established in fact. But suppose they could; if there is no discretion in the Bishop, what would that be (to apply a previous argument) but to transfer the discretion from him to them, and why should that be done? especially when it is remembered that the commission cannot be issued without trouble and expense to the commissioners and party complained of. Another argument against this being obligatory on the Bishop is that it is contrary to analogy. Complaint is made that there may be a wrong unpunished. So there may be at Common

Law. The Queen may pardon; the Attorney-General enter a *nolle prosequi* to any indictment. Why may not the Bishop, who is in the nature of prosecutor, do the same? It is strange that if Mr. Carter should be indicted for these offences, the prosecution could be stopped, but cannot be if the proceedings are in the Ecclesiastical Courts.

I now proceed to examine the words of the section, and I confess I do so with a strong belief they will not be found to be compulsory. It cannot be doubted that the Act is very loosely drawn. In discussing the section I will leave out for the moment the Bishop's alternative power to issue the commission "of his own mere motion if he thinks fit." "It shall be lawful." That means shall have power. "*Prima facie* those words import a discretion, and they must be construed as discretionary, unless there be anything in the subject-matter to which they are applied, or in any other part of the statute, to shew that they are meant to be imperative," per Crompton, J., *In re Newport Bridge* (8). It is for those who assert that these words are imperative, to prove it. I think they fail to do so. No doubt, a power given for the furtherance of justice is to be exercised and is a command. I quite assent to the remark of Mr. Justice Coleridge that "words only directory, permissive or enabling, may have a compulsory force where the thing to be done is for the public benefit, or in advancement of public justice." But it is to beg the question to say that that is the case here. The justice must be a justice which it is desirable should be exercised, and not a power such as this under such circumstances as I have pointed out. No doubt the public are interested in the matter; but their interest must be that in some cases there should be no prosecution. I know the danger of laying down a rule, how impossible it is to anticipate all possible exceptions. But I think the following may be of some use in ascertaining whether enabling words are compulsory. A statute giving a power means that it should be exercised in certain cases; where the conditions of those cases are always the same, then it must mean the power should

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be exercised in all those cases, and so is compulsory: see the reasoning of the Judges in the above case of *In re Newport Bridge* (8), and especially of Blackburn, J., at p. 280, and what was said by the Court in *Mac Dougall v. Paterson* (21). An example of this is seen in the last case, where the power to give costs was made dependant on the plaintiff living twenty miles from the defendant. That was the sole condition, and of course would exist without variation in every case where it existed at all. But where the circumstances of the cases vary, then words empowering, but not commanding, are not obligatory. It may be said that rule might apply here, and that it was enough that "a complaint" was made, be it what it might or by whom. To my mind it is impossible so to hold, and the statute must mean a complaint such as ought to be inquired into, and so a discretion is given to the Bishop. This would have been by construction of the section, supposing the words, "or if he think of his own mere motion," had not been there: do they make any difference? I think not. It is said that they shew that he is *not* compelled to act of his own mere motion, and consequently that he *is* on complaint made. I do not think so. They might assist in the construction of a clause when there were considerations on both sides of equal weight and doubtful language, and tend to shew that the part without them was compulsory. I do not think they do so. I admit they are superfluous words on this view: I incline to think they are inevitably so. I cannot well understand how a man can be *bound* to act of his own mere motion. Suppose "if he think fit" were omitted, would he be *bound* to act of his own mere motion? I admit that this is not the question here, but it bears on it; because it shews that the words are superfluous, unless they are put in to shew that the Bishop must act on complaint, whether he thinks fit or not. But surely the right way to say that would be to say it in words, and not by implication, from the use of otherwise superfluous words elsewhere. In addition to this, it is to be observed that these words are continually used in the statute, where they are absolutely useless; and

that though "it shall be lawful" may mean "shall" in one or more parts of the statute, it most certainly generally means "may" only. On these grounds I construe the section, as it has been so often and so authoritatively construed before. I say nothing about the Public Worship Regulation Act, 1874, save this, that it is certainly not obligatory. Why not? If the Church Discipline Act is, I cannot see. I cannot say that such a state of things would be a legislative absurdity, but I cannot see the reason of it.

Other arguments have been argued on both sides, which I refer to unwillingly, but which ought to be noticed, or it may be supposed they have been lost sight of. It is said by the respondent that to reverse the decision in this case would be to leave the laity at the mercy of the clergy; by the appellants it is urged that to affirm the judgment would be to transfer the discipline of the Church from the Bishops to the Queen's Bench. These arguments are revelant as shewing the probability or improbability of such legislation as each contends for. I think it unnecessary to express any opinion on these matters—matters which mankind have so dealt with as to make them of the greatest importance to human happiness. But fortunately we can, I think, construe the statute without expressing an opinion on these subjects. For my own part I desire to add that there is no question of religion, no question even of Ritualism before us. I have not read any one of the charges made against Mr. Carter, it being admitted that they are true and shew ecclesiastical offences. The question before us is the same as if the complaint had been one of brawling in the church. But with reference to the costs of these proceedings, and in order that silence should not be misunderstood, I must say one word on what may be called the merits of the question between the appellants and the respondents. I have lived long enough to learn that two right-minded men may honestly take different views of what is right in the same matter; and I have no doubt that the Right Reverend Bishop and the reverend gentleman who are appellants have been perfectly conscientious in their

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conduct in this affair. But it is admitted that Mr. Carter has committed, and is wilfully and knowingly persisting in committing six several breaches of the law of the land, acts for which he might be indicted and punished. By what means he has persuaded himself that he can receive the wages of the State Establishment to do a certain duty, and not do it but do that which is opposed to it, I cannot conceive; and, with all submission, I feel a nearly equal difficulty in understanding how it can seem right to the Right Reverend Bishop not to bring him to justice. Of course, recognising as I do that the Bishop possesses a discretion in this matter, I most fully admit he is vastly more capable of exercising it well than I am. But the way he does exercise it is subject to criticism even by those less competent than himself (in the same way as the opinion and sentences of Judges may and ought to be and are criticised by laymen), and especially must be by me in reference to the costs of these proceedings. And it does seem to me (I speak with sincere respect, and am not using words of form) that the discretion here has been most erroneously exercised. It is as though a public prosecutor should refuse to prosecute a man guilty of and persisting in a public nuisance against the rights and to the injury of the neighbourhood, because the offender was old and respected, and because some of the neighbours worked for him, and because some prosecutions for nuisance had recently failed. It seems to me the appellants have invited and provoked this litigation; and as one appellant breaks the law, and the other affords him impunity, I think there should be no costs allowed to either of them.

BAGGALLAY, L.J.—These two appeals are brought, the one by the Bishop of Oxford, and the other by the Rev. Thomas Thellusson Carter, rector of the parish of Clewer, in the diocese of Oxford, against an order of the Queen's Bench Division, made on the 8th of March, 1879, for a mandamus to the Bishop, commanding him, either to issue a commission for the purpose of making inquiry as to the grounds of certain charges preferred by

one Dr. Julius, a parishioner of Clewer, against Mr. Carter for offences alleged to have been committed by him against the laws ecclesiastical, or to send the case by letters of request to the Court of Appeal of the province, to be there heard and determined according to the law of the Court.

It is unnecessary to specify the particular offences with which Mr. Carter was charged; it is sufficient to say that they consisted in unauthorised deviations from the established ritual and ceremonial of the Church of England.

The application for the mandamus was supported by affidavits, verifying the practices which formed the subject of complaint, and, as the statements in such affidavits were in no way contradicted or explained, it must be assumed, at any rate for the purposes of these appeals, that Mr. Carter had committed the offences, with which he was charged, within the diocese of Oxford.

It has been suggested, on the part of the appellants, that there was no sufficient evidence before the Queen's Bench Division of a refusal on the part of the Bishop to entertain the complaint of Dr. Julius, and that, consequently, if the Court had any jurisdiction to make an order for a mandamus, the order should have been limited to a mandamus to entertain the complaint of Dr. Julius; but, having regard to the correspondence which has passed between the Bishop and Dr. Julius and his solicitors, it must, in my opinion, be assumed that the Bishop had taken into consideration the subject of the complaint, and, for reasons, which were satisfactory to himself, had refused to institute proceedings under the powers conferred upon him by the Church Discipline Act; indeed, the reasons of the Bishop for so refusing appear from his letters, which have been put in evidence. Concisely stated, they are as follows: 1. His unwillingness to increase the injurious consequences to the Church, which, in his opinion, had been occasioned by other proceedings of a similar character; 2. His regard for the strongly expressed wish of the great majority of Mr. Carter's parishioners that proceedings should not be taken against him; and 3, the ad-

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vanced age of Mr. Carter and the general respect and esteem in which he was held by those who knew him. The learned Judges, who constituted the Court when the order appealed from was made, were of opinion that it was not within the discretion of the Bishop to refuse to interfere, when complaint was made to him of offences committed, or alleged to have been committed, within his diocese; and that, whatever might be his own opinion as to the propriety or expediency of so doing, it was obligatory upon him, under the provisions of the Church Discipline Act, to adopt one or other of the two courses referred to in the order, though he had a discretion, as to which of those two courses he would adopt.

Now, the authority to issue a commission is conferred by the 3rd section of the statute, and it is conferred upon the Bishop of the diocese, within which the offence is alleged to have been committed; whilst the authority for sending the case by letters of request to the Court of Appeal of the province is conferred by the 13th section on the Bishop of the diocese in which the accused party holds preferment; but inasmuch as, in the case now under consideration, the offences are alleged to have been committed in the same diocese as that in which Mr. Carter holds preferment, each of the two authorities, if exerciseable at all, is to be exercised by the same Bishop, and the sending of letters of request is, in this case, an alternative only for the issuing of a commission; the substantial question, therefore, which we have to determine, is whether, according to the true construction of the 3rd section of the Church Discipline Act, the power conferred upon the Bishop of issuing a commission is one, which it was obligatory upon him to exercise when applied to by Dr. Julius, or whether he had a discretion to exercise it or not, as he might think fit. And the answer to this question depends upon the meaning to be attributed to the words "shall be lawful," as used in the 3rd section. Now, *prima facie*, these words import a discretion; but, to adopt the language of Coleridge, J., when delivering the judgment of the Court of Queen's Bench in the case of *The Queen v. The Tithe*

*Commissioners* (23), "It has been so often decided as to have become an axiom that, in public statutes, words only directory, permissive or enabling, may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice." Such words may have different meanings in different sections of the same statute, or even in different portions of the same section; and, whether, in any particular section or portion of a section, they are to be regarded as compulsory or as importing a discretion, must depend, not only upon the immediate context, but also upon the object and general scope of the enactment.

The arguments, which have been addressed to us on behalf of the appellants, may be conveniently classed under the three following heads, though they were not put before us in the same sequence: 1. That the provisions of the Church Discipline Act, so far as they confer a jurisdiction in respect of such offences as those preferred against Mr. Carter, have been in effect repealed by the Public Worship Regulation Act, 1874; 2. That, if those provisions are still in force in respect of the offences with which Mr. Carter is charged, the construction of the 3rd section has been settled by authority, which it is not open to any Court, whether of primary or appellate jurisdiction, to question; and that, according to the construction so settled by authority, the power conferred upon a bishop of issuing a commission is one which he may exercise or abstain from exercising at his discretion. 3. That if the true construction of this section ought not to be regarded as settled by authority, it is nevertheless that for which they contend.

But before proceeding to consider the arguments so addressed to us, it will be convenient, and particularly so with a view to a full appreciation of the authorities to which attention will be directed presently, to trace the several steps of the new procedure introduced by the Church Discipline Act, the object of which, as stated in its preamble, was "to amend the manner of proceeding in causes for the correction of clerks." Now, in approaching the consideration of the 3rd

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section, we cannot fail to observe the very wide terms in which the authority thereby conferred upon the bishop, is expressed. If a clerk in holy orders is charged with any offence against the law ecclesiastical, however grave or however trivial such offence may be, or, even if he be not so charged, if there exist concerning him any scandal or evil report of his having so offended, it is open to any one, whether a parishioner or an entire stranger to both parish and diocese, without any pecuniary or other personal interest in the matter, and whether a member of the Church of England or not, to make complaint to the Bishop of the diocese in which the offence is alleged to have been committed, and power is conferred upon the Bishop upon such complaint being preferred, to issue a commission for the purpose of making inquiry as to the grounds of the charge or report. I do not stop at present, to consider whether the authority so conferred is one which the Bishop is under an obligation to exercise, or whether it is within his discretion to abstain from exercising it, but pass on to notice the proceedings consequent upon the issuing of a commission. Under sec. 4, the party accused is to have notice of the meetings of the commissioners, and may attend them, if he think fit; power is conferred upon the commissioners to examine witnesses upon oath for the purpose of ascertaining whether there are sufficient *prima facie* grounds for instituting further proceedings; and if the commissioners, or a majority of them, are of opinion that there are such *prima facie* grounds, they are to transmit to the Bishop a report to that effect with the depositions of the witnesses. It is to be observed that the Act contains no provisions as to the parties by whom, or the sources from which, the expenses connected with such proceedings are to be defrayed; though it is obvious that in many cases the expenses must necessarily be considerable. The Act next provides (section 5), that in case the party accused holds any preferment in any other diocese than that in which the offence has been committed, the Bishop to whom the report shall be made is to transmit a copy thereof, and of the depositions to the

Bishop of such other diocese; and at this stage of the proceedings the Bishop of the diocese in which the accused party holds any preferment may (section 6), with the consent of the accused party and of the party complaining, pronounce sentence without any further proceedings; but if sentence be not so pronounced, *either the last-mentioned Bishop or the party complaining* may proceed against the accused party, in which case articles are to be prepared and filed, and the Bishop, with the aid of three specially qualified assessors, is to hear and determine the cause, and to pass sentence therein, according to ecclesiastical law; this portion of the procedure is provided for in sections 7 to 12. Now, with reference to that portion of the procedure to which attention has as yet been directed, it is to be observed that the Bishop who is to hear and determine the cause is not *necessarily* the Bishop in whose diocese the offence is alleged to have been committed, and by whom the commission has been issued. In all cases in which the accused party holds preferment in any other diocese than that in which the offence is alleged to have been committed, the powers and the duties of the Bishop of the diocese in which the offence is alleged to have been committed begin with the issuing of the commission and end with the forwarding of copies of the report and of the depositions to the Bishop of the diocese in which the accused party holds preferment. In a case in which the offence charged is one against religion, as, for instance, promulgating heretical doctrine, contravening the thirty-nine articles, or depraving the Book of Common Prayer, it is not unfrequently committed by a publication in the metropolis, or other town, though the author is beneficed in a diocese remote from the place of publication; but in a case like the present, in which the offence charged is in respect of ritual or ceremonial, it is more frequently committed within the diocese in which the accused party holds preferment. It is perhaps not immaterial to observe that offences of this latter kind were, comparatively speaking, unknown at the time when the Church Discipline



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Act was passed. The case of *Westerton v. Liddell* (54), in the years 1856 and 1857, was probably the first case of this character, at any rate, in modern times. But it is further to be noted that, when the commissioners have reported, however ready and willing the accused party may be to acknowledge his fault, and to submit to such punishment, if any, as his offence may render him liable to, it is in the power of the party complaining to insist upon a public prosecution, with all its consequent annoyance, trouble and expense. And it will also be observed that the provisions as yet referred to in no way provide for carrying the proceedings beyond the report of the commissioners in a case in which the party accused is not the holder of any preferment. This, however, is to some extent provided for by section 13, which enacts that it shall be lawful for the Bishop of the diocese in which any such clerk shall hold preferment, or, if he hold no preferment, then for the Bishop of the diocese in which the offence is alleged to have been committed, in any case, if he shall think fit, either in the first instance or after the commissioners shall have reported that there is sufficient *prima facie* ground for instituting proceedings, and before the filing of the articles, but not afterwards, to send the case by letters of request to the Court of Appeal of the province, to be there heard and determined according to the law and practice of the Court. Now, here it is to be noted that, if the clerk holds any preferment, the Bishop to whom complaint is made, unless he happens to be also the Bishop of the diocese in which the preferment is held, is not empowered to send the case to the Court of Appeal. All that he is authorised to do in such a case is to issue a commission and receive the commissioners' report, whilst on the other hand, his power to issue a commission, whether it is obligatory upon him or not to exercise it (which I am not at present considering), is liable to be interfered with and rendered nugatory by the exercise by the Bishop of the

other diocese of the power, conferred upon him by the 13th section, of sending the cause in the first instance to the Court of Appeal. It would appear also, that in the case of an accused clerk who is without preferment, any further proceedings which may be taken against him, in the event of a report by the commissioners that there are *prima facie* grounds for them, must be in the Court of Appeal. There are two more sections in the Act, the purport of which should be noted. The 15th gives an appeal from the judgments of the Bishop and of the Court of Appeal to the Archbishop and to the Queen in Council. In the former case the appeals are to be heard by the Judge of the Court of Appeal of the province, and in the latter by the Judicial Committee of the Privy Council. The 24th section provides that when any act, save sending a case by letters of request to the Court of Appeal of the province, is to be done or any authority is to be exercised by a Bishop under the statute, such act is to be done or authority exercised by the archbishop of the province in all cases where the Bishop, who would otherwise do the act or exercise the authority, is the patron of any preferment held by the party accused.

Such being the general nature and course of the procedure introduced by the Church Discipline Act, I pass on to consider the first of the contentions pressed upon us on behalf of the appellants, namely, that the provisions of that statute, so far as they confer a jurisdiction in respect of such offences as those with which Mr. Carter has been charged, have been in effect repealed by the Public Worship Regulation Act, 1874. In my opinion this contention is untenable. The Public Worship Regulation Act, 1874, doubtless enables proceedings to be taken under certain circumstances for the correction of offences of the same or a similar kind to those charged against Mr. Carter, but the circumstances under which such proceedings may be taken are of a special character. The Bishop must be put in motion, not, as in proceedings under the Church Discipline Act, by any one who chooses to intermeddle in the matter, but

(54) Moore's Special Rep. and Brodrick's Eccles. Judgments in P.C. 117.

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by certain officials, namely, the arch-deacon, the rural dean, or the churchwarden, or by three parishioners of the parish, who are respectively required to make declarations as to their being members of the Church of England. Upon the application of persons so specially interested in the subject proceedings may be taken as provided by the Act; but the circumstance that a more simple form of procedure can be adopted under the latter Act, when the parties complaining have a special interest in the subject-matter of their complaint, cannot, in my opinion, afford any reason for holding that the provisions of the earlier Act are repealed by the later. I can see no inconvenience or incongruity in treating both enactments as in force. The consideration that Dr. Julius, joining with two other parishioners, members of the Church of England, could initiate proceedings under the Public Worship Regulation Act, 1874, appears to me to afford no good ground for holding that Dr. Julius *alone* cannot initiate proceedings under the Church Discipline Act. But the terms of the statute itself negative any such inference. The 5th section enacts that nothing in the Act contained, save as therein otherwise expressly provided, shall be construed to affect or repeal any jurisdiction which was then in force for the due administration of ecclesiastical law; and the only express provision to be found affecting the Church Discipline Act is in the 18th section, which provides that when any suit or proceeding has been commenced against any incumbent under the Church Discipline Act, he shall not be liable to proceedings under the Public Worship Act in respect of the same matter, and that no incumbent proceeded against under the Public Worship Act shall be liable to proceedings under the Church Discipline Act in respect of any matter upon which judgment has been pronounced in proceedings under the Public Worship Act. The language of this latter section appears to me to put it beyond all question that it was the intention of the Legislature that the provisions of both statutes should continue in force, to the extent that proceedings

might be adopted under the one or the other, though it imposes a restriction after the adoption of proceedings under the one upon proceedings under the other.

I pass on, then, to consider the *second of the contentions of the appellants*, namely, that the question of the construction of the 3rd section of the Church Discipline Act has been conclusively settled by authority. Some forty years have elapsed since the statute became law, a period apparently sufficient to have allowed of the correct construction of the section being ascertained by competent and binding authority; but it cannot be denied that different or doubting opinions have been from time to time entertained and expressed, and to such opinions I propose now to direct attention.

With the exception of some observations made by Lord Campbell in December, 1842, in delivering the judgment of the Judicial Committee of the Privy Council, in the case of *Head v. Sanders* (36), to the effect that *there were no means of compelling the Bishop to issue a commission, although he had given notice of his intention to do so*, there would appear to be no record of any judicial decision or dictum, affecting the question now under consideration, previously to the proceedings in the case of *Ditcher v. Denison* (30). In that case, in consequence of the Bishop of the diocese being the patron of the preferment held by Archdeacon Denison, the power of issuing a commission to inquire into certain offences against the laws ecclesiastical, alleged to have been committed by the archdeacon, which would otherwise have been exercisable by the Bishop, was vested in the archbishop under the 24th section of the Act. In the month of November, 1854, application was made to the Court of Queen's Bench, on behalf of Archdeacon Denison (55) for a writ of prohibition to the archbishop, who had given notice of his intention to issue a commission, and, upon such application being refused, Lord Campbell (the other members of the Court being Wightman, J., Erle, J., and Crompton, J.) said—

(55) 4 E. & B. 292; s. c. 24 Law J. Rep. Q.B. 35.

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"The Legislature has thought it inexpedient, where the Bishop is the patron, to leave it entirely in the discretion of the Bishop whether proceedings shall be instituted against the incumbent or not." In that case the Bishop had it in his power, under the reservation contained in the 24th section, to send the case by letters of request to the Court of Arches, but he had declined to do so. And similar views, as to the discretionary character of the Bishop's power to issue a commission, were expressed by Lord Campbell on other occasions during the proceedings against the archdeacon, and particularly so on the occasion to which I am about to refer. The archbishop, after receiving a report from the commissioners that there were sufficient *prima facie* grounds for instituting proceedings, declined to proceed further in the matter, and a rule *nisi* having been obtained for a mandamus commanding him to proceed, such rule was made absolute on the 24th of January, 1856, the Court being of opinion that *after the commission had once issued* the archbishop was bound to proceed. Upon that occasion Lord Campbell said: "I have not the slightest doubt that his Grace proceeded *optima fide*, with a view to the good of the Church over which he presided; but, with profound respect for his sacred character and high position, I must express some regret that he did not exercise his power to refuse the commission, and if he had done so, I think it would have been well for the Church of England." In respect of the issuing a commission, the archbishop had the same power (whether to be exercised compulsorily or at discretion) as the Bishop would have had if he had not been the patron of the preferment held by the archdeacon. In the course, however, of the same proceedings, after the rule for a mandamus commanding the archbishop to proceed had been made absolute, Dr. Lushington expressed a decided opinion to the contrary effect. When the case came on to be heard before the archbishop at the close of the year 1856, Dr. Lushington acted as one of his assessors, and in that capacity made known the conclusions at which his

Grace had arrived. In so doing, after stating that the duty ordinarily discharged by the Bishop had devolved upon the archbishop by reason of the patronage of the preferment held by the archdeacon being vested in the Bishop, he went on to say (30)—"In the fulfilment of that duty, his Grace caused the original commission to be issued, a duty which, as his Grace has been advised, it was imperative upon him to discharge, and respecting which there was no legal discretion vested in him;" and, after quoting the words of the 3rd section of the Church Discipline Act, and repeating that the Bishop applied to had no discretion, the learned Judge proceeded to assign the reasons for the opinion he had so expressed, in the following terms:—"If it were so" (that is, if the Bishop had a discretion), "the ancient law of the Church would have been subverted by the statute, which there was no intention to do. Lord Stowell, in the case of *His Majesty's Procurator-General v. Stone* (12), uses these words:—'It is not in the power of the Bishop, by any intervention on his part, to refuse the process of the Court to any one who is desirous of availing himself of it in a proper case.' That observation stands not only upon the authority of Lord Stowell, but is confirmed by that of Sir John Nicholl. What would be the consequence if the Archbishop or Bishop had a purely discretionary power to order the commencement of proceedings according to his own judgment, or, I might almost say, according to his own fancy? Why, in every bishopric within a province, or within the whole kingdom of England, it would rest entirely in the power of a single Bishop either to permit a prosecution against any ecclesiastic for alleged unsound doctrine or immoral conduct, or, according to his own mere opinion, he might prevent any discussion taking place, and any charge, however serious, from being considered, the consequence of which might be that the uniformity which now happily prevails amongst the clergy of this country would be destroyed or subverted." I have referred, somewhat in detail, to the language used by Dr. Lushington on this occasion,

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for the reason that, though other Judges, as will presently appear, have entertained and expressed doubts upon the subject, he is, to the best of my belief, the only Judge who, previously to the proceedings in the present case, had expressed it as his opinion that it was not within the discretion of the Bishop, when applied to under the provisions of the 3rd section of the statute, to abstain from issuing a commission, and for this further reason, that the Judges of the Queen's Bench Division, when making the order from which these appeals are brought, expressed their entire concurrence in the views expressed by Dr. Lushington.

I propose at a later period to make some comments upon the reasons assigned by Dr. Lushington for the opinions so expressed by him; but, for the present, I pass on to consider the next authority in order of date, the case of *The Queen v. The Bishop of Chichester* (2), upon which so much reliance has been placed by the counsel for the appellants. In estimating the importance of this case as an authority upon the question now under consideration, it is essential to bear in mind what the points were which in that case called for a decision. In February, 1859, the Rev. Charles Golightly, a clerk in holy orders, residing in the diocese of Oxford, applied to the Bishop of Chichester to issue a commission under the statute to inquire into certain charges preferred by him against the Rev. Richard Randall, rector of Woollavington, in the diocese of Chichester, of offences against the laws ecclesiastical, the offences charged being in respect of certain practices and doctrine which it was alleged that he had put in practice and taught in his own parish. Mr. Golightly had no connection with the parish of Woollavington or with the diocese of Chichester, nor had he any private or personal interest in the matters complained of. The Bishop, after inquiry, declined to interfere, and a rule having been obtained on behalf of Mr. Golightly, calling upon the Bishop to shew cause why a mandamus should not issue commanding him to issue a commission, cause was shewn on the 2nd of July, 1859. On the part of the Bishop it was contended that he had

in all cases a discretion whether he would issue a commission or not, and, further, that Mr. Golightly was not a proper party to apply for a commission, and that consequently the Court, even if it should hold that the Bishop had no discretion, where the party applying had a *locus standi*, might and would, in the exercise of its own discretion, refuse to issue a mandamus in the case under consideration. On the other hand, it was contended on behalf of Mr. Golightly that the Bishop had no discretion as to issuing the commission, but was bound to issue it upon application being made to him. The Court, at the hearing, was composed of Lord Campbell, and Wightman, J., Erle, J., and Hill, J.; but, before judgment was delivered, Lord Campbell was appointed Lord Chancellor, and Erle, J., became Chief Justice of the Common Pleas. Separate judgments were delivered by Hill, J., and Wightman, J., who, whilst they agreed in holding that the rule for a mandamus should be discharged, differed as to the grounds upon which they proceeded. Hill, J., in the course of his judgment, expressed himself as follows:—"If it were necessary to give an opinion upon the construction of the 3rd section of the statute, I should have thought that the writ ought to issue, so that a question of such importance might be decided on the return in such manner that the judgment of the Court might be reviewed by a Court of error; and I am not satisfied that it is a mere matter in the discretion of the Bishop whether he will issue a commission or not, if a proper complaint be made by a party who is entitled to complain. But it appears to me not necessary to give any opinion on the construction of the statute. This is an application to the discretion of the Court to issue the prerogative writ of mandamus." The learned Judge then proceeded to state that, in his opinion, it would be productive of the greatest inconvenience and mischief if the Court were to lend its aid to any stranger to compel a Bishop to issue a commission in any particular case, and that on that ground the rule ought to be discharged.

Now, I am unable to see that the in-

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convenience or mischief will be any less, if, according to the proper construction of the third section, it is the duty of the Bishop to issue a commission at the instance of any stranger; it is not to be supposed that the Bishop will abstain from doing his duty, because another Court, having power to compel him to do it, will not exercise that power; and should he even be justified in abstaining from his duty, because the Court, in the exercise of its discretion, would not compel him to do it, it would be only removing the discretion from the Bishop to the Court. But to proceed to the judgment of Wightman, J. It is unnecessary to refer to it in detail, it is sufficient to say that, in his opinion, it was the intention of the Legislature to invest the Bishops with a power of causing enquiry to be made in all cases, in which it appeared to them that the interests of the Church and of the public required it; and that it was more for the interests of religion and of the public that the Bishop should be entrusted with a discretion as to issuing a commission than that it should be left entirely, as was expressed by Sir William Scott in a case to which I shall presently have occasion to refer, to the judgments or passions of private persons, who under the influence of zeal, or prejudice, or fancy, might call peremptorily upon the Bishop, without any real or substantial ground, to institute proceedings which would cause at once expense, trouble and vexation, and tend to create disturbance and scandal in the Church. He was, therefore, of opinion, that the Bishop had a discretion as to the propriety of issuing a commission, and that the rule for a mandamus should for that reason be discharged. With reference to the reasons, so forcibly expressed by Wightman, J., for holding that the Bishop might exercise a discretion as to the issuing or withholding a commission, it has been urged that he was mainly induced to arrive at that conclusion by an opinion, alleged to have been erroneously formed by him, that, previously to the passing of the Church Discipline Act, the office of the Judge would only have been promoted in the case of some direct and positive charge of an offence against the laws

ecclesiastical, and that no such proceeding could be had upon the ground only of the existence of some scandal or evil report of his having so offended, and the views, so pressed upon us, were pressed upon, and found favour with, the learned Judges of the Queen's Bench Division. That Wightman, J., held that opinion cannot be doubted, and it may have, to some extent, influenced the judgment which he delivered, in the sense that it strengthened the convictions he had formed from a consideration of the inconveniences to which the contrary construction of the third section would give rise; but abundant evidence is, in my opinion, furnished by the general scope of the judgment that, quite irrespective of the opinion, so formed by him, as to the practice before the Church Discipline Act, he had arrived at the conclusion that the Bishop had the discretion which he claimed to exercise. Nor do I assent to the proposition, that the opinion so formed by Wightman, J., was erroneous, though I do not deem it necessary to express any decided opinion upon the subject. I have been unable to discover any record or report of the office of the Judge having been promoted in a case of evil report only. It is probably the fact that, when a clerk in holy orders was proceeded against by either of the forms of procedure formerly known as "*inquisitio*" or "*denunciatio*," in the former of which the Bishop or Archdeacon proceeded of his own mere motion, and in the latter upon the denunciation or presentment of the churchwarden, scandal or evil report might form the subject of the proceeding; and it is doubtless the fact that, in proceedings which were not *ex officio*, when the office of the Judge was promoted in respect of an offence charged, an article was ordinarily, if not necessarily, exhibited to the effect that the offence charged had given rise to scandal or evil report. And it is in this sense, and in no further or other sense, that I read such passages as the following, which have been quoted from the old text-writers, in support of the view that the office of the Judge might be promoted in respect of a mere scandal or report. It is said by Oughton that the articles were to contain

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"tam causas conventionis quam famam publicam;" and again, "Igitur in his articulis fama publica obiecti criminis est alleganda et objienda." And so, again, it is stated that *if the proof of the alleged offence failed*, but the existence of the evil report was established, the accused party might be put to clear himself by purgations. It was stated by Wightman, J., at the close of his judgment, that both Lord Campbell and the Lord Chief Justice Erle were of opinion that the rule should be discharged, but without intimating whether they concurred with Hill, J., or with himself as to the grounds for such opinion. Having regard to the previously expressed opinions of Lord Campbell, in cases to which reference has been made, it may, I think, be assumed that he agreed with the views expressed by Wightman, J.; on the other hand, it would appear that the Lord Chief Justice Erle, on subsequent occasions, disclaimed having acted on the ground taken by Wightman, J., though he does not appear to have upon any occasion expressed dissent from the views expressed by that learned Judge. So far, then, as the decision in the case of *The Queen v. The Bishop of Chichester* (2) is concerned, it cannot, I think, *taken by itself*, be treated as having established more than this, that, at the time when it was arrived at, it was a matter of uncertainty whether, according to the true construction of the third section, the Bishop had or had not a discretion in respect of the issuing of a commission, when a complaint has been preferred. But twenty years have elapsed since the decision in that case, and during that period the general question whether the Bishops have such discretion, as well as the decision in the case of *The Queen v. The Bishop of Chichester* (2), as bearing upon that question, have on several occasions been the subject of judicial comment, and I proceed to refer to some of the cases in which such comments have been made.

In the case of *In re The Newport Bridge* (8), which came before the Court of Queen's Bench very shortly after *The Queen v. The Bishop of Chichester* (2), the question to be determined was, whether the words "*it shall and may be law-*

*ful*," as used in a particular statute, were to be treated as imperative or as importing a discretion; the Court, consisting of Crompton, J., Hill, J., and Blackburn, J., held that the words were discretionary only; and, in support of this view, Crompton, J., in the course of his judgment, referred to the case of *The Queen v. The Bishop of Chichester* (2) as having decided that the words "*it shall be lawful*" in the 3rd section of the Church Discipline Act were to be read as conferring a discretion, and added that *that appeared to him to have been a correct decision, though Hill, J., assented to it with hesitation*. Neither Hill, J., nor Blackburn, J., expressed any dissent from the view taken by Crompton, J., of the case of *The Queen v. The Bishop of Chichester* (2). It is quite true, as has been observed by the counsel for the respondent, that it was not necessary for the Court in that case to rely upon the decision in the case of *The Queen v. The Bishop of Chichester* (2); but it is nevertheless referred to and relied upon by Crompton, J., as an illustration of the class of cases in which such words, when found in public statutes, were to be treated as importing a discretion. In March, 1868, Sir R. Phillimore delivered judgment in the case of *Martin v. Mackonochie* (39) in the Court of Arches; in the course of the arguments the motives of the parties to the suit were severely criticised by counsel, and, in reference to these criticisms, Sir R. Phillimore said in his judgment: "I must of course presume that his Lordship was satisfied upon good grounds both that it was proper that his office should be promoted, and that Mr. Martin was a proper promoter, because his Lordship, who has the advantage of having a very learned legal adviser, was no doubt aware, from the decision of the Queen's Bench in the case of *The Queen v. The Bishop of Chichester* (2), as well as from the decision of the Privy Council in *Sherwood v. Ray* (5), that it was competent to him to exercise his discretion as to whether his office should be promoted or not." Again, in April, 1869, in consequence of the Bishop of London having declined to issue a commission, at the instance of Mr. Sheppard, to enquire into

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the doctrines propounded by the Rev. W. J. E. Bennett, an application was made to the Queen's Bench for a mandamus to the Bishop to issue a commission; the application was refused by the Court, consisting of Lush, J., Hannen, J., and Hayes, J., and though not upon the ground of the Bishop having a discretion in the matter, as to which it was unnecessary to arrive at a conclusion, Lush, J., in the course of the argument and in giving judgment, expressed in forcible language his full concurrence with the views expressed by Wightman, J., in *The Queen v. The Bishop of Winchester* (2), and similar views were expressed by Hayes, J., and in no way dissented from by Hannen, J. And these cases were followed by the case of *Elphinstone v. Purchas* (6) in the Privy Council. The suit had been instituted in the Arches Court by letters of request from the Bishop of Winchester, the promoter being a parishioner of the parish within which the chapel at which the defendant ministered was situated; the offences charged consisted in the use of certain unlawful rites and ceremonies set forth in the articles exhibited. Sentence was pronounced by the Arches Court against the defendant upon some, but not upon all, of the articles; the promoter appealed from such sentence to the Queen in Council, but died after the inhibition and citation had issued.

On the motion for the substitution of another parishioner as promoter of the appeal, who was not authorised by the ordinary or connected with the original promoter, and who had no personal or pecuniary interest in the subject-matter of the suit, it was held that, though the suit, as a criminal suit, had determined by the death of the original promoter, yet having regard to the ancient practice of the Court of Delegates in such cases and the peculiar circumstances of the case under consideration, it was the duty of the Court of Appeal to allow a proper person to be substituted in the place of the deceased appellant and to revive the appeal. The Lords present on the hearing were the Archbishop of York, Lord Cairns, Sir James Colville, and Sir Robert Phillimore, and the judgment, having

been reserved, was delivered by Sir R. Phillimore on the 14th of July, 1870. After referring to the proceedings in the suit, and to the questions raised by the appeal, and to the necessity of considering the general nature of the suit for the satisfactory answering of such questions, the judgment proceeded in the following terms (p. 254): "It was decided by their Lordships in the case of *Sherwood v. Ray* (5), which was one of great importance, and very carefully considered by the eminent Judges who sat upon it, among whom was Sir John Nicholl, perfectly acquainted with the practice of the Ecclesiastical Court, that the promotion of the office of Judge, though generally permitted as a matter of course, cannot be demanded *ex debito justitiæ*. Subsequently to this decision the statute 3 & 4 Vict. c. 86 was passed. By the 13th section it was enacted 'that it shall be lawful for the Bishop if he shall think fit,' either to issue a commission of inquiry, or, in the first instance, to send the case by letters of request to the superior Court. In the case of *The Queen v. The Archbishop of Canterbury* (10), the Queen's Bench held that when the Archbishop had once issued a commission at the instance of a promoter, the Bishop could not refuse to allow his office to be further promoted. In the case of *The Queen v. The Bishop of Winchester* (2), the Queen's Bench refused to compel by mandamus the issue of a commission of inquiry at the instance of a person who was unconnected with the parish or diocese; and Mr. Justice Wightman expressed a strong opinion that under the general law, and under the words of the statute, the Bishop had an absolute discretion to allow or refuse his office to be promoted in the first instance. In the present instance, however, it appears that the local ordinary, the Bishop of Winchester, thought both that the cause was one which on the ground of public interest ought to be instituted, and also that a proper person had applied for leave to promote the office of the judge. He moreover availed himself of the provision of the statute to send the case by letters of request to be tried in the superior Court of the province. Having taken

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this course, it was not competent to his Lordship, according to the decision to which we have referred, to stay or prevent the further prosecution of the suit." And after referring to several cases, in which a new promoter had been appointed where the former one had died during the progress of the suit, the judgment again proceeds in the following terms: "Criminal ecclesiastical suits ought not to be, and it must be presumed would not be allowed to be, instituted in the first instance by the Ordinary, who has full control *in limine* over the subject, unless the public interest requires their institution. But it would be a great evil if, after the due institution under proper authority of such suits, the course of justice with respect to them could be arrested by any technical or formal ground." And a similar view to that taken by the Lords of the Privy Council in *Elphinstone v. Purchas* (6) as to a discretion being vested in the Bishop to refuse to issue a commission, was adopted in 1873 by Lord Selborne, then Lord Chancellor, in the case of *Ex parte Edwards* (4). In that case Mr. Edwards, the clerk against whom the complaint was brought, filed a statement of objections to the issuing of a commission, the objections being that the party by whom the complaint was preferred was a Dissenter, that his application was not *bona fide*, and that it was an unlawful transaction amounting to maintenance, the proceedings being in fact promoted by a body called the Church Association.

The Bishop of Gloucester and Bristol, in whose diocese the offences were alleged to have been committed, refused to hear the objections, and thereupon Mr. Edwards applied in the first instance to Bacon, V.C., and by way of appeal from him to the Court of Appeal in Chancery, for a prohibition to restrain the issuing of a commission and of any proceedings thereunder until the Bishop should have heard and determined the objections. The Court was composed of Lord Selborne, and Mellish, L.J., and in the course of his judgment, refusing the application, Lord Selborne said: "The statute imposes upon the Bishop the duty of issuing, in what he may consider a proper case, a commis-

sion of enquiry; and in the language of the statute he may do so either upon the application of any party complaining of an offence alleged to have been committed, or if he shall see fit of his own mere motion. I have a very serious doubt whether it would be competent for the Bishop to refuse to entertain and consider an application from any party, because the statute says that any party who thinks fit to do so may make the application. But doubtless it is for the Bishop to exercise a discretion whether he will or will not issue the commission, either when he has received the application from any party, or when he might do so upon his own motion." Mellish, L.J., however, expressed himself upon this point in the following manner: "I will then assume what is not quite certain, on the construction of the section, that the Bishop has a discretion, on account of the character of the promoter, to refuse to issue a commission; I say it is not quite certain, because the words are 'it shall be lawful for the Bishop,' and these words are very often considered to be compulsory." In the result, Lord Selborne being of opinion that the Bishop had a discretion as to the issuing of a commission, and Mellish, L.J., assuming that he had such discretion, though not then prepared to express a positive opinion to that effect, it was held that the accused party had no right, at that stage of the proceedings, to insist upon being heard.

I believe that I have now referred to all the authorities upon the question of the construction of the third section of the Church Discipline Act, to which our attention has been directed in the course of the arguments on these appeals; and, such has been the diligence of the counsel engaged, that I have been unable to find any other authority than those which have been mentioned by them: it remains for me to express my opinion upon their effect.

Now, whatever weight is to be attached to the other authorities, there is in the case of *Elphinstone v. Purchas* (6), a distinct declaration by the Judicial Committee of the Privy Council, the ultimate Court of Appeal in matters ecclesiastical, that the Bishop has full control *in limine*



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over the subject-matter of criminal ecclesiastical suits, and that such suits ought not to be allowed, unless he is of opinion that the public interest requires their institution. I am not prepared to say that the decisions of the Judicial Committee are, in all cases, binding upon the different Courts of which the Supreme Court of Judicature is now composed; it is not necessary to say so to support the opinion which I am about to express; but having regard to the emphatic language in which the views expressed by Wightman, J., in *The Queen v. The Bishop of Winchester* (2), were adopted in the judgment in *Elphinstone v. Purchas* (6), and to the fact that, during the ten years which preceded the judgment in *Elphinstone v. Purchas* (6), such views were generally accepted, and that in the ten years which have elapsed since that judgment no judicial dissent from it was expressed until the judgment from which these appeals are brought, I should be prepared to hold, and so far as my individual opinion is concerned, I do hold that the substantial question involved in these appeals, namely, the question whether according to the true construction of the third section of the Church Discipline Act, the Bishops have or have not the discretion claimed for them, has been conclusively settled in the affirmative by authority. It is somewhat singular that, although the judgment of the Judicial Committee in the case of *Elphinstone v. Purchas* (6), was referred to in the judgment of the Queen's Bench Division as bearing upon the question of the practice before the Church Discipline Act in suits in which the office of the Judge was promoted, the attention of the learned Judges does not appear to have been directed to its bearing upon the question of the construction of the third section of that Act.

Before leaving the subject of judicial authority as bearing upon the question of the construction of that section, I desire to refer to the circumstance of our having allowed the counsel for the appellants to quote to us a passage from the speech of the Lord Chancellor in the House of Lords, when moving the third reading of the Public Worship Regulation

Act in 1874: the counsel for the appellants, whilst admitting that he could not refer to the passage in question, or any other passage in that or any other speech for the purpose of construing the Public Worship Regulation Act, insisted that it was perfectly open to him to refer to it as representing the opinion of the Lord Chancellor as to the then state of the law relating to proceedings in respect of offences against the laws ecclesiastical, which law it was proposed to some extent to affect by the bill before the House. After hearing the objections of the counsel for the respondent, we allowed the passage to be read, and though I have since entertained some doubts whether we were right in our decision, which doubts have not been wholly removed, I am, upon the whole, of opinion that there was no objection to the course which we allowed the appellants' counsel to take. The question, with reference to which we allowed it to be cited, was whether, at the time of the passing of the Public Worship Regulation Act, there was a general concurrence of judicial opinion as to the true effect of a provision in an Act of Parliament passed thirty-four years previously. The Courts have been in the habit of allowing reference to be made to text books, the authors of which are living Judges, and I am unable to distinguish, in principle, an expression of opinion by the Lord Chancellor as to the state of the law upon a particular subject, with which he is inviting the House of Lords to deal, from an expression of opinion upon the same subject by another Judge in a treatise published by him. The weight to be attached to the opinion, whether expressed in the one form or the other, must of course depend upon the surrounding circumstances.

The doubts which I have entertained as to the propriety of our allowing reference to be made to the speech of the Lord Chancellor, have arisen from a consideration of the difficulties, which in some cases may arise, though they do not exist in the present, in the way of strictly limiting the purposes, for which reference may be made to such expressions of judicial opinion. The passage in the Lord Chancellor's speech was in

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the following terms: "The Bishop may commence proceedings either on his own mere motion or on the application of any other person, and the proceedings may be taken, too, without any security being taken for the payment of costs. The Bishop may indeed, if he is called on to proceed, for his own protection, ask the person who puts him in motion to give him some security for his costs; but as far as the person proceeded against is concerned, no security whatever can be demanded. Then the Bishop has a discretion, as he has under this bill, whether or not he will proceed." The Lord Chancellor next proceeds to point out that, if the Bishop proceeds, the first step is to appoint a commission.

Now if the opinion, which I have already expressed, that the question of the construction of the third section of the statute has been conclusively settled by authority, is well founded, it is decisive of the question involved in these appeals, but, having regard to the elaborate and very carefully considered judgment, which has been delivered in this matter in the Queen's Bench Division, and to the circumstance that in that judgment the authorities upon the subject of the construction of the third section of the Church Discipline Act, with the exception of *Elphinstone v. Purchas* (6), though carefully reviewed, were not considered as conclusive, and bearing in mind also that any uncertainty which may have existed previously to such judgment must of necessity be increased by the opinions expressed in it, I am unwilling to rest my decision in this case upon authority alone; I propose, therefore, to consider the question of the construction of the statute apart from the authority to be derived from the judicial decisions and dicta to which I have referred.

As I have already observed, the question, whether in any particular enactment, the words "*it shall be lawful*," are to be regarded as imperative or as importing a discretion, must depend, not only upon the immediate context, but also upon the object and general scope of the statute; I propose, therefore, to consider this question under the three following heads:

first, what inference as to the proper construction of the section is to be drawn from the consideration that the object of the statute was to provide means for ensuring the correction of clerks in holy orders who had committed offences against the laws ecclesiastical; and, whilst dealing with the question under this head, I shall omit from consideration the means, which were previously in force for effecting the same purpose; secondly, whether the language of the Act, *per se*, favours the obligatory or permissive construction; and thirdly, the extent to which the construction of the third section is affected by a consideration of the procedure for the correction of the like offences, which was in force previously to and at the time of the passing of the Church Discipline Act, and to replace which procedure that Act was passed.

Now, under the first of these heads of consideration, a great deal may be said in favour of each of the alternative constructions. It may be urged, as it has been urged with great force, that it is the right of the public, whether clergy or laity, to have the services of the Church conducted in strict accordance with law; that their consciences ought not to be offended, nor the interests of pure religion prejudicially affected, by the preaching or other publication of heretical doctrine, or by unauthorised deviations from the established ritual and ceremonial of the Church of England; that to secure the punishment of such offences as a means of preventing their continuance or repetition is a matter of public interest, and that such punishment cannot be secured, if a power is given to the Bishop of interfering with and preventing a prosecution; that Bishops, as well as clerks, may have different views upon matters of doctrine as well as in respect of ritual or ceremonial, and that to leave the power of allowing or preventing proceedings to the Bishop might, and in the present state of religious opinion probably would, lead to practices being tolerated in one diocese, which were prevented in another. This line of argument is at first sight very forcible, but it is deprived of much of its force, when it is borne in

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mind that the complaint, upon which it is insisted the Bishop must act, may be made by any person who cares to intermeddle.

It is impossible to estimate the extent of scandal and mischief, which might be occasioned to the Church, if such unlimited power of initiating proceedings is to be held vested in any one who chooses to exercise it; not only would rival parties in the Church itself be induced to embark in litigation, with the object of obtaining small party triumphs, though at the cost of much injury to the general interests of the Church, but persons of no religious views, without any personal interest in the matter, and actuated possibly by feelings of general hostility to the Church and a desire to bring it into disrepute, might initiate and prosecute proceedings; it cannot but be for the public interest that some check should be interposed upon such useless, not to say mischievous, proceedings; and the argument *ab inconvenienti* is strengthened by the consideration that, if a Bishop is in all cases bound to proceed upon receiving a complaint, from whomsoever it may proceed, the obligation will be imposed upon him, not only in cases of offences of a serious character, but also in those in which the offence is trivial, or in which the offending party has erred through ignorance or has acknowledged his error and promised to abstain from repeating it, or in which the Bishop, from his knowledge both of the accuser and the accused, has every reason to believe that the issuing of a commission would only result in a report that there were no grounds for further proceedings. To the suggestion that the Bishops might fail to discharge their duty honestly and uprightly, and that unauthorised practices might be allowed or prevented according to the peculiar views of the Bishop, it is, in my opinion, sufficient to say that a similar objection might be raised to every discretion vested in persons wielding judicial or quasi-judicial authority; if it is found in practice that such consequences ensue, the legislature may safely be trusted to interfere and provide sufficient safeguards for the future. So far, then, as the con-

struction of the third section is affected by considerations arising out of the object for which the Act was passed, I can see nothing to suggest that the words "*it shall be lawful*," as used in the third section, should have other than their primary permissive meaning.

Nor is there, in my opinion, anything in the language of the Act, which, taken *per se*, suggests that an imperative sense or meaning should be attributed to them; the words repeatedly occur in the several clauses of the Act; in most instances they clearly import discretion; in some they possibly are used in an imperative sense; in the 3rd section they doubtless *may* have been intended to be so meant and understood, but there is nothing in the immediate context to cause such a meaning to be necessarily attributed to them. Reliance has been placed upon the words "*if he shall think fit*," as suggesting that, while they confer a discretion upon the Bishop of proceeding upon his own mere motion, instead of upon the complaint of the person applying to him, they impliedly negative any further or other discretion. I cannot take this view, the words may be superfluous, and similar expressions are to be found in other parts of the Act, where they are clearly superfluous; but I much doubt whether they are superfluous in the 3rd section; in my opinion they strengthen the suggestion that a permissive meaning should be attributed to the words "*it shall be lawful*."

But I pass on to consider what, at the time when the statute was passed, was the state of the law as affecting prosecutions for ecclesiastical offences, and of the practice in relation to such law. I fully assent to the proposition that, the object of the statute being confined to the introduction of a new procedure for the correction of offending clerks, it is to be assumed, in the absence of any indication to the contrary, appearing in the language of the statute, or to be reasonably inferred therefrom, that it was not intended by the Legislature to extend or abridge the rights, powers or privileges of either the laity or the clergy, in relation to prosecutions for such offences. The application of this principle to the

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construction of the 3rd section of the Church Discipline Act has been insisted on by both parties to these appeals, though they differ in this that the appellants contend that, before the passing of that Act, the office of the Judge could not be promoted without leave of the Court, which might be withheld at discretion, whilst the respondent insists that the Court had no discretion whatever in the matter, provided the offence charged was one of ecclesiastical cognisance, and the promoter was of means to meet the costs of the proceedings in the event of his failing to support the charge. I proceed to consider the several authorities which have been cited in support of these conflicting views. Reference has been made on both sides to the old text-writers, Clarke, Oughton and Consett, the two latter of whom substantially quote from or adopt what had been previously written by Clarke, but it does not appear to me, after fully considering the statements of these writers, that such statements amount to more than this, that if a clerk, accused of any offence against the laws ecclesiastical, had not been proceeded against by either of the forms of procedure known as "*inquisitio*" and "*denunciatio*," any person who was competent to meet the costs if he failed, was qualified to implore and promote the office of the Judge and to require the accused party to answer articles; but it does not necessarily follow, that if the office was implored, leave was, *as of right*, to be given to promote it, though it must be admitted that the language used by those writers is open to the interpretation, which, on the part of the respondent, it is sought to put upon it. Apart from the authority of decided cases, and looking only at the language used by Clarke and his copyists, I should prefer the construction that the writers intended to represent that the prosecution of a clerk for an ecclesiastical offence was not confined to *ex officio* proceedings by the Bishop or Archdeacon, but might be promoted *in proper cases* by any other person, layman or clerk, who was willing to run the risk of having to pay the costs of the proceedings. But we are not left to the *dicta* of the early text-writers, whose views, as would appear

from the observations of Sir William Scott in the case of *Turner v. Meyers* (27), to which for another purpose I shall have occasion to refer presently, were not always in accordance with established principles of law; we have judicial authority upon the subject, and to such authority the counsel, as well for the appellants as for the respondent, have referred as supporting the views for which they respectively contend.

On the part of the respondent it is urged that the view, for which they contend, is supported by passages in the judgments of Sir George Lee in the case of *Argar v. Holdsworth* (26), of Sir William Scott in the cases of *Turner v. Meyers* (27) and *The Procurator-General v. Stone* (12), and of Sir John Nicholl in the case of *Carr v. Marsh* (17), and still more so by the observations of Dr. Lushington, to which attention has already been directed in the case of *Ditcher v. Denison* (30). To what extent, then, do the authorities, so relied upon, bear out the proposition asserted by the respondent, that the promotion of the office of Judge was a proceeding, which could be put in force by anyone, *as of right*? It is true that in *Argar v. Holdsworth* (26) Sir George Lee said that a clergyman might be prosecuted by anyone for neglect of duty; but the suit of *Argar v. Holdsworth* (26) was one which had been instituted against the vicar of a parish in Totness, for refusing to marry the prosecutor, who was a parishioner of the defendant's parish, and had obtained a license for his marriage from the Archdeacon; articles, alleging that the defendant was bound to marry a parishioner upon the production of a legal license in that behalf, had been allowed by the Court of the Archdeacon, had been disallowed, on appeal, by the Consistory Court, and upon such disallowance coming before the Court of Arches, it was objected that the proper remedy was by an action at law for damages; it was in reference to this defence that Sir George Lee made the observations relied upon by the respondent, and the whole passage in which the words relied upon were used, was as follows: "I said that possibly Argar might have an action for damages;

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but nevertheless the clergyman might be prosecuted by anyone for neglect of his duty ; " this can hardly be considered as an authority on the one side or the other. Again, the passages relied upon in the judgments of Sir William Scott in *Turner v. Meyers* (27) and *The Procurator-General v. Stone* (12), were in the following terms : in the former he said, "The criminal suit is open to everyone, the civil one to everyone shewing an interest ; " and in the latter, "It is not in the power of the Bishop by any intervention on his part, to refuse the process of the Court to anyone who is desirous to avail himself of it in a proper case." Thus quoted, these passages appear to support, to some extent, the respondent's contention ; but let us examine the circumstances under which these observations were made. In *Turner v. Meyers* (27) the suit was a civil one, instituted by a father to annul the marriage of his son, on the ground of his son's insanity, and Sir William Scott held that, as it was a civil suit, it was necessary that the promoter should shew an interest, which he failed to do, as his son was of full age at the time of the marriage. The statement that the criminal suit was open to everyone, was for the mere purpose of distinguishing between a civil suit in which the promoter *must* have an interest, and a criminal suit which could be promoted though the promoter had no interest ; the case has no bearing upon the question, whether the leave of the Court for the promotion of the suit could be obtained as of right. And in the case of *The Procurator-General v. Stone* (12), the promoter, who after citation had appeared in person, but under protest, objecting at the hearing that the Procurator-General was not qualified to be a promoter of the suit, and it was to this line of defence, as would appear from what follows in the judgment, that Sir William Scott referred.

I do not gather from the reports that in either of these cases any questions arose as to the necessity for obtaining leave to promote the suit, or as to the circumstances under which such leave was granted ; but I should infer from the course pursued by the same learned Judge

in the cases to which I am about to refer, that leave had been applied for and obtained in both. In the case of *The Duke of Portland v. Bingham* (7), which came before Sir William Scott some years previously to *Turner v. Meyers* (27), that learned Judge directed attention to the non-observance of the rule in Ecclesiastical Courts, that when the office of the Judge was promoted by any private individual, a personal application should be made to the Judge in the presence of the Registrar, in order that it might appear in the minutes of the Court, and he gave notice that for the future the Court would hold any omission to observe that rule fatal ; and, accordingly, in the first suit of *Maidman v. Malpas* (11), the accused party was dismissed in consequence of leave not having been obtained for the promotion of the suit. And, in giving judgment in the second suit between the same parties, Sir William Scott used the following language, which has been frequently quoted and approved of on subsequent occasions : "The leave of the Court should be first obtained, since it is a part of the ecclesiastical jurisdiction, which is not to be exercised without discretion, or to be left entirely to the judgments or passions of private persons."

Now the passages to which I have just referred in the judgments of Sir William Scott in the case of *The Duke of Portland v. Bingham* (7) and the two cases of *Maidman v. Malpas* (11) appear to me to explain and illustrate the state of the practice as Sir William Scott found it and as he left it ; from the time of the Reformation the rule had been that leave should be obtained for the promotion of the office of the Judge, but the observance of such rule had been neglected for many years. In *The Duke of Portland v. Bingham* (7) Sir William Scott drew attention to this neglect, but, in consequence of the practice having fallen into desuetude, he did not punish the then promoter, but gave warning that for the future any similar neglect would lead to the dismissal of the suit. The first suit of *Maidman v. Malpas* (11) having been commenced without leave, was for that reason dismissed ; and in the second, which had been promoted after leave had

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been obtained, he referred to the former suit, and assigned the reasons for the existence and enforcement of the rule. In the case of *Carr v. Marsh* (17) the proceedings were against a clerk for officiating in a chapel without the authority of the incumbent; he pleaded the license of the Bishop, and insisted that the office of the Judge ought not to be promoted against him in the Court of the Bishop, whose license he held. In overruling this objection, Sir John Nicholl said, "Application is always made to the Judge before a citation is issued in a cause in which the office is promoted; but that is not for the purpose of considering the merits of the case, but the nature of the suit, whether it be of ecclesiastical cognizance, or the fitness of the person to be made responsible for costs to the other party." These observations of Sir John Nicholl, if they are to receive their strict interpretation, undoubtedly support the respondent's contention, that if the offences charged were of ecclesiastical cognizance, and the party applying was of ability to defray the costs, the granting of leave to promote the suit was of right; but the views so expressed are at direct variance with those expressed by Sir William Scott in *Maidman v. Malpas* (11), and they are inconsistent also with the judgment of Sir John Nicholl himself in the case of *Lee v. Matthews* (28), which came before him some fourteen or sixteen years later; in that case, which was a suit for brawling, Sir John Nicholl said, "This being a case of office, the whole transaction should have been fairly and candidly stated at once, in order that the Judge might have an opportunity of considering whether, both parties being involved in *pari delicto*, he ought to allow his office to be promoted." Again, in the case of *Sherwood v. Ray* (5), before the Judicial Committee of the Privy Council in 1837, and which was the last case upon the subject before the passing of the Church Discipline Act, the suit, which was a civil one, had been instituted by a father to set aside the marriage of his daughter as incestuous, and the objection raised was that the father had no sufficient interest to maintain the suit. The Lords present were Lord

Brougham, Baron Parke, the then Judge of the Court of Bankruptcy, and Sir John Nicholl; and Baron Parke, in delivering the reserved judgment of the committee, observed as follows: "It is to be recollected that this may be the only form in which any individual can question the marriage as a matter of right; for to promote the office of Judge in a criminal suit requires the authority of the Court, and though this is obtained without difficulty in ordinary cases, it cannot be obtained *ex debito justitiæ*." The learned Judges of the Queen's Bench Division appear to have treated this authority as of little weight, because the question whether leave to promote the office of the Judge could be demanded as of right was not the point to be determined in the suit, and had not been adverted to in the argument. I cannot take the same view of the weight to be attached to this statement; it is doubtless true that the question was not the point to be determined, and had not been adverted to in argument, but the necessity for obtaining the authority of the Court to promote the office of the Judge in a criminal suit was assigned in the judgment as a reason, if not the substantial reason, for holding that the father had a right to prosecute the civil suit, as otherwise the father, or any other person interested, might have had no means of questioning the validity of the marriage. And the observations which I have just quoted from the judgment of the Judicial Committee in *Sherwood v. Ray* (5) were referred to as expressing the state of the law and practice in relation to the promotion of the office of Judge in the passage which I have already cited from the judgment of their Lordships in *Elphinstone v. Purchas* (6).

It remains only to notice the observations of Dr. Lushington in the case of *Ditcher v. Denison* (30). I have already quoted them in detail, being desirous of accurately pointing out the line of reasoning adopted by him. It is clear that he founded the views then expressed by him upon the language which he quoted from Sir William Scott's judgment in *The Procurator-General v. Stone* (12) and upon the observations of Sir John

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Nicholl in *Carr v. Marsh* (17). I have just directed attention to the circumstances under which these observations were made by Sir William Scott and Sir John Nicholl in the two cases referred to, and have pointed out how little such observations can be regarded as indicating the matured opinions of these learned Judges upon the question we are now considering. The views expressed by Dr. Lushington are at all times deserving of the most respectful consideration, but they lose much of their importance when, as in the case of *Ditcher v. Denison* (30), they have evidently been founded upon an erroneous appreciation of what he regarded as authorities binding upon him. The circumstances of some of the cited authorities rendered it necessary for the counsel for the respondent to admit the possibility of the Court having some further jurisdiction in respect of the refusal of leave to promote the office of the Judge than that of determining whether the offences charged were of ecclesiastical cognizance and ascertaining the competency of the proposed promoter to meet the expenses in the event of his failing to establish the charges preferred by him. For instance, the case of *Les v. Matthews* (28) compelled them to admit that the Judge might have to consider whether in a case in which both parties were *in pari delicto* he ought to allow his office to be promoted; and it is difficult to understand why, if the Court had a discretion to refuse to allow the office of the Judge to be promoted on account of the proposed promoter being *in pari delicto* with the accused party, there should not have been a like discretion in respect of any other unfitness of the party complaining. Again, it was hardly disputed that there must have been a discretion somewhere to prevent the promotion of frivolous and vexatious suits, and that such discretion could not well have been vested elsewhere than in the Judge; such a discretion must necessarily be a very wide one, and, if this extent of discretion in respect of the granting or refusing leave to promote the office of the Judge is once recognised, it is difficult, if not impossible, to place limits upon it. Upon the whole, then, after a full consideration of all the

authorities cited, I have arrived at the conclusion that when proceedings, by way of promoting the office of the Judge, were first introduced, such promotion could only take place with the leave of the Court; a leave rarely refused in a proper case, but of the propriety of interfering in each case the Court was the only judge; that in the somewhat lax proceeding of the seventeenth and eighteenth centuries the application for leave fell into disuse, and the office of the Judge was ordinarily promoted, without the leave of the Court being granted or even applied for; that Sir William Scott being influenced probably by the circumstances of some one or more of the cases which came under his consideration, appreciated the evils which had arisen, and might arise again from neglecting that which he described as a rule and as "part of the ecclesiastical jurisdiction," and insisted upon its observance for the future, as a check upon proceedings which might otherwise have their origin in "the passions of private persons;" and that such rule, so reinstated by Sir William Scott, continued in force and was recognised as in force down to the time of the passing of the Church Discipline Act in 1840.

This being so, I can come to no other conclusion upon the question of the construction of the 3rd section of that Act, than that the authority thereby conferred upon a Bishop, of issuing a commission, is one which, when complaint is made to him, he may put in force, or abstain from putting in force, according as he, in the exercise of his discretion, and having regard to the circumstances of each case that may be brought under his consideration, may think fit.

Upon both grounds, then, upon the ground that the question of construction has been settled by authority, and upon the ground also of the independent judgment formed by myself upon the same question, I am of opinion that when complaint was made to the Bishop of Oxford by Dr. Julius, he, the Bishop, had a discretion, in the exercise of which he was at liberty to abstain from taking either of the proceedings referred to in the order of the Queen's Bench Division, that the Queen's Bench Division consequently had

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no jurisdiction to interfere, and that the rule for a mandamus must be discharged.

With respect to the question of the costs, I see no reason why the ordinary rule should not be followed. Whether the Bishop exercised his discretion wisely or not, is a question which, with all respect for the views expressed by Bramwell, L.J., is not in my opinion for our consideration to-day; the mandamus was applied for and supported on the ground, that the Bishop under the circumstances of the case had no discretion to refuse to issue a commission, and the answer of the Bishop was that he had a discretion, which it was not within the jurisdiction of the Queen's Bench Division to control. To have entered into evidence for the purpose of shewing that he had exercised his discretion wisely, would have been foreign to the real question raised. I am far from suggesting that such circumstances existed in the present case, but I can well understand that there might be circumstances in addition to those, which for the purposes of these appeals must be treated as having existed, which would lead me to regard the refusal of the Bishop to issue a commission as a course taken by him in the best interests of the Church and of religion. But I do not think that there should be two sets of costs. The appeals ought to be allowed, but only one set of costs ought to be given.

THESIGER, L.J.—I concur in the conclusions at which the other members of the Court have arrived; but as they involve a reversal of the judgment of the Court below, and the case is one of importance, I think it desirable I should state in my own language the grounds upon which my opinion rests.

A considerable amount of time was occupied during the discussion of the case in this Court in tracing to its origin, and following throughout its course down to the passing of the Church Discipline Act, the position, in regard to the prosecution of ecclesiastical offences, of the Bishop and his Court. The *a priori* argument which this historical investigation is intended to found is not conclusive; but still the result of the investigation must necessarily be to throw some light upon

the question for decision, and it therefore demands consideration. It starts with these undisputed facts. The Bishop's Court had existed from the earliest times, and obviously must have taken its rise from the Bishop's pastoral authority over his diocese. The procedure in the Bishop's Court in criminal suits, whatever might have been its original shape, had long settled down into a form under which the proceedings were in theory instituted by the Bishop himself *ex mero motu*, or *ex officio promoto*. The Bishop himself had long ceased to sit in his Court, having delegated his authority in this respect to a Judge, whose office in technical language was "implored," when a private party desired to institute criminal proceedings. From very early times an appeal appears to have lain from the Bishop to his metropolitan, who at the same time had also a concurrent original jurisdiction. The latter jurisdiction it was the main object of the Statute of Citations (23 Hen. 8. c. 9) to curtail; but while that Act left the Archbishop very little of his concurrent jurisdiction, it preserved the appeal to him from the Bishop, and gave him original jurisdiction, to use the language of the Act, "in case that the Bishop or other immediate Judge or ordinary dare not or will not convent the party to be sued before him." By the 25 Hen. 8. c. 19, a further appeal for lack of justice at or in any of the Courts of the Archbishops, was given to the King's Majesty in the King's Court of Chancery, to be determined by commissioners appointed under the Great Seal, in like manner as appeals from the Admiralty Court were determined. In this manner, and apparently without the possibility of any interference on the part of the temporal Courts, so long as the Bishops did not exceed their jurisdiction, the matter stood down to the passing of the existing Act of Uniformity (1 Eliz. c. 2). By it uniformity in the performance of divine service and in the administration of the sacraments was prescribed, and Archbishops, bishops and other ordinaries were required and charged to enforce the Act in language which, so far as it goes, certainly tends against the view that at that time they were under any absolute obliga-



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tion to allow their office to be promoted in cases of ecclesiastical offences, or that Parliament intended them to be placed in such cases under any obligation which could be enforced by the temporal Courts. It is only, to use the words of the Act, in "God's name," and "as they will answer before God for such evils and plagues wherewith Almighty God may justly punish his people for neglecting this good wholesome law," that they are earnestly required and charged to endeavour themselves to the uttermost of their knowledges that the due and true execution of the Act might be had throughout their dioceses and charges. And while the Act gave jurisdiction to the temporal Courts in respect of offences under it by enabling justices of oyer and terminer and justices of assize upon indictment to try such offences, it is observable that even there the Legislature appears to have recognised the rights of the Bishop and his pastoral authority and power by authorising him to associate himself with the justices at the trial.

Pausing for a moment at this point, and without expressing any confident opinion upon the subject, I would say that apart from the authorities, the origin and character of the Bishop's jurisdiction, the form of the procedure in the criminal suit to which he was in theory a party, and which was commenced by imploring his office, or the office of his Judge, the appeals which under the Statute of Citations were open to parties where the Bishop would not or dared not convent persons accused, and the language used in the Act of Uniformity convey to my mind a strong impression that the Bishop by himself or by his Judge possessed at the time of and after the passing of the last-mentioned Act a discretionary power of refusing to allow the process of his Court to be set in motion in respect of ecclesiastical offences. Both appellants and respondents, however, place reliance upon the decisions and *dicta* of Judges in cases where this point was directly or indirectly raised. At first sight it appears difficult to arrive at any very certain conclusion from the perusal of these cases. The strong observations of Sir William Scott, *Maidman v. Malpas* (11), are met

with the equally strong observations of Dr. Lushington at Bath in the case of *Ditcher v. Denison* (30). Sir John Nicholl, in *Lee v. Mattheus* (28), is supposed to be answered by himself in the previous case of *Carr v. Marsh* (17), and the cases of *Argar v. Holdsworth* (26), *The Procurator General v. Stone* (12) and *Turner v. Meyers* (27), in which *dicta* are to be found tending to the effect that the right to institute a criminal suit in the Ecclesiastical Courts was an absolute one open to any private person, and with whom the Bishop could not interfere, are properly subject to the remark which was made upon them in the Court below, namely, that "they were incidentally made and were not necessary to the decision of the cases in which they were pronounced," and against these *dicta* is to be set the very distinct statement of Parke, B., when delivering the judgment of the Privy Council in *Sherwood v. Ray* (5), that "to promote the office of a Judge in a criminal suit requires the authority and consent of the Court, and though this is obtained without difficulty in ordinary practice, it cannot be demanded *ex debito justitiæ*."

But while upon a cursory examination of the cases, they may appear to shed a doubtful light upon the question under consideration, when they are more carefully examined as they have been by Baggallay, L.J., in his judgment, I think that the current of authority manifestly supports the view expressed in *Sherwood v. Ray* (5). Passages in text-books, which may all be traced back to an original passage in *Clarke's Praxis*, Tit. 323, p. 417, *modus procedendi per accusationem* cannot, even if they were more favourable than they are to the opposite contention, be relied upon to negative a discretion, which decided cases prove to have at least to some extent actually existed. But, in truth, it appears to me that there is a mode by which the apparently conflicting views expressed upon this point either in text-books or in decided cases may be reconciled. The Bishop or his Judge had, I conceive, a real discretion in the matter of allowing a criminal suit to be instituted. The application for leave to promote the office of the Judge was not a mere matter of form, or for the purpose merely of the

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Judge seeing that the offence charged was of ecclesiastical cognisance, and the party applying a fit person as regards solvency, but was, as Sir William Scott stated in *Maidman v. Malpas* (11), for the purpose of preventing the exercise of his jurisdiction being left entirely to the judgment or passions of private persons; but, on the other hand, the ecclesiastical Judges, while they enforced the necessity of the applications, would naturally act upon fixed principles of practice: they would, as lawyers, apply to ecclesiastical offences the principle that it is the interest of the State that offences should be punished, and as a general rule of action, although not an invariable one, as pointed out by Sir John Nicholl in *Lee v. Matthews* (28), they might, as the same Judge said in *Carr v. Marsh* (17), merely consider the nature of the suit whether it was of ecclesiastical cognisance and the fitness of the person applying to be made responsible for costs to the other party. There would thus be on the one hand in the Judge and as between him and any interference on the part of the temporal Courts an absolute discretion to allow or not to allow his office to be promoted in criminal suits; there would be, on the other hand, in his Court, as a matter of its internal economy, a practice which might be moulded from time to time to meet the exigencies of the case, and by which his judicial discretion would, as between him and the suitors of the Court, be regulated. I am confirmed in this view of the position of the Bishop and his Judge prior to the Church Discipline Act, by the observations upon the point to be found in the judgment of the Privy Council in *Elphinstone v. Purchas* (6).

Assuming then the view I have expressed to be correct, the argument is pertinent that the Legislature would not be likely, looking to the object of the Church Discipline Act, to make such an important and serious change as that of enabling any private person wherever resident, whatever might be his real motives in prosecuting, however undesirable it might be in the particular instance that a prosecution should be instituted, and upon mere rumour as well as specific charge to demand, for the pur-

pose of such a prosecution, that the machinery of the Bishop's Court, which hitherto had only been open to him at the discretion of the Bishop or his Judge, should be put in motion. The institution of the commission of enquiry does not really meet this objection, for it is manifest, when the language of the 3rd and 4th sections of the Act is looked at, that the functions of that commission are not of a discretionary character, but are analogous to those of a grand jury upon a bill of indictment.

But although the argument is pertinent it is not conclusive, for it may be said that if the leave to promote the office of the Judge was not before the Act *ex debito justitiæ*, still it was granted by the Bishop's Judge according to fixed rules of practice, and therefore the Legislature might possibly determine to sweep away any discretionary power of refusing such leave when passing an Act which again constituted the Bishop the Judge in his own Court, and interposed between an accused clerk and his accuser at least some protection in the commission of enquiry. Under these circumstances I prefer in approaching the construction of the Church Discipline Act, not to weigh very much upon the argument drawn from the discretion which I consider the Judge of the Bishop's Court possessed before the Act. I would press it only to this extent, namely, that no presumption in favour of the absolute right of a private person to institute proceedings for ecclesiastical offences can be imported into the construction of the Act in the face of that pre-existing discretion.

The language, however, of the 3rd section of that Act, read according to its natural and grammatical signification, points, in my opinion, strongly to the conclusion that a discretion has been preserved by the Act. The words "it shall be lawful," are the governing words of the section, and those words, when used in a statute, primarily import that something to be done, which but for the statute would be contrary to or at least unauthorised by law, has given to it a legal sanction or effect. But such words may, either from the nature of the act to which they refer, if the context will permit of it,

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or from the context itself, acquire a secondary meaning under which the thing to be done becomes obligatory. As regards the nature of the act, if it be for the public benefit or in advancement of public justice, it is an axiom, as Coleridge, J., in *The Queen v. The Tithe Commissioners* (23) says, "that words only directory, permissive or enabling, may have a compulsory force." But the question at once arises whether the thing to be done in this case, the issuing by the Bishop of the commission, is "for the public benefit," or "in advancement of public justice," in the sense in which those expressions are used in the axiom just quoted, and if so, whether further it is of such a character as that permissive words not only "may" but must be read as having a compulsory force, and upon neither of these points do the cases cited in the Court below, as illustrations of circumstances in which the axiom had been acted upon, appear to me to afford any real assistance. They were all cases of a very different kind to the present, and indeed this case is of so special a character, that it must, as it seems to me, almost of necessity be decided upon considerations peculiar to itself. As tending against the view that the axiom is to be applied to this case, these considerations may be urged: First, the act to be done is not a judicial one. Neither it nor any of the proceedings under the Church Discipline Act, down to and inclusive of the report of the commissioners, is, as the Privy Council said in *Ditcher v. Denison* (38), under the statute "a suit, or the commencement or any part of a suit." Secondly, the choice of the Bishop in whose diocese the offence is alleged to have been committed as the person to receive the application, to set on foot the enquiry, and to select the commissioners, points to action on his part in his pastoral capacity, and suggests an incongruity in the idea of a temporal Court compelling him to exercise his authority, although it might well prohibit him from exceeding it. Thirdly, the fact that no form or mode by which the application is to be made to the Bishop is prescribed, seems to involve the idea that he would in the exercise of

his pastoral authority be able for himself to regulate these matters, and indicates therefore to some extent a discretionary power, the limits of which, if it had been intended that the power should be limited, one would have expected the Legislature to lay down. Fourthly, the benefit to the public of an absolute power in any person to set on foot upon mere allegation of scandal, as well as upon specific allegations of fact, an enquiry into any clergyman's conduct, is, to say the least, doubtful.

The judgment of the Court below puts forward in powerful language the reasons which tend in a contrary direction; but it seems to me, with deference, that those reasons are too exclusively drawn from the consideration of the rights of parishioners in regard to offences against ritual which it must be recollected had not, in 1840, when the Church Discipline Act was passed, assumed so important an aspect as at the present time, and that they give too little weight to considerations arising out of the far more numerous classes of offences to which the Act applies, and which might be made the subject of undesirable as well as of unfounded prosecutions. But even if the reasons for construing the words, "it shall be lawful," as peremptory were stronger than they are, I think that the context affords a strong argument against so construing them. The question is whether the words, "it shall be lawful for the Bishop," are to be read as meaning "the Bishop may" or "the Bishop must." If they are read as meaning "the Bishop may," they are suitable to the whole sentence which they govern, for it is a correct although redundant expression to say, "the Bishop may, on the application of any party complaining, or, if he shall think fit, of his own mere motion, issue a commission;" but if they are to be read as meaning "the Bishop must," they do not properly fit in with a part of the sentence, for it is certainly not an apt expression to say "the Bishop must, if he shall think fit, of his own mere motion issue a commission." The section, therefore, in the latter case would have to be construed as if the expression "it shall be

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lawful" had two different meanings when applied to the two limbs of the following sentence.

The words "if he shall think fit" do not really qualify the expression "it shall be lawful;" but merely introduce an alternative mode of action in the case of a supposed offending clerk. This may be more clearly seen by transposing the parts of the section in a way that does not alter its sense, i. e., by reading it as if it ran, "It shall be lawful for the Bishop to issue a commission on the application of any party complaining, or if he shall think fit of his own mere motion." The obligatory force of the section, if it exist at all, must rest in the expression "it shall be lawful" unaided by any argument to be derived from the supposed qualifying words "if he shall think fit," and for the reasons I have given I think that the reading of the section, which would give that expression an obligatory force, can only be adopted by doing a violence to the structure of the sentence in which it occurs, and to the natural and grammatical meaning of the language used which the strongest reasons alone could justify. But putting the case of the respondent as high as it can be put, it cannot, in my opinion, be justly said that the intention of the Legislature to negative all discretion on the part of the Bishop is so plain that, to effectuate that intention, a forced construction of the language used in the 3rd section is to be adopted. Before leaving the section I would further observe that in it may be found proof that the draftsman had a clear mode of expressing his meaning when any act was to be made obligatory, for in the proviso under which notice is to be given to the party accused of the intention to issue a commission, the expression "shall be" is substituted for "it shall be lawful."

But as bearing upon the construction of the 3rd section of the Church Discipline Act, we have had addressed to us, by counsel on both sides, many arguments derived from the language or matter of other sections of the Act. In many sections the expression "it shall be lawful" is used, and comments upon

its meaning have been made. That it is, as argued by the appellants' counsel, used in all these other sections merely in a permissive sense is at least not sufficiently clear to allow of any certain inference as to its meaning in the 3rd section being drawn. All that can be said with certainty is, that it is used in some sections in that sense, and therefore is not an expression exclusively appropriated by the draftsmen of the Act to the imposing of an obligation. Reliance, however, has been placed on the part of the respondent upon the obligation which it has been held (and I assume, for the purpose of argument, validly held) is imposed upon the Bishop after the commission has reported that there is a *prima facie* case, to take the proceedings mentioned in the 9th section. It is pointed out that in that section the same expression "it shall be lawful" is used. The conclusion, however, drawn by the respondent that the expression in itself has a peremptory force in the 9th section is not a valid one, for the 7th section enacts that, upon the commissioners' report that there is a *prima facie* case, "if the bishop of any diocese within which the party accused may hold any preferment, or the party complaining shall thereupon think fit to proceed against the party accused, articles shall be drawn up and filed," and the 8th section enacts that a copy of the articles shall be forthwith served upon the party accused. The suit is thus instituted, and section 9 only provides the machinery for the conduct of that suit. The argument, therefore, may be turned against the respondent, for it may be said that in sections 7 and 8, as in the proviso to section 3, where obligation is intended the Act uses expressions which are clearly in form peremptory, and the fact that when a suit is once set in motion the Bishop has no right to stop it is no argument against his power to prevent the suit being instituted at all.

I pass from the consideration of the form of these sections to a matter of substance to which the appellants' counsel have referred which is worthy of notice. The 3rd section of the Act relates equally to clerks with and without

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preferment, and the obligation upon the Bishop to issue a commission, if it exist at all, must exist as regards both classes of clerks. But assuming it so to exist, it is said that this strange anomaly would arise in the case of a clerk holding no preferment. If in such a case the commission report that there is sufficient *prima facie* ground for instituting further proceedings, there is no machinery for instituting such proceedings in any Bishop's Court, for sections 7 and 9 only relate to a clerk who has preferment, and give jurisdiction to the Bishop in whose diocese the party holds preferment, while on the other hand, although in the case of an accused clerk having no preferment section 13 enables the Bishop of the diocese within which the offence charged is alleged to have been committed, to send the case by letters of request to the Court of Appeal of the province, it does so in language which is admittedly permissive only. The apparent anomaly thus pointed out is naturally relied on as an additional argument in favour of the view that the issuing of a commission is a matter of discretion, and not of obligation. But I do not myself lay any stress upon this argument, for whether there is or is not a discretion under section 3, the anomaly, if it can be called such, would still remain that a clerk without preferment cannot be prosecuted in any Bishop's Court; and it is possible, and I think from the frame of some of the sections of the Act probable, that the introduction of two different bishops at different stages of the proceedings against an accused clerk may have led to the anomalous position of a clerk without preferment escaping attention in the passage of the Church Discipline Bill through Parliament.

In short, the result of my consideration of the different sections of the Church Discipline Act other than the 3rd section is that the arguments drawn from their form or matter are either too minute or too doubtful to be of much aid in the construction of the latter section, and I would only say of them that they at least do not in any way displace the view which I have already expressed upon the language of that section standing by

itself. I may make the same observation upon the Public Worship Regulation Act, 37 & 38 Vict. c. 85, which has also been imported into the discussion. I cannot think that that Act makes the question clearer, except perhaps so far as it indicates that in certain matters of ritual the Legislature did not, while granting a simple machinery for the prosecution of offences, think that the right of parishioners, or even of persons clothed with special authority, and with all the insignia of respectability, to institute criminal proceedings, was of such a kind as that the Bishop in his pastoral capacity should not have a power to put a veto upon its exercise.

In this respect, therefore, the later Act strikes a blow at the argument founded upon the supposed improbability of the Legislature clothing the Bishop under the earlier Act with a discretion to prevent persons instituting proceedings; but it goes no further, and cannot be legitimately pressed as an argument that under the earlier Act the Bishop in fact and law had a discretion which, in the case of a simpler machinery, and in the absence of the protection of the commission of inquiry, the Legislature thought proper to give.

Putting aside these minor arguments as affording but small, if any, aid in solving the question before us, I come to the important point of the authorities under the Church Discipline Act. Each decision, each dictum, which has been cited in favour of the view that the 3rd section of the Act gives a discretion to the Bishop, and does not impose a duty which can be enforced by writ of mandamus, has been subjected to the most searching criticism; but no criticism can displace this fact, that from a time not long after the passing of the Act down to the time when the decision of the Court below was pronounced, there has been the strongest preponderance of judicial opinion on the side of those who maintain the existence of the Bishop's discretion. The cases which bear out this statement have been so fully dealt with by Baggallay, L.J., that I do not propose myself to discuss them. I would only say that, among the authorities upon

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which I rely, I do not count the speech of the Lord Chancellor in the House of Lords. I was a party to the decision under which it was allowed to be quoted to us, and the ground upon which I thought it admissible was that it had, in the occasion upon which it was spoken and the position of the speaker, at least as great a sanction as the text-books of living Judges, which have upon many occasions been admitted as authorities.

But upon further consideration of the matter I have been led to doubt very much whether the principle upon which such text-books have been treated as authorities is a sound one; and even if it were a sound one, I cannot but think the extension of it to speeches in a House of Parliament sitting in its legislative capacity, however eminent may be the speakers, however solemn the occasion on which they speak, inexpedient in a very high degree. It is true that in many instances, and perhaps this particular one is a conspicuous example, the speech, looking to the circumstances under which it is made, the previous consideration which the speaker has given to the subject, and the character in which he speaks, may be entitled to far more weight than the hasty utterances of a Judge at *Nisi Prius*, or even the *obiter dicta* of a Judge in banco; but the Judge in the latter cases has the safeguard of a judicial proceeding cast around him; his mind is not likely to be influenced by any considerations beyond those which the law enforces upon him; while when the scene is removed to the arena of Parliament, political considerations may enter, as they have before now entered, into the opinions of lawyers upon legal subjects, and may insensibly affect the judgments of even the greatest and wisest of our Judges. The sanction and safeguard of judicial procedures are removed, and even the conditions which give the text-book its weight, the exclusive devotion to the legal subject of which it treats, and the calmness with which it is necessarily prepared, may in many instances not exist. It is to be observed, however, that the Lord Chancellor was one of the members of the Privy Council who took part in the case of *Elphinstone v. Purchas* (6),

and, even excluding his very weighty authority altogether, there is still left a body of judicial opinion in favour of the view that the Bishop has a discretion whether he will or will not issue a commission of so strong a kind that, if at this late period it is to be overruled at all, it should, in my opinion, only be overruled by the ultimate tribunal of appeal.

Against it, if the judgment appealed from be excluded can be set only: first, the dictum of Dr. Lushington in *Ditcher v. Denison* (30), in a judgment in respect to which the Privy Council when it was before them in a subsequent stage of the proceedings, stated that it seemed "to be a just inference that the Judge was precluded from taking time for deliberation;" secondly, the expression of a doubt by Hill, J., in *The Queen v. The Bishop of Chichester* (2), immediately followed by a statement of the learned Judge that he gave no opinion upon the point which had raised the doubt; and, thirdly, what has not inaptly been described as a half doubt of Mellish, L.J. (4), and which really was no more than a guarding of himself against being supposed to express an opinion.

My judgment then upon this case may be summarised thus. Prior to the Church Discipline Act the promotion of the office of the Judge was not in theory a matter *ex debito justitiae*, although in practice leave to prosecute for an offence of ecclesiastical conuizance may never have as a general rule of practice been refused to a *bona fide* and solvent accuser. The existence of a discretion in the Bishop or his Judge operates as some check upon unnecessary or undesirable prosecutions, and considering the fact that they may under the Church Discipline Act be based upon alleged scandal as well as specific charges, it is at least not improbable that the Legislature would maintain a check which had previously existed, trusting to the Bishop exercising his office in the interests of the public order and discipline of the Church. The object of the Act, namely, the amendment of the manner of proceeding in causes for the correction of clerks renders it at least somewhat improbable that the Legislature should make such an important

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change as that of removing altogether this check, and at least one might expect it to have been made in clear and unmistakeable language. The nature of the Church Discipline Act, its general scope and object, and the particular subject-matter of its 3rd section, are not, nor is any of them, of such a character as necessarily to require that the words of that section, if permissive in form, shall be construed as peremptory in fact. The expression "it shall be lawful," in the section, is not only in itself in form permissive, but it is coupled with a context, the structure and grammatical signification of which must be altered in order to read the expression as peremptory in fact. Neither the language nor the subject-matter of other sections of the Act affords a valid argument in favour of reading the 3rd section according to any but its formal and natural meaning, and lastly, authority has decided that its formal and natural meaning is its real meaning, and that the Bishop has under the section a discretion with which the temporal Courts have no claim to interfere.

Concurring then with the other members of the Court in the view that the 3rd section of the Church Discipline Act is permissive only, it is unnecessary for me to deal with many questions which have been raised in argument upon the supposition that a contrary view might be entertained. I may say, however, that I agree with the Court below that the Public Worship Regulation Act, 1874, although covering offences which are included in the Church Discipline Act, does not preclude a prosecution for such offences under that Act; and I consider that if the Bishop had been subject to the jurisdiction of the temporal Courts in regard to his refusal to issue a commission, there was sufficient ground in the present case for the issuing of the writ of mandamus.

But arriving at the conclusion that the Bishop had in the present case a discretion to refuse either to issue a commission or to send letters of request, I am of opinion that the facts stated in the affidavits establish that he has exercised his discretion at least for the time being,

and whatever may be my opinion as to the mode in which it has been exercised, I do not conceive it within my province to express it. The Legislature has constituted the Bishop the arbiter to decide whether or no an ecclesiastical prosecution shall be set on foot within the diocese over which he holds spiritual authority. If appeal from his decision lies at all it does not lie to the temporal Court, and as I have no jurisdiction to interfere with the Bishop's decision, I feel it undesirable for me to express an opinion in reference to the grounds upon which it has been based. I would only guard myself against being supposed to differ in any way from the expressions upon this point which have fallen from Bramwell, L.J., or which were made use of in the Court below. I merely refrain from expressing my own opinion. In the result, I arrive at the conclusion that the appeals should be allowed, and inasmuch as the respondent has wrongly invoked the aid of the temporal Court, I think that however proper may have been his motives in his endeavour to institute proceedings against Mr. Carter, and however much one may sympathise with his desire to put down practices alien to the spirit of our Reformed Church, and contrary to the established law of the land, there is no sufficient reason for departing from the general rule of this Court, that the successful party should have his costs, and I am of opinion therefore that the appeals should be allowed with costs.

*Appeals allowed.*

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Solicitors—J. Girdlestone, for prosecutor; Cunliffe, Beaumont & Davenport, agents for Davenport, Oxford, for Bishop of Oxford; Brooks, Jenkins & Co., for Rev. T. T. Carter.

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[IN THE QUEEN'S BENCH DIVISION.]

1879.  
June 18, 20. { ADAMSON AND ANOTHER v.  
July 3. { THE NEWCASTLE STEAM-  
SHIP FREIGHT INSURANCE  
ASSOCIATION.

*Ship and Shipping—Marine Insurance—Charter-Party "to be cancelled" in Event of War—Restraint of Princes—Closing of Port of Export.*

Plaintiffs having chartered a ship to one O., to proceed to Galatz after completing intermediate employment, and to load a cargo of grain from there or certain other eastern ports, effected an insurance with the defendants by a time policy on loss of freight for a whole year, the perils insured against being amongst others "restraint and detainment of princes." By a memorandum on the charter-party it was agreed: "In the event of war, blockade or prohibition of export preventing loading, this charter-party to be cancelled." At the time of the ship's arrival at Genoa, in completion of the intermediate voyage, war having been declared by Russia against Turkey, the plaintiffs learned that the ports specified in the charter-party were closed. O. declined, upon plaintiffs' request, to cancel the charter-party, and they accordingly sent the ship in ballast to Constantinople; but the ports still being closed, and there being no prospect of their being opened, the ship did not proceed further eastward, but obtained a cargo from Constantinople to England at a freight less than the chartered freight, and the plaintiff brought this action on the policy for the difference:—Held, by COCKBURN, L.C.J., and MANISTY, J. (LUSH, J., dissenting), that the plaintiffs were not entitled to recover, on the ground that by virtue of the memorandum the charter-party became void on the closing of the ports, that being a prohibition of export preventing loading; and that the charter-party having been thus rescinded before the ship sailed from Genoa, the chartered voyage, the subject of the policy, had never begun.

Held, by LUSH, J., dissenting, that on the true construction of the memorandum the charter remained in force until one of the parties elected to avoid it, which he would have the option of doing within a reasonable time after the happening of any

of the specified events; that here it continued in force until the loading became impracticable, namely, when the ship was at Constantinople, and that the plaintiffs had, therefore, an interest in the chartered freight, which they lost by the restraint of princes, and were entitled to recover from the defendants.

This was an action on a policy of insurance on freight of the ship *Edgar*; the plaintiffs seeking to recover for their interest in the chartered freight, which they alleged they had lost by the "restraint of princes," one of the perils insured against.

The facts and arguments are fully set out in the judgment delivered by Manisty, J., below.

*Benjamin and J. P. Aspinall* (Cohen with them), for the plaintiffs, cited *Geipel v. Smith* (1), *Barker v. Fleming* (2) and *Bankin v. Potter* (3).

*Wood Hill* (The Solicitor-General with him), for the defendants, cited the judgment delivered by Lush, J., on the 5th plea in *Geipel v. Smith* (1).

[LUSH, J.—I must have read the 5th plea as stating that the blockade was not temporary; as the Court was fully agreed that a temporary obstacle would not absolve.]

*Cur. adv. vult.*

The following judgments were (on the 3rd of July) delivered:—

MANISTY, J.—This was an action on a policy of insurance on the freight of the ship *Edgar*, effected by the plaintiffs with the defendants on the 24th of February, 1877, from noon of the 20th of February, 1877, until noon of the 20th of February, 1878, at all times and in all places. The perils insured against were, among others, perils of the seas and restraints and detainments of kings and princes, and the interest insured was "owner's freight at risk on board the

(1) 41 Law J. Rep. Q.B. 153; s. c. Law Rep. 7 Q.B. 404.

(2) 39 Law J. Rep. Q.B. 25; s. c. Law Rep. 5 Q.B. 59.

(3) 42 Law J. Rep. C.P. 169; s. c. Law Rep. 6 H.L. Cas. 83.



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ship or chartered when in ballast." By a charter-party dated prior to the policy of insurance, namely, on the 17th of February, 1877, the plaintiffs chartered the *Edgar* to one I. A. Cicognani, by which it was agreed that the ship, after completing intermediate employment (which she was to be at liberty to take), should proceed to Galatz for orders, to load there or at Braila or Ismailia, and there load a full and complete cargo of grain or seed, and being so loaded should therewith proceed to Malta for orders, &c., and by a memorandum in the margin of the charter-party it was agreed as follows:—"In the event of war, blockade or prohibition of export preventing loading, this charter-party to be cancelled."

On the 24th of April, 1877, Russia declared war against Turkey, and on the 30th of April her Majesty issued a proclamation of neutrality.

On the 1st of May, 1877, the *Edgar* sailed from the Tyne for Genoa with a cargo of coal under a charter-party. She arrived at Genoa on the 14th of May, 1877, and after discharging cargo she took in ballast, for the purpose of proceeding to Galatz.

Before the *Edgar* arrived at Genoa the plaintiffs ascertained that Russia had closed the ports of loading mentioned in the charter-party of the 17th of February, 1877. Nevertheless, the *Edgar*, by order of the plaintiffs, sailed from Genoa, in ballast, on the 21st of May, 1877, towards Constantinople, to fulfil the charter-party of the 17th of February. Before doing so the plaintiffs requested the charterer (Cicognani) to cancel the charter-party, but he refused to do so, and insisted upon holding the plaintiffs to it.

The *Edgar* arrived at Constantinople on the 28th of May, when it was found that the loading ports were still closed, and that there was no reasonable probability of their being open in time for the *Edgar* to load the chartered cargo. She therefore did not proceed further towards Galatz, but obtained at Constantinople a homeward cargo for England, the freight of which was less than the freight she would have earned had she obtained the chartered cargo. This action is brought

to recover the difference, and the questions submitted to us are—

First. Whether the charter-party became as a matter of law void (by which I understand the parties to mean whether, according to the true construction of the charter-party, it came to an end) on the closing of the ports of loading in the charter-party mentioned without any election to cancel it having been made either by the owner or the charterer?

Second. Whether the charter-party was as a matter of law void and rescinded before the *Edgar* sailed in ballast for Genoa?

I am of opinion that both questions should be answered in the affirmative. I think that the act of closing the ports by the Russian Government was a prohibition of export, preventing loading within the meaning of the memorandum in the margin of the charter-party, and that upon the happening of that event (which was before the *Edgar* reached Genoa) the charter-party came to an end without any election by either party.

It is contended on the part of the plaintiffs that the charter-party was voidable only at the option of either party, that neither having elected to avoid it the charter-party continued in force, and that consequently the *Edgar* having sailed from Genoa for Galatz in ballast there was a loss of chartered freight when the ship was in ballast.

This construction necessitates the introduction into the charter-party of the words "at the option of either party" after the words "to be cancelled," which would not only violate the rule of construction, that words should never be added unless it be necessary to add them in order to give effect to the plain and manifest intention of the parties, but it would, as it seems to me, defeat the plainly expressed intention of the parties, and might give rise to questions of considerable difficulty. One such question would be, when was the option to be exercised? I suppose each party would be allowed reasonable time for making up his mind whether he would or would not abandon the adventure.

The authorities seem to shew that in the event of a restraint of princes the

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obligation of a shipowner (in the absence of any special provision) is to wait a reasonable time for the purpose of ascertaining whether the restraint is likely to be of such a duration as to render it impossible, commercially, to carry out the contract, and the question of what is a reasonable time must depend upon the circumstances of each particular case.

It was suggested in the course of the argument for the plaintiffs that under the circumstances of the present case the master was justified in sailing from Genoa and proceeding as far as Constantinople before abandoning the adventure, and that consequently the chartered voyage had commenced, and the policy had attached, whereas on the part of the defendants it was contended that, in the absence of the clause in question the duty of the master would have been to wait a reasonable time at Genoa for the purpose of ascertaining if the prohibition was likely to be removed, and that if he had done so the chartered voyage never would have been commenced. The plaintiffs' construction of the charter-party would involve this question. The defendants' construction excludes it.

Other questions of more or less difficulty and nicety would be open as between the shipowner and the charterer if the plaintiffs' construction of the charter-party be adopted, all of which are excluded by the defendants' construction of it.

If the parties really intended that the charter-party should only be voidable at the option of either of them, it was very easy for them to say so, and it is worthy of note that when they did so mean they did so say. The charter-party included two ships. As to one of them, it was stipulated that if it did not arrive at the loading port on or before the 15th of June, the charterers were to have the power to cancel the charter. As to the other, it was stipulated that if it did not arrive at the port of loading by the 30th of June, "charter for that steamer to be cancelled." If the words "to be cancelled" in the memorandum as to the prohibition of export are to be read as meaning to be cancelled at the option of either party,

the same words in the stipulation to which I have just adverted would, I suppose, have to be read in like manner, and I cannot for a moment believe that such was the intention of the parties. Of course it was open to the parties to agree that the second ship should be loaded notwithstanding she did not arrive at her port of loading by the 30th of June, but that would have been matter of new agreement. So the parties might have agreed at Genoa that notwithstanding the prohibition of export from the ports of loading, the *Edgar* should proceed to Constantinople, or to Galatz, or anywhere else, but that would have been a new agreement, *dehors* the charter-party. I think it much safer to adhere to the words which the parties have used, and to give effect to them according to their plain and ordinary signification, than to put a construction upon them which necessitates the introduction of additional words.

For these reasons I am of opinion that the questions put to us should be answered in the affirmative.

COCKBURN, L.C.J.—I concur in this judgment. On the first argument I was disposed to think that the effect of the memorandum was to make the charter not void, but voidable at the option of either party, so that if both parties concurred in waiving the right to cancel, the charter would continue in force. But on fuller consideration I have arrived at the opposite conclusion, and am of opinion that the meaning and effect of the memorandum was in order to prevent all further question or delay, to put an end *ipso facto* to the charter-party, on the happening of the contingency.

LUSH, J.—I regret that I am unable to concur with the Lord Chief Justice and my brother Manisty as to the construction to be put upon the memorandum to the charter-party. If there had been but one contingency provided for, and that one was "prohibition of export preventing loading," there would have been no difficulty, and it would have been immaterial whether the words "to be cancelled" were read as importing "*shall* be cancelled," or only "*may* be cancelled;" in

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other words, whether on the happening of the event the charter was to be treated as absolutely void or only voidable. But two other contingencies are mentioned, namely, "the event of war and blockade." A declaration of war may long precede a blockade or a closing of the ports. The seat of hostilities may be far off, or hostilities may terminate before reaching such a stage. The meaning put upon the words in their application to one of the specified events must be put upon them in their application to each event.

The charter must of course be construed without reference to the policy of insurance, and as if the contention arose between the charterer and the shipowner. Suppose the shipowner in this case, instead of stopping at Constantinople, had gone on to one of the loading ports with the intention of carrying out the charter, and had, when he arrived there, found that the prohibition had been or was shortly to be withdrawn, but that he could command higher freights on a homeward voyage, was he to be at liberty then to change his mind and to fall back upon the declaration of war which took place and which he knew of before he started from Genoa? If the memorandum means that upon that event the charter is to be treated as actually cancelled, he may, and it would be a good defence to an action by the charterer for refusing to receive the cargo, that the charter had ceased to be in force. Or supposing the charterer found, when the ship arrived at the port, that he could ship at a lower rate than the chartered freight, he might set up the same plea as an excuse for not shipping the cargo. I cannot think that the parties intended to place themselves in this position. Nor do I think that a verbal agreement by the two not to treat it as cancelled would have any binding force. By the hypothesis the charter is void, and nothing short of a written agreement would have the effect of renewing it, which would be to make a new charter. The word charter imports a writing. A verbal charter is a thing unknown in maritime commerce. There may be an agreement on the one hand to load and on the other to carry, but the security and the special provisions and exceptions

always found in a charter would be wanting.

The alternative construction would answer every purpose intended by the parties, and be free from inconvenience. If it is voidable only, the charter would remain in force until one of the parties elected to avoid it, but it would be optional to either of them to put an end to it upon the happening of either of the specified events, provided he did so within a reasonable time, and before the other party had altered his position upon the faith of his having waived it. If, for example, after the vessel had arrived at Constantinople, the master had found that the ports were open, it would have been too late, after what occurred at Genoa, for him to quote the declaration of war as a ground of declaring the charter at an end.

It is objected that this construction of words requires the memorandum to be enlarged by adding the words "at the option of either of the parties." But that seems to me necessarily implied. The memorandum is the language of both parties, and amounts to an agreement that in certain events the charter may be cancelled. It cannot mean that if both concur they may cancel it. That they can do at any time without any previous agreement. The words read in that sense would have no effect. They must, as it seems to me, to give them any operation at all, mean that either may cancel. Express words are found in another part of the charter, but that is where an option is given to one party only.

Nor do I think that writing or any other manual act is necessary in order to cancel. It is sufficient that the party elects to exercise his option, and notifies his election to the other party.

A further objection is that this construction makes the memorandum useless. But its purpose will appear if we consider what the rights and obligations of the parties would have been without it. Supposing, for example, the master had reached the loading port, and had there received information that it was likely to be soon opened, he would have had to stay there a reasonable time to see if that event happened. If he went away, and

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the prohibition were taken off a few days afterwards, the charterer might say he had not waited long enough. The charterer might be in the same dilemma if the shipowner wished to stay and he wanted to dispose of his goods on shore. The object of the memorandum was to avoid these harassing questions, and to enable each party, as soon as the event happened which might defeat the voyage, to put an end to it and to all possible litigation upon such a question.

For these reasons I am of opinion that the charter continued in force up to the time when the loading became impracticable, and consequently that the assured had an interest in the chartered freight which he lost by the "restraint of princes."

*Judgment for defendants.*

Solicitors—H. C. Coote, agent for H. A. Adamson, North Shields, for plaintiffs; Williamson, Hill & Co., agents for Ingledew & Daggett, Newcastle-on-Tyne, for defendants.

[IN THE COURT OF APPEAL.]

(*Appeal from the Exchequer Division.*)

1879. } MIDGLEY AND EDMONDSON v.  
June 27. } COPPOCK.\*

*Vendor and Purchaser—Sale of Land—  
"Outgoings" to be paid by Vendor till  
Completion—Charge for Paving under Local  
Improvement Act.*

By the Manchester General Improvement Act, 1851, the Town Council were empowered to order streets to be sewered and paved by the owners of the adjoining houses, and in case of default by such owners to do the work themselves, and to charge the respective owners with their proportionate part of the expenses thereof, to be recoverable by action of debt; and by way of additional remedy the Council were empowered to require payment of any such charges from the person who should then or

at any time thereafter occupy any such houses, &c., and to levy the same by distress from time to time, to the extent of the rent due from the occupier to the owner:—

Held, that a charge made upon the owner of houses under the above sections was an "outgoing" from the premises within the meaning of a contract between the vendor and purchaser of such houses, which provided that "all rents, rates, taxes and outgoings should be received and discharged by the vendor up to the time of completion."

This action was brought to recover a sum of 70*l.* 19*s.* 3*d.* paid by the plaintiffs in respect of the sewerage, paving and draining of certain premises in Grindlow Street, Manchester, under the following circumstances:—

In the year 1873 the Corporation of Manchester, under the powers of the Manchester Improvement Act, 1851, performed certain work in paving, sewerage and draining the streets adjacent to the premises in question, and called upon their owner to pay his share of the expenses of such work, amounting to something over 100*l.*

The owner did not pay the sum demanded, and sold the premises to one T. L. Rushton. On the 28th of April, 1877, the defendant entered into a contract with Rushton for the purchase of the premises. No conveyance to the defendant was actually executed. The contract contained a clause to the effect that the premises were sold subject to all rights of road and way, &c., "and to the payment of claims and demands made or to be made for the forming, paving and sewerage of any adjoining road, street or way, and to existing leases and tenancies."

On the 29th of June, 1877, the defendant contracted for the sale of the premises to the plaintiff Edmondson. The contract contained the following stipulation:—"All rents, rates, taxes and outgoings shall be received and discharged by the vendor up to the time of completion, such rents and outgoings to be apportioned if necessary."

In pursuance of the agreements between Rushton and the defendant, and between the defendant and Edmondson, by a conveyance dated the 7th of August, 1877,

\* *Coram* Lord Coleridge, C.J.; Bramwell, L.J.; and Brett, L.J.

*Midgley v. Coppock (App.), Exch.*

Rushton, at the request of the defendant, conveyed the premises direct to the plaintiffs. In that conveyance the defendant entered into the usual covenant that he had not encumbered.

Before the conveyance was executed, the corporation had claimed payment of the sum due to them for paving, &c., from Rushton. Rushton paid them on the 15th of May, 1877, a sum of 30*l.* on account. The defendant was in possession for three months before the sale to the plaintiffs, during which time a tenant was in occupation of the premises, but no claim was made against him by the corporation. But in October, 1877, the corporation claimed the balance due to them on the paving account from the plaintiffs. The plaintiffs paid the amount due, 70*l.* 1*9s.* 3*d.*, and now brought this action to recover the amount so paid from the defendant as an "outgoing" from the property payable before the completion of the purchase.

The material parts of the Manchester General Improvement Act, 1851 (14 & 15 Vict. c. 119), are as follows:—

By sections 15 and 17 the Town Council were empowered to order streets to be sewered and paved by the owners of the adjoining premises; and in case of default by such owners to do the work themselves, and to charge the respective owners with their proportionate part of the expenses thereof, to be recoverable by action of debt.

Section 18 enacts that, "By way of additional remedy it shall be lawful for the Council, whether such demand shall have been made upon the owner or not, to require the payment of all or any part of such charges and expenses from the person who shall then or at any time thereafter occupy such houses or ground, and in default of payment thereof by such occupier on demand by the Council, the same may be levied by distress, &c., out of the rent from time to time becoming due in respect of the said houses or ground, as if the same had been actually paid to such owner as part of such rent."

By section 19, "In no case except as hereinafter mentioned shall any occupier be liable to pay more money in respect of such charges and expenses as

aforesaid than the amount of rent due from him at the time of the demand made upon him for such charges and expenses in case he shall pay the same or any part thereof on demand, or at the time of the issuing of the warrant of distress or the levying thereof in case such charges and expenses or any part thereof shall be levied by distress."

The case was tried at Manchester Spring Assizes, 1878, before Lopes, J., without a jury.

His Lordship reserved the case for further consideration, and on the 2nd of December gave judgment for the defendant, holding that the covenant in the defendant's agreement with the plaintiffs was applicable only to apportionable outgoings, and therefore not to the payment in respect of which the plaintiffs' claim was brought.

The plaintiffs appealed.

*Edwards (J. W. Lowe with him)*, for the plaintiffs.—The charge made by the corporation is an "outgoing" from the premises. This is shewn by section 18 of the Act, which makes it recoverable from the tenant. The outgoings referred to in the covenant are to be apportioned "if necessary." That shews that other outgoings besides apportionable outgoings are intended. [He was stopped by the Court.]

*Gorst and J. F. Leese*, for the defendant.—The sum demanded by the corporation is not a charge upon the land, but a penalty upon the owner who neglects to do the sewerage, &c., when ordered to do it—*Tidswell v. Whitworth* (1), and the observations of Willes, J., on that case in *Thompson v. Lapworth* (2). Sections 18 and 19 of the Improvement Act are carefully drawn so as to prevent loss falling upon the occupier. They merely provide a machinery for attaching the owner's money in his tenant's hand. The owner who has to pay is the owner who has made default and no other. The plaintiffs need not have paid this money and have paid it in their own wrong.

(1) 36 Law J. Rep. C.P. 103; s. c. Law Rep. 2 C.P. 326.

(2) 37 Law J. Rep. C.P. 74; s. c. Law Rep. 3 C.P. 149.

*Midgley v. Coppock (App.), Exch.*

If, however, the charge in question could ever have become a charge affecting the defendant, it could only become so under section 15, on demand being made. No such demand was made on the plaintiffs. Again, the corporation could only have recovered against the defendant, after demand, to the extent of three months' rent. Therefore if the plaintiffs are entitled to recover at all it can only be to the extent of three months' rent. The plaintiffs claim under the contract of the 29th of June. But that contract is merged in the conveyance which contains no covenant to pay outgoings. These charges, if they are outgoings, were not known to either party before the purchase, the purchase is now completed, and it is too late for the plaintiffs to ask for compensation—*Manton v. Thacker; Ex parte Croshaw* (3).

LORD COLERIDGE, C.J.—This was an appeal from a judgment of Lopes, J., in favour of the defendant, in an action on a contract in writing which contained an agreement in the following words:—"All the rent, rates, taxes and outgoings payable in respect of the premises shall be received and discharged by the vendors up to the time of completion, such rents and outgoings being apportioned if necessary." The action is to recover a sum of 70*l.*, being a balance of a certain sum of money said to be due to the corporation of Manchester, for paving, sewerage and improving a street adjacent to the premises which are the subject of the contract. The plaintiffs bought the premises of the defendant, subject to the covenant, and were called on by the corporation to pay and paid the balance of the sum due, and the question is whether the defendant ought or ought not to repay to the plaintiffs the amount so paid. The plaintiffs have had to pay the money under the provisions of the Manchester Improvement Act, 1851. It is not necessary to enter into a discussion of all the sections of that Act and for this reason: Whatever may be the construction of certain portions of the Act it is clear that if and when the owner, whosoever

he may be, has a tenant, the money can be recovered from that tenant by the process pointed out in sections 18 and 19, that is to say, by successive distresses for such portion of the sum as is due for rent which by notice the tenant can be prevented from paying to the landlord. I say nothing whatever as to whether each successive owner can be personally made to pay, but clearly the tenant can, and so payment can be enforced from the landlord so to speak through the sides of the tenant. In this case the sum paid is an outgoing payable in respect of the premises, it is an outgoing which can be recovered from the tenant of the premises from time to time, and only in his capacity of tenant, and therefore is an outgoing from the premises. The vendor has undertaken up to the time of completion to pay such outgoings; this is an outgoing to which the premises were liable before that time, and therefore the defendant is bound to pay it. I think it is due to my brother Lopes to mention the ground upon which he decided the question, a ground on which the case has not been argued at any length before us. He decided, not on the question of liability, but on the words of the covenant, saying that this payment did not come within the covenant which contained the words, "such rents and outgoings being apportioned if necessary," and therefore could only apply to apportionable outgoings. Now if the words "if necessary" had been left out, there would have been much force in that argument, but I think those words have been overlooked, and they appear to me to shew that some of the taxes and outgoings contemplated may not be apportionable. Taxes like the property tax are, no doubt, apportionable, and such outgoings must be apportioned, but in cases like this a full interpretation should be given to all the words of the section, and the words "if necessary" seem to contemplate some outgoings in which apportionment is not necessary because they are not apportionable. This charge seems to be one of them, and the defendant has not discharged it though liable to do so. I ought to say that I do not wish to derogate in any way from the cases

*Midgley v. Coppock (App.), Exch.*

which have been cited which are cases of landlord and tenant, and have nothing to do with the liability of successive owners.

BRAMWELL, L.J.—I am of the same opinion. Our decision is not inconsistent with that in *Tidswell v. Whitworth* (1). In that case the landlord had covenanted to pay for all impositions which had become payable in respect of the premises. If he had paid he could not have come upon the tenant for repayment, and it was held that he could not, by omitting to do his duty, render the tenant liable.

BRETT, L.J., concurred.

*Judgment for the plaintiffs.*

Solicitors—Pitman & Lowe, agents for J. E. & R. Whitworth, Manchester, for plaintiffs; Sewell & Edwards, agents for F. J. Marlow, Manchester, for defendant.

[IN THE COURT OF APPEAL.]

(Appeal from the Divisional Court for Q.B., C.P. and Exch. Divisions.)

1879. } THE QUEEN v. HARRINGTON.\*  
July 1. }

*County Court Jurisdiction—Injunction to restrain a Nuisance—Power to enforce Obedience by Attachment—Judicature Act, 1873, sect. 89.*

*In an action for nuisance brought in a County Court where the claim for damage is within the limits of its jurisdiction, the Judge has power to grant an injunction restraining the nuisance, and also to enforce obedience by attachment.*

This was an appeal from a decision of the Divisional Court for the Q.B., C.P. and Exch. Divisions which will be found reported 48 Law J. Rep. (Q.B., C.P. and Exch.) 300.

By that decision a rule in the nature of a *mandamus* was made absolute, and

\* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

the Judge of the Coventry County Court was ordered to hear and adjudicate upon an application made by the plaintiff for the attachment of the defendants in an action of *Martin v. Bannister and others*, for disobedience to an injunction granted by the Judge to restrain a nuisance for which the plaintiff had claimed and obtained damages.

The facts of the case are fully stated in the report of the decision of the Court below.

On appeal—

*Dugdale and Wilberforce*, for the defendants in *Martin v. Bannister*.

*Bigham*, in support of the rule.

The arguments were substantially the same as those employed in the Court below.

BRAMWELL, L.J.—I am of opinion that this judgment ought to be affirmed, and I agree entirely with the reasons given by the Lord Chief Baron and Baron Pollock for their judgment, and it is not necessary for me to add a word more. There is one remark, however, which I would like to make. The argument is that section 89 gives no new jurisdiction to the Court, and that when a man applies to a County Court for damages and an injunction at the same time, he sets up two causes of action, one actual damage already suffered, and the other damage apprehended in the future. That doctrine is too subtle. I am not sure whether the County Court would have jurisdiction if the only cause of action were apprehended damage; but if there has been actual damage, there is but one cause of action for which there are two remedies—damages and an injunction. The County Court, then, has power to entertain a claim for damages, and at the same time for an injunction to prevent a repetition of the injury. Then as to attachment, it seems to me scarcely necessary to do more than shew that an injunction may be granted in order to prove that attachment may be granted also. I really do not know whether in any case it would be possible to enforce an injunction by indictment, as has been suggested. All I can say is I never heard

*The Queen v. Harington (App.), Q.B.*

of such a proceeding, and if that were the only way to enforce it, an injunction would be nugatory. Then it is said an attachment is not part of the remedy given by the Court, but a punishment inflicted for disobedience to the injunction. But that is not really so. It is a part of the remedy, which consists of an injunction and consequent attachment. The remedy is in fact an injunction enforceable by attachment.

BRETT, L.J.—The first point argued before us was, that the County Court has no power to issue an injunction, because it is said an injunction is not a remedy but a cause of action. I cannot see how an injunction can possibly be called a cause of action. If it were so, it must exist before the action is brought. But an injunction does not. One cause of action is the existence of a nuisance. Another may be the apprehension or threat of a nuisance. Those are both causes of action, but it may be that when there is only a threat of a nuisance it may not be within the jurisdiction of the County Court to grant an injunction. That point I do not decide. But here there is a clear cause of action. That cause of action is the existence of a nuisance. But it is said that on such a cause of action the County Court could not issue an injunction. The Judicature Act, section 89, says, as regards the jurisdiction of the County Court, that it "shall, as regards all causes of action within its jurisdiction for the time being, have power to grant and shall grant in any proceeding before such Court, such relief, redress, or remedy, or combination of remedies . . . in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice." As soon as it is admitted that an injunction is not a cause of action but a remedy, the power of the County Court to grant an injunction becomes clear beyond question.

Then it is said that the County Court has no power to commit for disobedience to the injunction, for the commitment is not a "remedy" but a punishment for disobedience. It is plain that the High Court would have power to commit if

the action were in the High Court;—that the Court would grant an injunction, and commit the person against whom it was granted, until it was obeyed. It may be that that power was given to the Court by section 16 of the Judicature Act, 1873, or it may be it is derived from Order XLII. rule 5 (which rule probably meant that whereas an injunction in Chancery was followed by attachment, and the same rule was to hold good at Common Law, there were some other orders not strictly to be called injunctions, and the rule was intended to supply a remedy both as to injunctions properly so called and to those other forms of Order). But whether it is derived from that rule or not, it is clear the High Court would have the power if the action had been brought there. Then is the attachment part of the remedy, or a punishment? If it were a punishment, the Court could not take it off. No Court has power to take off a punishment which it has once inflicted. But the power of the Court to take off the attachment on the injunction being obeyed shews that it is a part of the redress given in order to enforce the injunction in favour of the party who obtains the injunction, and not a punishment inflicted on the party against whom it is obtained. And as the attachment is part of the redress, the County Court has a right not only to grant an injunction but to enforce it by attachment.

COTTON, L.J.—There are two questions which we have to decide in this case. First, has a County Court jurisdiction to grant an injunction where a case comes before it in which a nuisance is actually committed? Secondly, if so, can the County Court enforce the injunction by attachment?

Now there were two ways in which injunctions could be granted in Chancery. Where the applicant had apprehensions, and good reasons to apprehend, that a nuisance would be committed, the Court would grant an injunction. But there was another way in which the Court of Chancery would grant an injunction, namely, as an additional remedy where there had been actual damage done. All



*The Queen v. Harrington (App.), Q.B.*

the Common Law Courts could do in such a case was to give damages. All the Court of Chancery could do was to grant an injunction to prevent a repetition of the injury. That this was merely an additional remedy or redress, and not a new cause of action different from any recognised by the Common Law Courts, is shewn by the fact that the Court of Chancery could give no damages but only an injunction, and the Common Law Courts no injunction but only damages. Having regard to this, it is unnecessary to decide whether the County Court has power to restrain merely anticipated wrong. Here we have a wrong which has been actually committed, which the Court could deal with in an action for damages. And section 89 of the Judicature Act, 1873, gives the County Court power to grant the remedy formerly applied by the Court of Chancery, which under the Judicature Acts the High Court is enabled to apply.

As to the second point it seems to me that the County Court has power to enforce its injunctions in the appropriate way by attachment. The power seems to me to be given by section 89, and must be exercised in the manner and form pointed out by the County Court rules. I do not rely on the rule as giving jurisdiction, but merely as regulating the manner in which it is to be exercised.

*Appeal dismissed.*

Solicitors—Chester & Co., agents for G. E. Giles, Nuneaton, for plaintiff; H. Fluker, agent for J. Estlin, Nuneaton, for defendants.

[IN THE COMMON PLEAS DIVISION.]  
1879. } WYNN (appellant) v. FOR-  
May 23. } RSTER (respondent).

*Mines—Coal Mine—Neglect of General Rules under 35 & 36 Vict. c. 76. s. 51—Liability of Agent as well as Manager.*

[For the report of the above case, see 48 Law J. Rep. M.C. 140.]

[IN THE QUEEN'S BENCH DIVISION.]  
1879. } MASON v. THE WIRELESS HIGHWAY  
May 14. } BOARD.

*Practice—County Court Appeals—13 & 14 Vict. c. 61. s. 14—30 & 31 Vict. c. 142. s. 13—38 & 39 Vict. c. 50. s. 6—Appeal from Garnishee Order.*

*The statutes giving a right of appeal from the County Court extend only to an appeal from a decision in a cause or action.*

*A garnishee order is therefore not the subject of appeal, not being made in the action.*

In this case a rule had been obtained calling on the plaintiff, who had recovered judgment in the County Court of Cheshire against the defendants, to shew cause why a garnishee order made by the Judge of the County Court on the 31st of January, 1879, should not be set aside. The defendants moved the rule on the grounds that the North and South Wales Bank, who had been made garnishees, were not indebted to them, and that the money in the hands of the bank attached by the order was not such as could be attached.

The County Court Judge not having furnished a copy of his notes, the defendants applied to the Divisional Court within eight days from the 31st of January for an order to compel the Judge to supply his notes for the purpose of the motion by way of appeal being made. The Court refused to make the order asked for, but on the 10th of February the notes having been then obtained, heard the motion and granted a rule nisi.

It was now objected that the motion had been made too late, having been after the eight days given by 38 & 39 Vict. c. 50. s. 6, within which appeals by motion are authorized, and *Tennant v. Rawlings* (1) was cited.

THE COURT (2), not being agreed upon the point, decided to hear the case, leaving the plaintiff to go to the Court of Appeal.

*T. H. James* shewed cause.—There is a further preliminary objection to the hear-

(1) Law Rep. 4 C.P. D. 133.

(2) Cockburn, L.C.J., and Mellor, J.

*Mason v. Wirral Highway Board, Q.B.*

ing of this appeal. An order of a County Court Judge upon a garnishee summons is not the subject of appeal at all. There was no appeal under 9 & 10 Vict. c. 95, and the right of appeal was first given by 13 & 14 Vict. c. 61. s. 14 (3), but that was limited by being given to "either party in any cause" within the jurisdiction conferred by the Act. Under the Act the decisions in *Beswick v. Boffey* (4) and *Fraser v. Fothergill* (5), expressly shew that there was no right of appeal except by the original party and in the action. A garnishee order is not made in the action but is a separate proceeding. Then came 19 & 20 Vict. c. 108. s. 68, which extended appeals to replevin and interpleader, but not to anything else; then the 30 & 31 Vict. c. 142. s. 13, which gave an appeal with the leave of the Judge, in actions where it was not then allowed, but did not apply to a garnishee order outside the original action (6). It cannot be contended that 38 & 39 Vict. c. 50. s. 6, has enlarged the right of appeal, for that section is limited to regulating procedure, and giving a simpler mode of appeal. The matter therefore rests upon the earlier statutes, and the principle of their construction may be seen in *Carr v. Stringer* (7), to be that no appeal is given except from a decision on the cause, not therefore from an interlocutory order nor from a garnishee order.

*F. Marshall, contra.*—It is not correct to assume that the garnishee is outside the action. He becomes a party to the action immediately on the order being

(3) 13 & 14 Vict. c. 61. s. 14.—"If either party in any cause of the amount to which jurisdiction is given to the County Courts by this Act shall be dissatisfied with the determination or direction of the Court in point of law, or upon the admission or rejection of any evidence, such party may appeal from the same to any of the superior Courts of Common Law at Westminster."

(4) 23 Law J. Rep. Exch. 89.

(5) 23 Law J. Rep. C.P. 53.

(6) 30 & 31 Vict. c. 142. s. 13.—"An appeal from the decision of a County Court on the same grounds and subject to the same conditions as are provided by 13 & 14 Vict. c. 61. s. 14, shall be allowed in all actions of ejectment, and with the leave of the Judge an appeal shall be allowed in actions in which an appeal is not now allowed if the Judge shall think it reasonable and proper that such appeal should be allowed."

made, and that being so the order is one made in the action and an appeal lies. But even treating this as interlocutory, since the decision in *Carr v. Stringer* (7), appeals from interlocutory orders in a County Court have been heard and allowed—*Hare v. Lea* (8).

COCKBURN, L.C.J.—I am reluctant to decide the case on the preliminary objection, and I regret the construction of the 14th section of 13 & 14 Vict. c. 61, which limits the words "either party in any cause" in the manner laid down in *Beswick v. Boffey* (4). I cannot, however, see any difference between the language of that statute and the language of section 13 of the Act of 1867; the one speaks of an appeal being "in a cause," the other "in an action," and the expressions do not seem to me to be capable of being distinguished. Here the garnishee is not a party to the action, and according to the above decision, that which is done incidentally to an action is different from that done in an action. We cannot, therefore, I think, with those decisions which have been cited before us, put any other interpretation on the statute than that it does not apply to give a right of appeal against an order between the plaintiff and a third party.

MELLOR, J.—I am of the same opinion upon consideration of the authorities, and failing to see any distinction between the Acts. If the words had been "in any action or matter" it would have shewn a disposition on the part of the legislature to enlarge the word "cause" used in the earlier Act; but as this was not done, and only the word "action" substituted for the equivalent word "cause," I think no intention to give wider right of appeal can be inferred. In this case, therefore, of a garnishee order, the appeal is not given, and the rule must be discharged.

*Rule discharged.*

Solicitors—Walker, Son & Field, agents for Peacock, Cooper & Gregory, Liverpool, for plaintiff; Cunliffe, Beaumont & Davenport, agents for W. H. Churton, Liverpool, for defendants.

(7) E., B. & E. 123.

(8) Law Rep. 8 Ch. 295.

## [IN THE COURT OF APPEAL.]

(Appeal from the Exchequer Division.)

1879. } AHEARN v. BELLMAN.  
 June 17. } SEDGWICK v. AHEARN.\*

*Landlord and Tenant—Notice to Quit,  
 Sufficiency of—"Optional Notice."*

A landlord gave his yearly tenant six months' notice to quit, in the usual form; and in the same document gave him further notice that he would allow him to retain possession of the premises after the expiration of the notice, at an increased rent payable in advance:—Held (by BRAMWELL, L.J., COTTON, L.J.; BRETT, L.J., dissenting), a sufficient notice to quit, not vitiated by the further notice contained in the same document.

These were appeals from judgments of Lopes, J., at trial. The first case was an action of ejectment to recover possession of certain premises of which the defendant was tenant from year to year to the plaintiff at the rent of 90*l.* The second was an action, originally brought in the Chancery Division, claiming specific performance and damages for the breach of a contract to give the plaintiff Sedgwick possession of the premises in respect of which the first action was brought.

The sole question in both actions was the validity of a notice to quit, served by the plaintiff Ahearn upon the defendant Bellman on the 29th of October, 1877, which was in the following terms:—

"I hereby give you notice to quit and deliver up possession of the shop, premises and showrooms situate and being in Moss Street, Liverpool, and now held by you as tenant to me, upon May 1, 1878. And I further give you notice that should you wish to retain possession after the date hereinbefore mentioned the annual rental of the premises now held by you from me will be 160*l.*, payable quarterly in advance." On receipt of this notice, the defendant refused to entertain the proposition that he should remain at an increased rent, and refused to quit the premises on the 1st of May.

Lopes, J., held the notice to be bad, as

\* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

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being ambiguous and optional, on the authority of Lord Mansfield's judgment in *Doe d. Matthews v. Jackson* (1), and gave judgment for the defendant in the first case, and for the plaintiff in the second.

The plaintiff Ahearn appealed.

*Charles Russell and T. James*, for the plaintiff.—The notice is good. There could have been no doubt about it if the notice itself and the subsequent offer had been written on separate pieces of paper. In *Doe d. Matthews v. Jackson* (1) an alternative notice (in the same sense that this is alternative) was held good, and that decision is really in favour of the plaintiff. All that Lord Mansfield's decision in that case comes to is this, that supposing the tenant were to accept the offer, the landlord could not proceed to eject under his notice. But here the offer was not accepted, and the notice is not thereby vitiated.

This is not an "optional notice" to quit, i.e., a notice that the tenant may quit or not as he likes, but a good notice to quit followed by an offer of a fresh tenancy.

*Gully and French*, for the defendant Bellman and the plaintiff Sedgwick.—The notice is bad, being a qualified notice. It is true that there is no case in which an optional notice has actually been held bad; but the judgment of Lord Mansfield in *Doe d. Matthews v. Jackson* (1) shews that it is so. See also *Doe d. Langster v. Goodwin* (2). The view taken by Lord Mansfield in *Doe d. Matthews v. Jackson* (1) has been accepted by all the text writers. See Woodfall, *Landlord and Tenant*, 11th edition, p. 311.

There is not here the termination of one tenancy and the offer of a new one, but the option is given to the tenant to remain under the old tenancy if he will pay a higher rent, which is not the same thing. *Doe d. Monck v. Geekie* (3). The notice in the present case is something like that in *Messenger v. Armstrong* (4).

(1) 1 Dougl. 176.

(2) 2 Q.B. Rep. 143.

(3) 5 Q.B. Rep. 841; s.c. 13 Law J. Rep. Q.B. 239.

(4) 1 Term Rep. 53.

*Akara v. Bellman (App.), Exch.*

[COTTON, L.J. referred to *Muskett v. Hill* (5).]

*Russell*, in reply.—There is no need for a written notice at all. Suppose the landlord had given notice to quit, by word of mouth, and then had offered to consider terms for a new tenancy, it would clearly have been a good notice to determine the old tenancy. It could make no difference if he had stated the exact terms he was willing to accept, and asked the tenant to consider them. That is precisely what has been done in this case.

BRAMWELL, L.J.—I am of opinion that this judgment ought to be reversed. The question is, whether this is a good "notice to quit," as it is commonly and very properly called, for on expiration of the notice the tenant must of course quit the premises. It is in reality, however, a notice to determine the tenancy. The notice in the present case is as follows:—"I hereby give you notice to quit and deliver up possession of the shop, premises and show-rooms situate and being 20, Moss Street, Liverpool, and now held by you as tenant from me, upon the 1st day of May, 1878." No one can doubt but that if it stopped there it would be an effectual notice to quit. But in the same letter the landlord also writes: "And I further give you notice that should you wish to retain possession of the premises after the date hereinbefore mentioned, the annual rental of the premises now held by you of me will be 160*l.*, payable quarterly in advance." Now I am not at all sure the latter part of the letter was not in reality meant merely as a threat. But I think the more reasonable construction is (whatever the parties may have had in their mind) to consider it as an offer, and clearly the person to whom it was addressed would have a right to treat it so, and would have been justified in accepting it. Had he done so, to my mind the notice to quit would have been as valid and effectual as before, and would have put an end to the old tenancy; but at the same time a new one would have been created. I see no difference between a

notice and an offer in the same letter, and a notice in one letter and an offer in another; and I cannot see how the offer of a new tenancy can affect the validity of a notice to determine the old. It seems to me, if anything, to corroborate it. Mr. French says the old tenancy continues with certain variations. An old tenancy with new terms is rather unintelligible, for new terms would seem to imply a new tenancy. But there could be no continuation of the old tenancy in the present case unless the offer accompanying the notice had been accepted. But it was not accepted; on the contrary, the defendant expressly refused to accept it, and therefore even supposing that if the offer had been accepted the old tenancy would have continued, it is not so here, and therefore I am of opinion that the notice is a valid and subsisting notice. What would have happened if the tenant had taken no notice of the offer I am not sure, but I am inclined to think that if the tenant had not accepted within a reasonable time, the offer would have to be considered as made and refused. If it were regarded as a continuing offer, the tenant would have till the expiration of the notice to accept it, and his holding over would have been equivalent to an acceptance. But he clearly refused, and there was no new agreement. The tenancy was therefore determined, the tenant was no longer the plaintiff's tenant, and could be ejected. A passage from Woodfall has been cited to us which says that a notice to quit should be clear in its terms, and not ambiguous nor optional. That seems to me to be a truism. There is no special virtue in a notice to quit. All legal documents must be clear and intelligible; and a notice to quit must not be optional in this sense, that a notice either to quit or not to quit is no notice to quit at all. Take then a document of a different kind. Suppose I bought goods on the terms that on notice the vendor would send them by the London and North-Western Railway or the Great Northern, and I gave notice to the vendor to send them by the London and North-Western Railway (their terminus being nearer to my place of business than that of the Great

*Ahearn v. Bellman (App.), Exch.*

Northern); but added, "if you prefer sending them by the Great Northern Railway you may do so if you will allow me 1s. per ton for the extra carriage?" Would not that be a good notice to send the goods by the London and North-Western Railway? There would be an option if the vendor chose to take it; but if not, a good notice to send by the London and North-Western Railway. Here also an option is given to the defendant if he chooses to accept it. But if he does not, there is a good notice to quit. Then it is said that there is authority on the point, and that Lord Mansfield decided this very question in favour of the defendant. But with all submission I do not think that he did. He says, "that the landlord may give the tenant the alternative is clear, but the question is, what is the meaning of this notice. If it had really contained the option of a new agreement, and had said, for instance, 'or else that you agree to pay double rent,' the ejectment could not have been supported." That is to say, not that a mere option of a new agreement would have made the notice bad, but that that particular notice would have been in itself not valid, and the ejectment could not have been supported. The tenant is supposed to have continued in possession, and as there had been an offer of a new tenancy, the holding over would be evidence of an acceptance of the offer. But did he mean that if the tenant having an offer of a new tenancy had refused to accept it, ejectment could not have been supported? I see nothing to make me think so. "But," he says, "here the landlord does not mean to offer a new bargain." So even supposing that continuance in possession would have been evidence of acceptance of an offer which had been made, there was no such offer in that case, and Lord Mansfield's observations on the point are "obiter" merely, and I may further say that I agree with them, but I do not think that they apply to the present case. Then Willes, J., says that the notice contained first a notice to quit, and then, not an offer of a new tenancy, but a warning of the consequences of holding over. The dicta, therefore, in that case as to ambiguous

notices do not apply to the question before us.

But here I think there was a good notice to quit, and in addition an offer of a new tenancy. I cannot think that there is any settled rule of law which has been laid down and acted on, as has been contended by the defendant. I agree that if there had been such an established rule it would be a pity to depart from it, and I also agree that a notice to quit must be clear in its terms, and must not leave it optional with the tenant to go or stay. But it seems to me that there can be no settled rule of law embracing the present case, for I confess the question seems to me to be a novel one. And I am unable to see, apart from any hard-and-fast rule of practice, why as a matter of principle, when a man has been told that his tenancy is to determine at a certain date, but that if he chooses he can have a fresh tenancy on other terms, and he does not choose to accept those terms, he should be held to have had no valid notice to determine the tenancy. I may add, suppose the tenant had given notice to his landlord, but had added that he was willing to continue as tenant at a reduced rent, could any one have said that such a notice would not have been good as against the landlord?

BRETT, L.J.—I am of opinion that this notice was bad and of no effect. This action is an action of ejectment, and the plaintiff has no right to recover unless he has a right to immediate possession of the premises. The plaintiff and defendant are in the relative position of landlord and tenant under a tenancy from year to year, with an implied power to put an end to the tenancy by a certain notice to be given at a certain time. The power so given to the landlord is a strong power, though compensated no doubt by a similar power being given to the tenant, and it is a principle of law that such powers are to be construed strictly. Now I cannot agree that the requisite notice is a notice to determine the tenancy. It is a notice to quit possession at a certain time; and I cannot think that anything done by the parties at the time can have any effect upon its validity. It

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is said that if the defendant accepts the offer made to him to continue in possession at a different rent payable at a different time there would have been a new tenancy, and therefore that the old tenancy was put an end to at the time expressed in the notice. I differ from that view. The time when the old tenancy would have been put an end to would have been when a new agreement was entered into; for by necessary implication the new tenancy would cancel the old one, and if by a new agreement a new tenancy were erected, the old one would come to an end even before the time expressed in the notice. The sole question in the case is whether this is a good notice to quit. If the notice to quit is a bad one at the time it is given, the tenant is not called upon to do anything, but has a right to disregard it, and to remain on the premises; for the tenancy not having been put an end to, the tenant is entitled to remain on the premises, and the landlord cannot bring ejectment. Here there is a notice to quit on a certain day, but in the same document another proposition is made to the tenant at the same time, and that not a mere proposition to treat, in which case he could do nothing without the consent of the other party except quit the premises, but a proposition which allows him either to quit the premises or to stay if he will do so on certain terms. That is giving the tenant an option; at all events, so Lord Mansfield decided more than a hundred years ago. The rule he laid down was that a notice to quit, if optional (and it is optional if it gives the option of quitting or of staying on certain terms), is a bad notice to quit, according to the law of England between landlord and tenant. He treats this as a settled rule, and says, "That is the rule I have to consider;" and the only way in which he thought himself justified in holding the notice good was to say that it did not give an option: if it had, the action could not have been maintained. That Lord Mansfield meant what he said in this sense I have no doubt. He says so in terms, but he avoids the application of the rule by saying that the particular case is not within it. Then how has that decision been generally understood? It has been

understood in the sense in which I understand it by every text writer on the subject. To dispose of the passage in *Woodfall* as a mere truism does not seem to me to be the right way to deal with it. He says that the notice must not be ambiguous. That points to many decided cases, for there have been many notices which have been held ambiguous. Then it goes on to say that the notice must not be optional. That certainly does not apply to all notices. Many kinds of notices may be optional, but yet are good. His words are (p. 311, 11th ed.): "If a notice to quit be in these words, 'I desire you to quit, or else that you agree to pay double rent,' the tenant having an option, the notice would not be sufficient; but when notice in writing was served on a tenant, and was in the following words: 'I desire you to quit possession on Lady-day next, or I shall insist on double rent,' the Court held it to be sufficiently positive, and that the latter words were added only by way of threat of the consequence of holding over the possession." He then cites Lord Mansfield's judgment, which shews that he understood it in the same way as myself. Cole says the same thing (*Cole on Ejectment*, p. 47). Adams says the same (*Adams on Ejectment*, p. 96). Therefore we have it that more than a hundred years ago a rule was laid down applicable to this case. That rule has been copied in the sense in which Lord Mansfield meant it into all the text books upon the subject. Therefore in every source to which people could go to find out what was the state of the law of England between landlord and tenant on the point, they would be met with the proposition that if a notice to quit gives an option to quit or remain, that notice is bad, and may be disregarded altogether. My opinion on this matter is formed on the ground which I have had to state more than once in various cases, that when the law is once settled in a matter which concerns the daily management of property or business, whether the decision which so settled the law was right or wrong, the law ought not to be altered without legislative enactment; for after the law has been acted on in many cases, it would be most unjust to decide against

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a tenant who has acted according to a settled rule of law, and to affect his interests materially by changing the accepted rule of more than a hundred years' standing. I do not see how it can be said that Lord Mansfield did not hold that which has been generally considered to have been held by him. Nor do I see how it can be pretended that this case differs from that which he decided. I am therefore of opinion that the judgment of Lopes, J., was right and ought to be affirmed.

COTTON, L.J.—I am of opinion that the plaintiff is entitled to judgment, and that the judgment entered in this case should be reversed. The question is whether the yearly tenancy of the defendant terminated before this action was brought, and whether the defendant had no other title to possession. Now there is no particular form of notice necessary to determine a yearly tenancy. No doubt such notices are always called notices to quit, and that is for two reasons: in the first place, in the absence of any agreement for a new tenancy, the result of the determination of the tenancy is that the tenant must quit, and that if he remains he is merely a trespasser; and secondly, the notice is usually in the form of a notice to quit possession. But then it is said, and said truly, that a notice to determine a tenancy must be, as Woodfall says, clear and certain in its terms, and not ambiguous nor optional. But that does not mean that a notice which is in itself sufficient is rendered insufficient by an accompanying offer of a new tenancy. The notice must shew what the landlord binds himself to do. If it does not definitely shew that the landlord no longer will regard the tenant as tenant under the old tenancy, it is bad. For instance, if the landlord should say, "If you are dissatisfied you may give up your farm," that is not binding on the landlord, and cannot bind the tenant; so in the instance given in *Woodfall*, where the landlord gave notice that unless the tenant employed a certain number of miners the landlord would re-enter—*Muskett v. Hill* (5), such a notice binds the landlord to nothing, and he may still consider the tenant as his tenant

in spite of the threat. But what have we here? A clear and certain notice, indicating a fixed purpose on the part of the landlord that the tenancy shall come to an end on the 1st of May. If that was all, the tenant could not possibly say that an end had not been put to the tenancy. Then there is added, in a separate paragraph, but on the same sheet of paper, a further notice, not modifying the terms of the former tenancy, but offering distinct terms for a new one for which the landlord was ready to enter into an agreement. He could not then have turned round and said, "I still consider you as holding under the original tenancy." If the proposal had been on a separate paper there could have been no doubt; and in my opinion the fact that it is on the same paper, as it does not purport to modify the terms of the notice, though possibly it may modify the results, does not vitiate the notice, nor allow the tenant to allege that the old tenancy is not determined, any more than it allows the landlord to do so. That being so, I do not think it is necessary to discuss the case decided by Lord Mansfield, nor to say what would have been the effect if the tenant had taken no notice of the offer. If he had accepted it, there would have been a new tenancy commencing on the determination of the former one. Now every decision of Lord Mansfield is entitled to respect; but I doubt whether, if the present case had been before him, he would have differed from us. At all events, his decision does not bind us, nor is there any case in the books which shews that an unambiguous notice to quit is rendered bad by its being accompanied by a separate offer of a fresh tenancy. If the tenant had held over without refusing the terms, ejectment might fail, because there might be evidence to go to the jury that the tenant had accepted the terms. As regards the opinions expressed by the text books, they have all cited Lord Mansfield's judgment, and substantially copied the same passage one from the other without giving reasons. If the decision in *Doe d. Matthews v. Jackson* (1) had laid down a rule affecting the title to estates, it would be a different thing. But this is a simple question whether the form of a

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notice determining a tenancy is sufficient or not—a question of no such material importance as to prevent us from differing from former *dicta* on the subject. The text books do not seem to me to lay down a correct rule, and it is our duty to do so, and to decide what is the law.

*Judgment for the plaintiff.*

Solicitors—Walker, Son & Field, agents for Peacock, Cooper & Gregory, Liverpool, for the plaintiff Ahearn; W. W. Wynne, agent for H. E. Fildes, Liverpool, for the defendant Bellman and the plaintiff Sedgwick.

[IN THE QUEEN'S BENCH DIVISION.]

1879. } THE QUEEN v. THE SWINDON  
April 2. } NEW TOWN LOCAL BOARD.

*Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 150, 257—Paving private Streets—Recovery of Expense from Owners—“Owner in Default.”*

[For the report of the above case, see 48 Law J. Rep. M.C. 119.]

[IN THE QUEEN'S BENCH DIVISION.]

1879. } THE QUEEN v. THE GUARDIANS  
May 17. } OF THE POOR OF CLUTTON  
UNION.

*Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 35, 36—Owner re-building Cottages—Meaning of Words “Sufficient Privy.”*

[For the Report of the above case, see 48 Law J. Rep. M.C. 135.]

[IN THE COURT OF APPEAL]

(Appeal from the Exchequer Division.)

1879. }  
May 26, 27. } DAVIES v. M'VEAGH.\*

*Ship and Shipping—Charter-party—Commencement of Lay Days—Arrival at Place of Loading—Demurrage.*

The plaintiff and defendant entered into a charter-party dated the 19th of November, by which it was agreed that the plaintiff should load on the defendant's vessel a cargo of coal, and proceed therewith to D., “the vessel to be loaded and discharged in nineteen running days, or if detained longer, to pay 4*l.* per day demurrage. Vessel to load in B. M. Dock or W. Dock, High Level. On the 20th of November the vessel was admitted into the W. Dock, and was ready for loading, but was unable to obtain a berth at the High Level till the 5th of December in consequence of the regulations of the dock:—

Held, that the nineteen running days were to be calculated from the time when the vessel arrived in the W. Dock.

This action was brought to recover the sum of 80*l.* paid by the plaintiff to the defendant under protest, and damages for delay in the delivery of a cargo by the defendant to the plaintiff under the following circumstances:—

The defendant is the owner of the schooner *Pleiades*; and the following charter-party was entered into between the plaintiff and the defendant:—

“Liverpool, Nov. 9, 1877.

“I hereby engage with Joseph Davies, Esq., to receive and load on board my vessel the *Pleiades*, being tight, &c., a full and complete cargo of coal, and to proceed to Dublin Burgh Quay, or so near unto as she may safely get, and to deliver the same per bills of lading on being paid freight at the rate of 6*s.* per ton of twenty cwt., and three guineas gratuity. The vessel to be loaded and discharged in nineteen running days; or if longer detained, to be paid 4*l.* per day demurrage (the act of God, the Queen's

\* *Coram* Bramwell, L.J.; Brett, L.J.; and Theaiger, L.J.



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enemies, &c., always excepted). Ship to have a lien on the cargo for all freight, dead freight and demurrage.

"Penalty for non-performance of this agreement estimated amount of freight.

"Signed Thomas M'Veagh.

"I hereby agree to load the vessel on the above terms.

"Vessel to load in B. Moore or Wellington Dock, high level.

"Signed Joseph Davies.

"Nov. 19, 1877."

The charter-party was on a printed form, in which the words "with the usual dispatch of the port" were struck out, and the words "in nineteen running days" substituted.

Bramley Moore Dock and Wellington Dock are adjacent docks at Liverpool. Both are approached through the Wellington Half-tide Basin, and at the further end of Wellington Dock there is a high level railway and platform, with tips for loading coals.

On the 19th of November the vessel was cleared of her cargo and was in the Wellington Half-tide Basin ready to take in her cargo so soon as she could obtain a berth. On the 20th she was allowed by the dock authorities to enter the Wellington Dock in order to avoid the danger to which she was exposed, being without ballast, outside; but she was prevented by the dock regulations from obtaining a berth at the high level platform till the 5th of December. On that day she began to load, and finished loading on the 6th. The captain thereupon offered the plaintiff a bill of lading containing the words, "Sixteen days have been consumed in loading the said vessel at Liverpool, leaving three running days for discharging at Dublin." The plaintiff refused to take such a bill of lading, but the captain refused to sign one in any other form. The vessel arrived in Dublin on the 23rd of December, and the captain refused to deliver the cargo except on production of a bill of lading in the form specified. After considerable delay the plaintiff accepted such bill of lading under protest, and paid 80l. also under protest, for demur-

rage claimed by the captain for twenty days' detention.

The plaintiff brought this action to recover the 80l. so paid, and for damages for the detention of the cargo.

The facts were not disputed, and Brett, L.J., gave judgment for the defendant.

On appeal,

*Gully (J. C. Mathew with him)*, for the plaintiff.—The running days commenced when the *Pleiades* arrived at the place of loading, i.e. the high level platform in the Wellington Dock. In *Tapscott v. Balfour* (1) it was held that the running days began when the vessel entered the dock, which was specified as the place of loading. The entry of the *Pleiades* into Wellington Dock being merely a matter of grace, for the purpose of shelter, was not an arrival at the place of loading, and does not correspond to the entry into the dock in *Tapscott v. Balfour* (1) or in *Brown v. Johnson* (2). In *Ashcroft v. The Crow Orchard Colliery Company* (3) the words are "to be loaded with the usual dispatch of the port," and it was held that the vessel was not so loaded. That case is not inconsistent with the other two.

*C. Russell and French*, for the defendant.—The shipowner has done all he is required to do when he has put his ship in readiness to receive cargo at the "place of loading." That does not mean the exact spot, but something wider. It may be explained by reference to *Tapscott v. Balfour* (1). The owner said the days began from the time when the vessel arrived at the port. The charterer said from the time when she arrived where the cargo was placed for shipment. Both were wrong. The Court said the days began to run when the vessel got into the dock. A rule was laid down in the judgment of Lush, J., in the case of *This v. Byers* (4), that where a given number of days is allowed to the char-

(1) 42 Law J. Rep. C.P. 16; s. c. Law Rep. 8 C.P. 46.

(2) 10 Moo. & W. 331; s. c. 11 Law J. Rep. Exch. 373.

(3) 43 Law J. Rep. Q.B. 194; s. c. Law Rep. 9 Q.B. 540.

(4) 45 Law J. Rep. Q.B. 511; s. c. Law Rep. 3 Q.B. D. 244.

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terer for unloading, a contract is implied on his part that from the time when the ship is at the usual place of discharge he will take the risk of any ordinary vicissitudes which may occur to prevent him from releasing the vessel at the expiration of the lay days. He must therefore bear the loss occasioned by the fact that there was no berth ready for the ship on its arrival. The charterer would have to bear loss occasioned by matters which were the fault of neither party, e.g., in the case of frost—*Kearon v. Pearson* (5).

*Kell v. Anderson* (6) does not touch the present case. In that case the voyage was not completed at the time from which the shipowner claimed demurrage. *Randall v. Lynch* (7) is in the plaintiff's favour.

*Gully*, in reply.—There is no case which shows that where the owner has contracted to bring the vessel to a certain place, the vicissitudes he meets with in getting there will excuse him. *Randall v. Lynch* (7) involves the same point as *Tapscott v. Balfour* (1). The charterer was not ready, so the lay days began from the time when the vessel arrived in dock. *Tiss v. Byers* (4) does not touch the present case; it only decides that when a vessel has got to the place of loading, vicissitudes which prevent the cargo from being loaded must be borne by the charterer. But here the plaintiff contends the vessel had not arrived at the place of loading.

BRAMWELL, L.J.—I am of opinion that this appeal must be dismissed. When a ship is to take in a cargo at a specified place of loading, the responsibility rests not with her owner but with the charterer if the specified berth is not in a fit state to receive her upon her arrival at the appointed time. In the present case the ship was at her place of loading when she came into the Wellington Dock. Definitions are dangerous things, and I have no wish to state one which may be afterwards called in question; but I think

(5) 7 Hurl. & N. 386; s.c. 31 Law J. Rep. Exch. 1.

(6) 10 Mee. & W. 498; s.c. 12 Law J. Rep. Exch. 101.

(7) 2 Campb. 356.

it may be safely laid down that a vessel has reached the place of loading as distinguished from the spot of loading when she has entered that port from which her voyage is to commence. I am not afraid of the consequences of this definition being pushed to its full extent. Suppose that the defendant's vessel had been lying in the river Mersey, and that her captain had given notice to the plaintiff that he was ready to enter the dock and ready to take on board the cargo, I do not think it would have been open to the plaintiff as charterer to contend that the vessel was not at the place of loading, that she was not in a proper position, and that the nineteen days did not begin to run. If the defendant's vessel had got into the dock and had afterwards been turned out by the authorities, so far as concerns the defence in this action she would have been in as good a position for loading as if she had remained inside the dock. It has been said that if we decide in favour of the defendants we shall be going counter to the decision in *Tapscott v. Balfour* (1). I do not purpose to discuss the authorities, but I may say that if *Tapscott v. Balfour* (1) is at variance with our decision it is also opposed to that of *Ashcroft v. The Crow Orchard Colliery Company* (3).

BAGGALLAY, L.J.—I am of the same opinion. Having regard to the words of the charter-party it is clear that the lay days began to run at least as soon as the vessel was in the Wellington Dock, cleared for cargo, and I am not sure they ought not to be held to have begun to run sooner, when the vessel was lying in the Half-Tide Basin.

THESIGER, L.J.—I am of the same opinion; and I would only add that looking to the fact that the words, "with the usual dispatch," are struck out in this charter-party, and "within nineteen days" substituted, it seems to me that the intention was to substitute a definite for an indefinite period for loading and discharging the cargo. If the original words stood, the days would run from the time when the vessel was ready to

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take up her berth. The indefinite time specified for loading seems to have had some weight with the Judges in the case of *Tapscott v. Balfour* (1). But in *Ashcroft v. The Crow Orchard Colliery Company* (3) the time specified was equally indefinite, and yet the charterer was held responsible for delay in exactly the same way as if a definite time had been agreed upon. Consequently as the *Pleiades* was in the Wellington Dock and ready to load her cargo on the 19th, or at latest the 20th, of November, the running days must be computed as against the charterer from that day.

BRAMWELL, L.J.—I wish to add that our decision is justified by *Randall v. Lynch* (7) and *Brown v. Johnson* (2). The case of *Kell v. Anderson* (6), which has been alluded to, is distinct from the present and is to be explained by the fact that at the time of the alleged detention of the vessel a part of the voyage remained to be completed.

Solicitors—H. G. Field, agent for Etty, Liverpool, for plaintiff; Crowder, Anstie & Vizard, agents for J. M. Quiggin, Liverpool, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1879. } LANGDON (appellant) v. HOWELLS  
May 17. } (respondent).

*Railway Company—Passenger travelling without having paid his Fare—Tourist Ticket—Sale by Taker of Ticket—Intent of Purchaser to avoid Payment of his Fare, 8 Vict. c. 20. s. 103.*

[For the Report of the above case, see 48 Law J. Rep. M.C. 133.]

[IN THE COURT OF APPEAL]

1879. }  
May 12, 19. } HUNTER v. YOUNG et uxor.\*

*Residuary Legatee, Action against—Following Assets—Executor, Non-joinder of—22 & 23 Vict. c. 35. s. 29.*

Where a testator's estate has been distributed and the residue paid to the residuary legatee, an unpaid creditor of the testator may sue the residuary legatee for payment of his debt out of such residue, without joining the executor as defendant.

The statement of claim shewed that the defendant was the residuary legatee and personal representative of the residuary legatee of S. W. who was indebted to the plaintiff, that the estate of S. W. had been distributed, and that the residue had been paid by the executors to the defendant, and claimed payment of the debt out of such residue:—

Held, on demurrer, by BRAMWELL, L.J., and THESIGER, L.J., dubitante BAGGALLAY, L.J. (reversing the decision of CLEASBY, B.), that the statement of claim shewed a good cause of action against the defendant, and that it was not necessary to join the executor of S. W. as a defendant.

This was an appeal of the plaintiff from a judgment of Cleasby, B., in favour of a demurrer to the statement of claim. The statement of claim was as follows:—

1. The plaintiff is the widow of Samuel Hunter, who died on the 15th of September, 1875, having by his last will appointed the plaintiff his sole executrix. The will was duly proved, &c.

2. In the year 1869, Samuel Wittey, a solicitor, received on behalf of the estate of the said Samuel Hunter moneys amounting to 227l. 15s. 7d.

3. On the 27th of February, 1873, the said Samuel Wittey died, having then in hand a balance of 40l. 14s. 1d. of the said moneys due to the plaintiff, and having by his will made his widow, Mary Charlotte Wittey, his residuary legatee. The said will was duly proved by the executors in the District Registry at Salisbury, on the 21st of March, 1873.

4. On the 4th of March, 1877, the  
\* Coram Bramwell, L.J.; Baggallay, L.J.; and Thesiger, L.J.

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said Mary Charlotte Wittey died, having made the defendant Annie Maria Young, the wife of the defendant Frederick Young, her residuary legatee. Letters of administration with the will annexed were duly granted to the said Annie Maria Young on the 26th of April, 1877.

5. On the 21st of December, 1877, a portion of the residuary estate of the said Samuel Wittey to the amount of 250*l.* was paid by his surviving executor to the defendants or one of them, and the remainder of such estate which was of considerable value was assigned by the said executor to the said defendants or one of them, by deed dated the 21st of December, 1877.

6. The plaintiff requires payment by the defendants, or one of them, of the sum of 40*l.* 14*s.* 1*d.* due to her out of the estate of the said Samuel Wittey.

To the above statement of claim the defendants demurred on the ground that the statement of claim disclosed no cause of action against the defendants, who were not the legal representatives of Samuel Wittey, nor answerable for his debts.

The demurrer came on for argument before Cleasby, B., on the 23rd of November, 1878, when the learned Judge gave judgment for the defendants in favour of the demurrer.

On appeal,

*A. Charles and T. Latham*, for the plaintiff.—There is no necessity to sue the executor, for he has paid the whole fund to the defendants, into whose hands we have a right to follow it—*March v. Russell* (1). Nor is it necessary to join the executor as a party. See 22 & 23 Vict. c. 35. s. 29, *Olegg v. Rowland* (2). In that case the executors were joined as defendants, and it was held unnecessary to have joined them, as they had distributed the estate in accordance with Lord St. Leonards' Act, 22 & 23 Vict. c. 35 (3). If the action were brought

against the executor he would probably plead that he had properly administered the estate in accordance with that Act. See also *Noble v. Brett* (4), and *Thomas v. Griffith* (5). The fund being ascertained and appropriated, the executor is not a necessary party—*Arthur v. Hughes* (6). Even if he ought to be a party, since the Judicature Acts, the action ought not to be defeated because he has not been joined, but an amendment should be allowed—"Rules of the Supreme Court," Order XVI. rule 13.

*Petheram*, in support of the demurrer.—This is an action claiming payment of a sum of money, as if in debt. But there is no privity between the plaintiff and the defendants. The executor is primarily liable. The cases cited on the other side are cases in Chancery where all the parties have been before the Court, and the question is how the executor is to be placed in funds to pay the debt.

[BRAMWELL, L.J.—You do not deny that if the facts stated in the claim are true you would have to refund 40*l.* 14*s.* 1*d.*]

No, but we should not have to pay them to the plaintiff, but to the executor. The Court of Chancery has never ordered a legatee to pay a debt, but only to refund the amount to the executor. More-

which such executor or administrator is sought to be charged would have been given by the Court of Chancery in an administration suit, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall at the expiration of the time named in the said notices, or the last of the said notices, for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto; having regard to the claims of which such executor or administrator then has notice, and shall not be liable for the assets, or any part thereof, so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets, or a part thereof, as the case may be; but nothing in the present Act contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, into the hands of the person or persons who may have received the same respectively."

(1) 3 Myl. & Cr. 31.

(2) 36 Law J. Rep. Chanc. 137; s. c. Law Rep. 3 Eq. 368.

(3) By 22 & 23 Vict. c. 35. s. 29.—"Where an executor or administrator shall have given such or the like notices, as in the opinion of the Court in

(4) 24 Beav. 499.

(5) 2 Giff. 504.

(6) 4 Beav. 506.

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over, the statement of claim does not allege that the executor had no notice of the plaintiff's claim, or that before paying over the residue to the legatees he gave the statutory notices.

*Charles, in reply.*—There is no difficulty as to the form of the action. The plaintiff is not asking for judgment *de bonis non*. It is like an action of debt on a statute.

. It cannot be necessary to commence an administration suit.

*Cur. adv. vult.*

The following judgments were delivered on the 19th of May:—

BRAMWELL, L.J.—Although I am not wholly unacquainted with the practice of the Courts of Equity to make the residuary legatee refund part of the residuary estate in certain events, I may say that I was struck with the novelty of this action.

I have considered the case with care, and have taken counsel with others, and, although I do not pretend to have a confident opinion, I think that this appeal should be allowed. The statement of claim shews that the defendants are the personal representatives, as well as the residuary legatees of the residuary legatee of the deceased person, whom the plaintiff alleges was a debtor to him. The executor of the deceased debtor has done his duty; he has collected the estate of his testator, he has paid the debts and the legacies, and has handed over the residuary estate to the residuary legatee. Then the question arises whether this action can be maintained by the plaintiff against the defendants without joining the executor of the deceased debtor in the action as a co-defendant with the residuary legatees.

Could, then, this suit have been maintained in Equity without the executor being joined? This does not seem to be very clear, and I say this, after referring to living authorities, and looking with care at the written authorities on the subject. I have referred to *Seton on Decrees*, 4th edit. p. 976, to the case of *Fordham v. Wallis* (7) and to that of *Hall v. Palmer* (8), and other authorities.

(7) 10 Hare, 217.

(8) 3 Hare, 538.

These cases appear to be instances of administration suits, where the suit was instituted for the benefit of all the creditors, and there it would seem that the residuary legatee may be made a defendant, and may be compelled to refund. And it is certain that this suit can in some cases be maintained without it being necessary to join the executor, and this would indeed seem to be reasonable in several cases. Suppose, for instance, an executor who has completely performed his duties, dies intestate and insolvent, what is to be done then? It can hardly be contended that a creditor can be compelled to join his representatives. But I must again say that I do not pronounce this judgment without hesitation. Suppose that an executor were joined as co-defendant in an action such as the present, he might possibly say that the residuary legatee must not pay, that other creditors might appear and claim, and that the estate must be restored to him, in order that he, the executor, may distribute it, and so the proceedings might go on almost *ad infinitum*. Such a possibility as this is however inconsistent with the statements in the present claim, for the statement of claim asserts that there is a residuary estate.

I now turn to the statute to which reference has been made, and I find that section 29 of 22 & 23 Vict. c. 35, which provides for the distribution of the assets after notice given by the executor, also enacts "that nothing in the present Act contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, into the hands of the person or persons who may have received the same."

Now these words evidently pre-suppose that a creditor had a right in certain events to follow the assets, and the words in the earlier part of the section also assume that in some cases the executor would not be liable to be sued; for it enables him, after giving certain notices, to distribute the assets, and then provides that if he have followed all the requirements of the statute he shall not be liable for the assets, or any part thereof; and I am of opinion that a man who is not

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liable ought not to be sued. The statute clearly contemplates that an action may be brought against the residuary legatee without there being any necessity for joining the executor. Even if a Court of Equity would have required before the Judicature Act that the executor should be joined, I think that the Judicature Act dispenses with that necessity. If the defendants wished that the executor in this particular case should be joined, they could have made him a party, and they should have done so, and should not have demurred. It would not, in my opinion, be reasonable that the plaintiff should have to sue the executor, who would have a good answer to the action, and this renders the plaintiff liable to pay costs to the executor. It is better that the two really interested parties should carry on the litigation without dragging into it a third and uninterested party. I think that the judgment in *Olegg v. Rowland* (2) supports the view I have taken, and, on the whole, I think this appeal must be allowed.

BAGGALLAY, L.J.—I have had serious doubts during the argument, which have not yet been entirely removed. The old rule in the Court of Chancery was that where a creditor took proceedings to recover a debt from the estate of a deceased person it was necessary to make the legal personal representative a party to the suit. The creditor could further make the residuary legatee a party if the residuary estate had been paid over to him, and so he could follow the assets in the hands of the residuary legatee; but still it was necessary that the legal representative should be made a party to the suit. But there was an exception where the estate of the deceased person was administered by the Court. There the executor, acting under the direction of the Court, was always held to be protected against all claims of which he had no notice when he had duly taken all the steps required by the Court. Afterwards there was another exception under the statute of 22 & 23 Vict. c. 35, which is known as Lord St. Leonards' Act, and which provided that where an executor had given the notices required by that Act he should be protected at the expiration of

a specified time from liability to action, just as though the estate of the deceased had been administered in Chancery. In the case now before us the statement of claim does not and could not state that there has been a general administration of the estate under the Court; nor does it state that the executor had satisfied the requirements of the statute to which I have referred, nor that the legal representative had no notice of the claim. If all these facts exist they could be stated, and in the absence of any such statements, and having regard to the usual practice, I should be very much inclined to agree with Baron Cleasby, and to uphold the demurrer. The other Lords Justices, however, are of a different opinion, and therefore, although I entertain doubts, I do not wish to dissent from their judgment. The course that will follow from that judgment will be the more convenient, as, if the demurrer were allowed, leave would also be given to amend.

THESSIGER, L.J.—The principle upon which the action is founded is that, where an executor has administered assets and paid over the residue of an estate, a creditor of the testator is entitled to follow the residue to the extent of his debt. The fund is the point to which the action is directed, and the person in whose hands the fund is would, as it appears to me, be naturally the party against whom the action would be brought. The executor, if he has protected himself in the way pointed out by Lord St. Leonards' Act, is, according to the decision of Vice-Chancellor Malins in *Olegg v. Rowland* *qua* executor (2) not a proper party at all; but if, in such a case, he might be made a party, and even in cases where the executor has not protected himself by Lord St. Leonards' Act, I cannot think that the plaintiff's statement of claim is demurrable because he has not made him a party. If there are rights arising out of the action to be adjusted between the executor and the residuary legatee, the latter may bring him into the action by the machinery provided by rule 17 of Order XVI. of the rules under the Judicature Act.

It seems unreasonable that the plaintiff

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in cases like the present, should be bound to make the executor a party when the plaintiff's case is that he has no ground of claim against the executor, and might have to pay the costs if he did join him as a defendant.

*Judgment reversed. Demurrer overruled.*

Solicitors—Wood, Latham & Bigg, agents for J. T. Marshall, Devizes, for plaintiff; Courtenay and Croom, agents for Beale & Martin, Reading, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1879. } PHILLIPS v. THE LONDON AND  
April 25. } SOUTH WESTERN RAILWAY  
June 20. } COMPANY.

*New Trial—Inadequacy of Damages—Action for Personal Injury.*

A new trial may be granted for inadequacy of damages in an action for personal injuries where the Court is of opinion that from the circumstances of the case the damages are unreasonably small.

*Beet & Lums 53 L.J.C. 249*  
Action for personal injuries sustained by the plaintiff while travelling on the defendants' railway.

It was proved at the trial before Field, J., that the plaintiff was a medical man, and that at the time of the accident he was in receipt of a professional income of 5,000*l.* a year. That he received such severe personal injuries as to incapacitate him absolutely from carrying on his profession. His health was irreparably injured and it was probable that he would never recover. That he had incurred medical and other expenses to the amount of 1,000*l.*, and that he would in all probability have to incur still greater expense. The accident had happened sixteen months before the trial.

The jury found a verdict for the plaintiff, damages 7,000*l.*

A rule *nisi* having been obtained for a new trial upon the ground that the damages were insufficient, and upon the ground that the learned Judge had misdirected the jury in telling them that it was wrong for them to attempt to give

the plaintiff an equivalent for the damage he had sustained—

*Ballantine, Serjeant, and Dugdale* now shewed cause.—This Court will not grant a new trial on the ground of the insufficiency of damages—*Forsdike v. Stone* (1).

[COCKBURN, L.C.J.—I must say that I dissent wholly from that decision.]

In order to entitle a party to a new trial on this ground, there must also have been a misdirection on the part of the Judge, or misconduct by the jury—*Falvey v. Stamford* (2), *Rowley v. The London and North Western Railway Company* (3). At all events, the Court has often refused to grant a new trial on the ground of insufficiency of damages. This is shewn by a long series of cases. They cited also *Barker v. Dixie* (4), *Huckle v. Money* (5), *Beardman v. Carrington* (6), *Maurice v. Brecknock* (7), *Bendall v. Hayward* (8), *Manton v. Bales* (9), *Arnytage v. Haley* (10), *Kelly v. Sherlock* (11). With regard to the alleged misdirection, there was, in fact, none. The learned Judge did not tell the jury not to give the plaintiff fair damages. What he said was, that it was impossible that any sum of money would be an equivalent for the injuries received, but the summing up really amounted to a direction to give fair and reasonable damages.

*The Attorney-General (Sir J. Holker), Pope and A. L. Smith*, in support of the rule.—The cases relied on by the other side do not apply here. They are all cases of slander. This sort of action differs from those in being founded on contract and not on tort. In these cases

(1) 37 Law J. Rep. C.P. 301; s. c. Law Rep. 3 C.P. 607.

(2) 41 Law J. Rep. Q.B. 7.

(3) 42 Law J. Rep. Exch. 153; s. c. Law Rep. 8 Exch. 231.

(4) 2 Str. 1051.

(5) 2 Wils. 205.

(6) 2 Wils. 244.

(7) 2 Dougl. 509.

(8) 5 Bing. N.C. 424; s. c. 8 Law J. Rep. C.P. 243.

(9) 1 Com. B. Rep. 444.

(10) 4 Q.B. Rep. 917; s. c. 12 Law J. Rep. Q.B. 323.

(11) 35 Law J. Rep. Q.B. 209; s. c. Law Rep. 1 Q.B. 686.

*Phillips v. London and South Western Rail. Co., Q.B.*

all the surrounding circumstances should be considered by the jury, in estimating the damages, the chances of life and the chances of professional success, as well as actual loss and expenses. The jury here have given nothing in respect of future possible gains which are absolutely lost.

The damages in such a case as the present should be sufficient to constitute both an indemnity against actual pecuniary loss sustained, and the amount of which is ascertainable, and also a "solatium" for suffering and loss of health and business incurred, for which no sum of money can be an exact equivalent. The summing up was well calculated to deceive the jury, and make them think that they ought not to attempt to give any damages beyond the amount of actual pecuniary loss.

As a matter of fact, the plaintiff was proved to have actually lost a sum equal in amount to the damages given him; the jury have therefore allowed nothing in respect of future loss.

They cited also *Armsworth v. The South Eastern Railway Company* (12), *Blake v. The Midland Railway Company* (13), *Pym v. The Great Northern Railway Company* (14).

*Cur. adv. vult.*

The judgment of the Court (15) was (on June 20) delivered by

COCKBURN, L.C.J.—This was an action brought by the plaintiff to recover damages for injuries suffered when travelling on the defendants' railway, through the negligence of their servants. A verdict having passed for the plaintiff with 7,000*l.* damages, an application is made to this Court for a new trial on behalf of the plaintiff, on the ground of the insufficiency of the damages, as well as on that of misdirection as having led to an insufficient assessment of damages; and we are of opinion that the rule for a new trial must be made absolute; not, indeed, on the ground of misdirection; for we are unable to find any misdirection,

the learned Judge having in effect left the question of damages to the jury, with a due caution as to the limit of compensation, though we think it might have been more explicit as to the elements of damages.

It is extremely difficult to lay down any precise rule as to the measure of damages in cases of personal injury like the present. No doubt as a general rule where injury is caused to one person by the wrongful or negligent act of another, the compensation should be commensurate with the injury sustained. But there are personal injuries for which no amount of pecuniary damages would afford adequate compensation, while on the other hand the attempt to award full compensation in damages might be attended with ruinous consequences to defendants, who cannot always, even by the utmost care, protect themselves against carelessness of persons in their employ. Generally speaking, we agree with the rule as laid down by Brett, J., in *Rowley v. The London and North Western Railway Company* (3), an action brought on the 9 & 10 Vict. c. 93, that a jury in these cases "must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider under all the circumstances a fair compensation." And this is in effect what was said by Mr. Justice Field to the jury in the present case. But we think that a jury cannot be said to take a reasonable view of the case unless they consider and take into account all the heads of damage in respect of which a plaintiff, complaining of a personal injury, is entitled to compensation. These are: the bodily injury sustained; the pain undergone; the effect on the health of the sufferer, according to its degree and its probable duration as likely to be temporary or permanent; the expenses incidental to attempts to effect a cure, or to lessen the amount of injury; the pecuniary loss sustained through inability to attend to a profession or business, which, again, may be of a temporary character, or may be such as to incapacitate the party for the remainder of his life. If a jury have taken all these ele-

(12) 11 Jur. 758.

(13) 21 Law J. Rep. Q.B. 233.

(14) 32 Law J. Rep. Q.B. 377.

(15) Cockburn, L.C.J., and Lopes, J.



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ments of damage into consideration and have awarded what they deemed to be fair and reasonable compensation under all the circumstances of the case, a Court ought not, unless under very exceptional circumstances, to disturb their verdict. But looking to the figures in the present case, it seems to us that the jury must have omitted to take into account some of the heads of damage which were properly involved in the plaintiff's claim.

The plaintiff was a man of middle age and of robust health. His health has been irreparably injured to such a degree as to render life a burden and source of the utmost misery. He has undergone a great amount of pain and suffering. The probability is that he will never recover. His condition is at once helpless and hopeless. The expenses incurred by reason of the accident have already amounted to 1,000*l.* Medical attendance still is and is likely to be for a long time necessary. He was making an income of 5,000*l.* a year, the amount of which has been positively lost for sixteen months between the accident and the trial through his total incapacity to attend to his professional business.

The positive pecuniary loss thus sustained all but swallows up the greater portion of the damages awarded by the jury. It leaves little or nothing for health permanently destroyed and income permanently lost. We are therefore led to the conclusion, not only that the damages are inadequate, but that the jury must have omitted to take into consideration some of the elements of damages which ought to have been taken into account.

It was contended on behalf of the defendant that even assuming the damages to be inadequate, the Court ought not on that account to set aside the verdict and direct a new trial, inadequacy of damages not being a sufficient ground for granting a new trial in an action of tort unless there has been misdirection, or misconduct in the jury, or miscalculation, in support of which position the cases of *Rendall v. Hayward* (8) and *Forsdike v. Stone* (1), were relied on. But in both those cases the action was for slander, in which, as was observed by the Judges in

the latter case, the jury may consider not only what the plaintiff ought to receive but what the defendant ought to pay. We think the rule contended for has no application in a case of personal injury and that it is perfectly competent to us, if we think the damages unreasonably small, to order a new trial at the instance of the plaintiff. There can be no doubt of the power of the Court to grant a new trial where in such an action the damages are excessive. There can be no reason why the same principle should not apply where they are insufficient to meet the justice of the case.

The rule must therefore be made absolute for a new trial.

*Rule absolute.*

Solicitors—Hargrove & Co., for plaintiff; M. H. Hall, for defendants.

[IN THE COURT OF APPEAL.]

(Appeal from the Common Pleas Division.)

1879. }  
June 12. } MIGOTTI v. COLVILLE.\*

*Imprisonment—Computation of Time—  
“One Calendar Month.”*

*Where a term of one calendar month's imprisonment begins in one month and ends in another, the month must be calculated from the day on which the imprisonment commences to the day before the (numerically) corresponding day in the following month. If there is no such numerically corresponding day, the term will end on the last day of the following month.*

This was an appeal from a judgment of Denman, J., reported 48 *Law J. Rep.* M.C. 48.

The action was brought for false imprisonment against the governor of Cold-bath Fields Prison.

The plaintiff was convicted by a police magistrate on the 31st of October, 1877, of two separate assaults, and was sen-

\**Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

*Migotti v. Colville (App.), C.P.*

tenced for the first assault to be imprisoned for one calendar month, and for the second to be imprisoned "for fourteen days, to commence at the expiration of the imprisonment previously adjudged."

The plaintiff was accordingly taken into the custody of the defendant on the afternoon of the 31st of October, and remained in prison till 9 A.M. on the 14th of December, having claimed to be released on the previous day.

He afterwards brought this action for his detention by the defendant from the 13th to the 14th of December.

At the trial the jury assessed the damages at 20s., and, on further consideration, Denman, J., before whom the action was tried, gave judgment for the defendant, holding that the plaintiff was not strictly entitled to his discharge till midnight on the 14th of December.

On appeal,

The plaintiff in person contended that he had been imprisoned during the whole of November, which was a calendar month, and during fourteen days in December, as well as one day in October, so that he was detained on the whole for one calendar month and fifteen days, being one day in excess of the two terms for which he was sentenced. He cited *Catesby's Case* (1).

A. L. Smith, for the defendant, was not called upon.

BRAMWELL, L.J.—I am of opinion that the judgment of Denman, J., must be affirmed. No doubt, as the learned Judge says, it is a plausible argument, that the prisoner, having been confined during the whole of November and one day in October, has been in prison for more than one calendar month. The difficulty arises from the fact that the term calendar month is not strictly applicable except to the particular months named in the calendar, and is inaccurate as applied to a period beginning in one month and going on into another. Such a period in reality consists of portions of two calendar months. The anomaly has several curious consequences, and among them that of

which the plaintiff complains. The only rule that can be laid down is this, that where a month's imprisonment begins on a day in one month, and runs on into another, so many days must be taken from the second month, if there are enough, as will bring the time up to the day before that day in the second month which corresponds to the day on which the imprisonment began; e.g. if the imprisonment began on the 5th, it would end at twelve o'clock on the night of the 4th of the following month; if on the 25th, it would end on the 24th; if on the 29th, it would end on the 28th. That is to say, one must take as many days in the second month as had already passed in the month in which the imprisonment took place before the imprisonment began. The plaintiff says that as he was imprisoned on the 31st of October, and has been imprisoned till the 30th of November, he has been imprisoned for the whole of a calendar month and one day, and therefore he ought to have been let out on the 29th. But if he had been sent to prison on the 29th, he would have been liberated on the 28th; and if on the 30th, he would have been liberated on the 29th. Therefore, according to the plaintiff's own contention, he would be liberated on the same day whether he was imprisoned on the 30th or 31st. There is no reason in that at all. There is another difficulty in the way of the plaintiff's contention. Suppose he had been sent to prison for two calendar months, he would certainly not have been liberated till the 30th of December; and the only way to make sense of it is to apply the rule I have laid down, which never operates to the detriment of the prisoner. If he is sent to prison in a long month, he gets thirty-one days; if he is sent to prison in a short month, he gets thirty days. If he is imprisoned in February, so much the better for him, he would have the advantage of the short number of days in the month. That being so, the plaintiff's second period of fourteen days began on the 1st of December and ended on the 14th.

BRETT, L.J.—I am of opinion that the term a calendar month is a legal and technical term, and that we are bound to

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interpret its legal and technical meaning. The meaning of the phrase is, that in computing time by calendar months, the time must be reckoned by looking at the calendar, and not by counting days, and that one calendar month's imprisonment is to be calculated from the day of imprisonment to the day numerically corresponding to that day in the following month, less one. In some cases there is no corresponding day in the following month. In that case the computation is in favour of the prisoner, whose term of imprisonment is less than it would have been, and who is let out on the last day of the month.

COTTON, L.J.—I am of opinion that Denman, J., was clearly right in dealing with this question as a matter of law. It is not a question of the measurement of time, but of the technical meaning of the words calendar month. Prisoners cannot always be imprisoned during one particular calendar month, in the sense of a month the name of which is to be found in the calendar. What, then, is the meaning of the term when the sentence begins otherwise than on the first day of a calendar month? Although there are difficulties, I am of opinion that the right rule is that which has been laid down by Denman, J., and the other members of this Court. The imprisonment ends at twelve o'clock on the day immediately preceding the day in the following month corresponding to the day on which the imprisonment began. If there are not enough days in the second month to satisfy this rule, the calculation is made in favour of the prisoner, and he will be liberated on the last day of the month. Thus the prisoner sentenced to a calendar month's imprisonment will never be imprisoned for a greater number of days than there are in the month in which he was sentenced.

*Judgment affirmed.*

Solicitors—Gold & Son, for plaintiff; Nicholson & Herbert, for defendant.

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1879. } REDONDO v. CHAYTOR AND

May 17, 27. } ANOTHER.\*

*Practice—Security for Costs—Foreigners domiciled Abroad—Temporary Residence in England.*

*Although the plaintiff is a foreigner, usually resident abroad, and only temporarily in England for the purpose of bringing the action, an order for security for costs will not be made, if the plaintiff be actually in England at the time of the application being made.*

This was an appeal from an order of the Queen's Bench Division, rescinding an order of Lindley, J., ordering the plaintiff to give security for costs, and in the meantime staying proceedings.

The action was brought by Maraquita Redondo against the defendants as executors of one Foster, to recover certain instalments of an annuity alleged to have been granted by Foster, his executors and administrators, to the plaintiff, in consideration that she would reside abroad. The statement of claim alleged that the plaintiff had always continued to reside abroad, and that she was at present in England temporarily for the purpose of carrying on the action.

The defendants applied for an order that the plaintiff should give security for costs, supporting the application by affidavits to the effect that the plaintiff was a native of Spain, that her permanent residence was abroad, and that she had stated her intention of going abroad as soon as the present action was decided. The plaintiff filed an affidavit to the effect that she was at present residing at 30, Frith Street, Soho, and had no present intention of leaving the country.

The Master having refused, Lindley, J., made the order. On appeal, the Queen's Bench Division rescinded the order of the learned Judge, and the defendants appealed.

*Fullarton, for the defendants.—Ac-*

\* *Coram Bramwell, L.J.; Baggallay, L.J.; and Thesiger, L.J.*

*Redondo v. Chaytor (App.), Q.B.*

cording to the decision of the Court below, the true test whether security for costs is to be given or not is whether the plaintiff is actually residing abroad at the time of action brought.

But the reason security is given is that people with no permanent residence or property in this country can avoid process if the result of the action is adverse to them. Where, therefore, there is no reasonable certainty that the defendant will be able to obtain his remedy by process, the Courts will order security to be given for costs. That principle was established in 1727, in the case of *Goodwin v. Archer* (1), where the servant of a foreign ambassador was ordered to give security for costs in the same manner as if he were beyond sea. This case was followed by *Adderley v. Smith* (2), and approved by Lord Ellenborough, in *The Duc de Montellano v. Orlotin* (3). Security was accordingly ordered to be given by a foreigner, though actually in England, in the case of *Swanzy v. Swanzy* (4), following *Ainslie v. Sims* (5)—the case of a Scotchman, who, though domiciled in Scotland, had come to London for the purpose of the action. The reason of the rule is given by Buller, J., in *Pray v. Edie* (6), and is borne out by the distinction made between an English sailor, temporarily absent, who need not give security, and a foreign sailor who has no domicile in England—*Nylander v. Barnes* (7).

There are cases on the other side—*Ciragno v. Hassan* (8), *Nelson v. Ogle* (9), and an *Anonymous Case* (10). The cases in *Taunton* were not followed in *Oliva v. Johnson* (11). It was held no sufficient answer to the application to say that the plaintiff was in England at

the time of the action, and had no intention of leaving—see *Naylor v. Joseph* (12).

In *Dowling v. Harman* (13), Parke, B., says that he must follow the rule in the *Anonymous Case* (10), and that rule was followed in *Tambisco v. Pacifico* (14), where Willes, J. (*arguendo*), says that *Oliva v. Johnson* (11) is the only authority on the other side. But before the decision of *Tambisco v. Pacifico* (14) the Common Pleas had abandoned their rule—*St. Leger v. Di-Nuovo* (15). The rule of Chancery, as laid down in *Ainslie v. Sims* (5) and *Swanzy v. Swanzy* (4), ought now to prevail. There is a case of *Cambottie v. Inngate* (16) on the other side; but that case was not followed in *Swanzy v. Swanzy* (4), and may be considered as overruled. In *Westenberg v. Mortimore* (17) it was held that an affidavit that the plaintiff had since the order come to reside in England till the action was decided was no reason for a rescission of the order. There ought to be no hard and fast line against security being given where the plaintiff is actually in England. There may have been some reason for such a rule before the abolition of the writ of *ca. sa.*; but there can be none now. *Cessante ratiō cessat lex*. So now, residence in Scotland is no reason for giving security—*Raeburn v. Andrew* (18). Another class of cases which shews that the true criterion is the possibility of enforcing a judgment for costs, and not the mere question of residence, is that which shews that security will not be given, even where the plaintiff is resident abroad, if he has property of a permanent nature in England—*Swinbourne v. Carter* (19).

*Lumley Smith*, for the plaintiff.—The rule of practice is settled and invariable. If the plaintiff is residing abroad, security must be given; if in England, it cannot be demanded. It is necessary that there

- (1) 2 P. Wms. 452.
- (2) Dicken, 355.
- (3) 5 M. & S. 503.
- (4) 4 Kay & J. 237; s. c. 29 Law J. Rep. Chanc. 419.
- (5) 17 Beav. 57.
- (6) 1 Term Rep. 267.
- (7) 6 Hurl. & N. 509.
- (8) 6 Taunt. 20.
- (9) 2 Taunt. 253.
- (10) 8 Taunt. 737.
- (11) 5 B. & Ald. 908.
- (12) 10 Moore 522.

- (13) 6 Mee. & W. 181.
- (14) 7 Exch. Rep. 816; s. c. 21 Law J. Rep. Exch. 276.
- (15) 2 Sc. N.R. 587.
- (16) 1 W.R. 538.
- (17) 44 Law J. Rep. C.P. 289; s. c. Law Rep. 10 C.P. 439.
- (18) 43 Law J. Rep. Q.B. 73; s. c. Law Rep. 9 Q.B. 118.
- (19) 28 Law J. Rep. Q.B. 16.

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should be a fixed rule. *Prima facie*, no plaintiff need give security for costs, and the class of plaintiffs who are obliged to give it ought not to be extended. The text-books, though hesitatingly, express a view in favour of the plaintiff—see *Ohlty's Practice*, p. 1,350, and *Lush's Practice*, p. 931.

[BRAMWELL, L.J.—*Tidd's Practice*, vol. i. p. 534, says that, where a plaintiff, a foreigner, has expressed a determination to go abroad, security will be given.]

There is no difference between an Englishman and a foreigner. If the plaintiff is abroad security must in general be given. But in some cases, where the plaintiff is an Englishman, and has an *animus revertendi*, it will be refused. That the rule is a strict one is shewn by Lord Eldon in *Ogilvie v. Heme* (20). The cases on the other side are of no real value. In *Adderley v. Smith* (2) no reasons are given, and there is a case laying down the opposite rule in the same report, *Anonymous* (21).

In *Montellano v. Christin* (3) no rule was laid down. In *Goodwin v. Archer* (1) the plaintiff was ordered to give security because he was privileged from arrest, and not because he was a foreigner and resident abroad.

The general rule, that the intention of the plaintiff to leave the country is not a sufficient reason for making the order, is shewn by *Ciragno v. Hassan* (8), *Willis v. Garbutt* (22), and the *Anonymous Case* (10), *Dowling v. Harman* (13), and *Tambisco v. Pacifico* (14). The cases as to sailors merely shew that the Court will not take it for granted that, where a plaintiff has gone abroad, he will remain out of the jurisdiction.

*Oliva v. Johnson* (11) is the only decision really in point against the plaintiff. That case is noticed in *Tambisco v. Pacifico* (14), without approval. See *Drummond v. Tillinghurst* (23), where *Oliva v. Johnson* (11) is cited. But it was noticed that in that case it was shewn that the plaintiff had a domicile abroad, whereas in *Drummond v. Tilling-*

*hurst* (23), no such domicile was shewn. This is a similar case, and the arguments used in that case for the defendants are identical with those used here.

The case of *St. Leger v. Di-Nuovo* was wrongly decided. In *Naylor v. Joseph* (12) and *Gurney v. Key* (24) there was nothing to shew that the plaintiff was in England at the time of the application.

*Ainslie v. Sims* (5) was the case upon which the decision of the Common Pleas Division was based. In that case three former decisions were cited—*Green v. Charnock* (25), *Seilaz v. Hanson* (26), and *Hoby v. Hitchcock* (27)—but in all three the plaintiff was actually residing abroad. In *Morgan and Davis's Costs in Chancery*, p. 5, it is stated that a foreigner temporarily resident here will not be required to give security for costs, though it is not denied that he intends to return to his own country. For this *Cambottie v. Inngate* (16) is cited, which is a strong case in favour of the plaintiff, in which Wood, V.C., discusses and dissents from *Ainslie v. Sims* (5). *Swansy v. Swansy* (4) was decided on a different ground. Security was ordered to be given because the plaintiff had imposed on the Court by giving a false address, and not because she was domiciled abroad.

*Fullarton*, in reply.—The only authority in point against the defendant is *Drummond v. Tillinghurst* (23). But the principle there laid down, that where the plaintiff is a foreigner actually resident in England, and there is no reason to suppose he will leave the country, no security need be given. But that is inapplicable to the present case, where the plaintiff has shewn a clear intention to leave the country as soon as the litigation is over.

*Cur. adv. vult.*

The following judgments were, on the 27th of May, delivered by

THESEIGER, L.J.—Their Lordships have desired me to deliver my judgment first, though I may say at once that there is no difference of opinion between us.

(20) 11 Ves. 598.

(21) 2 Dicken, 175.

(22) 1 You. & J. 511.

(23) 16 Q.B. Rep. 740.

(24) 3 Dow. 559.

(25) 1 Ves. 396.

(26) 5 Ves. 261.

(27) 5 Ves. 698.

*Redondo v. Chaytor (App.), Q.B.*

The question raised in this case is whether the plaintiff ought under the circumstances to give security for costs. The action was brought by a foreigner to recover the arrears of an annuity from the executors of one Foster, under an alleged agreement. The statement of claim alleges that the plaintiff has been resident abroad since the agreement, until she temporarily came to England to enforce her claim. On this allegation and on certain affidavits the question as to costs arises.

It is enough to say that I am of opinion that the plaintiff is really in the country merely for the purpose of the writ, and unquestionably will go abroad at once if she obtains a judgment in her favour, and very probably if judgment is given against her will leave the country under circumstances which will prevent the defendants from availing themselves of any process for the purpose of recovering their costs; and consequently unless there is a settled rule of practice to the contrary, there is at all events some reason why the plaintiff should be called upon to give security for costs. But the Common Pleas Division has decided that whether the plaintiff be an Englishman or a foreigner, if at the time of the application he is within the jurisdiction of the Court, though only for a temporary purpose, the Court have no right or power to order him to give security for costs on the ground that he is usually resident abroad.

To shew that there is such a settled rule of practice it is necessary to go in detail into the cases. We there find that in favour of the view that such security ought not to be given there are five distinct decisions. In 1815 there was the case of *Ciragno v. Hassan* (8); in 1819 an *Anonymous Case* (10); in 1827 the case of *Willis v. Garbutt* (22); in 1840 that of *Dowling v. Harman* (13), and lastly, in 1856, that of *Tambisco v. Pacifico* (14). So far I have mentioned only Common Law authorities. In addition to these decisions we have the opinions of the text books, *Chitty's Archbold*, and *Lush*, all to the same effect, though they seem to leave the matter in some doubt, founded on a supposition that though the general current of authority is in favour of the

view taken by the Common Pleas Division, yet there are some decisions to the contrary.

There are three decisions which appear to be on the other side. But two of these are really of no authority on the point, namely, *Naylor v. Joseph* (12), and *Gurney v. Key* (24). For when we look into those cases, it appears that though the plaintiff may have been within the jurisdiction at the time of action brought, he was clearly out of the jurisdiction when the application was made; so that in those two cases the general rule applies. There is, therefore, in point of fact, only one case which can fairly be cited on the other side—the case of *Oliva v. Johnson* (11). It is observable that though that case was decided after the cases of *Ciragno v. Hassan* (8) and the *Anonymous Case* (10), neither of those two cases was cited; whereas on the contrary in *Dowling v. Harman* (13), though *Oliva v. Johnson* (11) was not actually cited, yet, as Baron Martin says in *Tambisco v. Pacifico* (14), it is clear that case must have been before the minds of the Court, for one of the Judges who decided the case of *Dowling v. Harman* (13), was also counsel in the case of *Oliva v. Johnson* (11), and in *Tambisco v. Pacifico* (14) the case of *Oliva v. Johnson* (11) was discussed, notwithstanding which the general rule was followed. In all these cases it may be observed that the Judges do not deal with the reason of the thing, but rely entirely on what they considered the rule settled, and established practice or *cursus curiæ*, which was to guide them in their decision.

It is impossible on the face of the authorities to hold that the practice at law was anything but what I have stated it to be. But then it is said that a conflict of authorities arises if the decisions in equity are examined. The first of these is in the case of *Ainslie v. Sims* (5), decided by Lord Romilly in the year 1852. In that case the rule I have laid down was not followed by the Master of the Rolls; and it is observable that none of the authorities were cited. But it is remarkable that in the same year *Tambisco v. Pacifico* (14) was decided, and in the same year again there was a contrary de-

*Redondo v. Chaytor* (App.), Q.B.

cision on the part of Vice-Chancellor Page Wood, in the case of *Cambottie v. Inngate* (16), where his Honour calls attention to the fact that the authorities were not cited before the Master of the Rolls in *Ainslie v. Sims* (5), and says—“By the comity of nations a foreigner was entitled to the same relief in a Court of justice as a British subject; on quitting the country the same security could be demanded from both of them.” In *Willis v. Garbutt* (22) Alexander, C.B., says: “No one can have security for costs until his opponent has quitted the country.” We can only enforce an order by staying proceedings until the security is given, and that may be done just as well after he has quitted the country as before. But it is said that though the Vice-Chancellor took that view in 1852, he was of a different opinion in 1857, when he decided the case of *Swanzy v. Swanzy* (4). But it seems to me that he in no way drew back from the position he held in 1852, nor did he give any opinion that the Master of the Rolls was right, but decided the case on quite a different principle, namely, that where an action has been brought by a foreigner temporarily resident in England, who, for the purpose of misleading the Court, gives a false description of his residence, or conceals his true residence, or gives a false name—that is in the nature of a fraud, and the Court can order the plaintiff to give security for costs. This is shown by the further observations of the Vice-Chancellor in *Cambottie v. Inngate* (16), who after referring to the case of *Fraser v. Palmer* (28), justifies his decision by remarking that it was not alleged that any fraud upon the Court was contemplated by the plaintiff. *Fraser v. Palmer* (28) was a case decided by the Court of Exchequer in Equity, in which Alderson, B., said: “If a plaintiff gives the right description of his place of abode when he files his bill, his circulating about afterwards is immaterial, unless he goes abroad. He is still open to the process. It is a different thing if he gives a false statement of his residence. He is then guilty of a fraud on the Court, and

on that ground is made to give security for costs.” This explains the meaning of the language of Wood, V.C., in *Swanzy v. Swanzy* (4), and the latter part of the judgment shews that the case of *Calvert v. Day* (29) (the pedlar's case), is no authority on this question.

So stands the question of authority, and in the face of those authorities we have no course open to us but to dismiss the appeal. We are not called upon to say what, if the matter were *res integra*, would be the right rule, but whether the Court below were right or wrong as to the settled rule of practice. But as there is a strong feeling, at least on the part of one member of this Court, that the settled rule is unreasonable, I should like to say a few words on the subject. No doubt in one view of the matter, where the plaintiff is a foreigner, and will probably leave the country if unsuccessful, so as to avoid paying costs, it seems rather hard that he should not be called upon to give security for costs, more especially as it is clear that there is no hard and fast rule in the converse case; for when a person usually resident in the jurisdiction is temporarily out of it, the Courts will not compel him to give security. Again, if a person is resident without the jurisdiction, but has property within it, the reason for requiring security being gone, the rule goes too, and no security will be required. Therefore it may be said it would be reasonable that the converse should hold good, and that if the plaintiff is only temporarily in England and will probably go abroad before process can issue against him, he should be made to give security for costs. But on the other hand it may be said that it would not be convenient to extend the number of cases in which security for costs can be demanded, and in which the plaintiff can be deprived of his remedy until and unless he can find such security. It may no doubt be a hardship on a foreigner who has come into this country for the *bona fide* purpose of trying a right, to be unable to do so because he cannot give security for costs; and although there are no doubt strong reasons on which a

(28) 3 You. & C. 280.

(29) 2 You. & C. 217.

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change of the law could be based, I do not wish to be understood as giving an opinion in favour of the change.

BAGGALLAY, L.J.—The authorities on the question before us have been so fully examined and explained by Lord Justice Thesiger, that it does not occur to me to add anything further except a few observations on the case of *Swanzy v. Swanzy* (4). It is well known that in all proceedings in Chancery, whether commenced by bill or petition, it was necessary to state fully on the bill or petition the name and residence of the person instituting the proceedings. And quite independently of whether that person was a foreigner or not, or was resident within the jurisdiction or not, it was enough to enable the Court to order him to give security for costs if he did not properly state his name and residence on his bill or petition. In the case of *Swanzy v. Swanzy* (4) there had been no proper statement of the petitioner's residence. She had taken lodgings at one place under one name, and at another place under another name. This was quite enough to render her liable to give security for costs independently of the question of residence abroad. I will only add that the principle always acted upon in the Court of Chancery was that laid down by Vice-Chancellor Page Wood in the case of *Cambottie v. Inngate* (16).

BRAMWELL, L.J.—The question being what is the settled practice of the Courts, I can only say it is impossible to dissent from the elaborate exposition of the law by Lord Justice Thesiger. I will add, however, that I am sorry for it for three reasons. First, I must say I always supposed the rule to be different; secondly, I must have made a number of bad orders at chambers on the subject; and thirdly, fortified by the opinions of the Judges in the Court below, I must say that I think the rule ought to be different. See what it amounts to. The order is applied for against a person domiciled abroad, because when costs are ordered against him, probably he will have gone abroad and left no goods in England. That is the danger to be guarded against. And in

order to do so you are told that you are not to enquire whether the plaintiff is likely to be in England after the action, so as to be answerable to process, or whether he is likely to have property in England at that time, but whether he is actually in England at the time of the application, when his presence here is of no use. As to it being hard on a plaintiff resident abroad to find security for costs, it may be inconvenient no doubt; but what is the hardship compared to that which the defendant suffers under the present rule? Upon my word, if I were sued by a foreigner under the existing law, I would simply say to him, "How much will you take? if it is any amount less than my costs will come to if I fight the case, I will pay it at once and save money, though you have no claim at all." It is all very well to give equal justice to foreigners and to induce them to have confidence in our Courts, but this rule seems to me to work injustice, and is not a proper rule of practice. Still it no doubt is the settled rule, and that being so this appeal must be dismissed with the usual consequences.

*Appeal dismissed.*

Solicitors—G. S. & H. Brandon, for plaintiff;  
T. W. Denby & Co., for defendants.

[IN THE QUEEN'S BENCH DIVISION.]

1879. } THE QUEEN v. THE JUSTICES  
May 15. } OF WEYMOUTH.

*Summary Order—Justices; Disqualification of—Public Health Act, 1875 (38 & 39 Vict. c. 55), section 258—Local Authority, Prosecution by, for Nuisance—Urban Authority, Members of acting as Justices.*

[For the report of the above case, see 48 Law J. Rep. M.C. 139.]



[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1879. { TURQUAND AND THE CAPITAL AND  
May 21. { COUNTIES BANK v. FEARON.\*

*Practice—Pleading—Rules of the Supreme Court, Order XIX. Rules 4, 18, 24, 27—Agreement, how to be pleaded.*

*Semble.—Whenever in any pleading an agreement is alleged, it is not sufficient generally to aver the existence of an agreement, and to state its effect; but the pleading should state whether the agreement relied on is in writing or by parol, or the result of a series of documents.*

This was an action on a guarantee. The statement of claim, after alleging that a firm of bankers carrying on business under the style of Willis, Percival & Co., had from time to time discounted bills for one H. Darling, proceeded as follows—

"3. On or about the 26th of August, 1874, it was agreed between the said Willis, Percival & Co. and the defendant that in consideration that the said Willis, Percival & Co. would for the future discount such acceptances without requiring a separate guarantee for each of the same from the defendant, the defendant would guarantee and be responsible to the said Willis, Percival & Co. for payment of such of the acceptances discounted by the said Willis, Percival & Co. as should be from time to time current to the amount of 1,000l."

It was further alleged that Willis, Percival & Co. had discounted various bills accordingly, and that a large sum was due from the defendant under his guarantee; that Willis, Percival & Co. had gone into liquidation; that the plaintiff Turquand had been appointed trustee under the liquidation, and had sold and assigned the estate and effects of the debtor to the plaintiffs, the Capital and Counties Bank, including the guarantee in question. And the plaintiffs in the alternative claimed the amount due upon the guarantee. The defendant applied to the Master in chambers to strike out the

third paragraph of the statement of claim, on the ground that the plaintiffs had not complied with Order XIX. rules 4, 18 and 24, supporting the application with an affidavit to the effect that on inspection of the agreement referred to in paragraph 3 of the statement of claim, it appeared that the guarantee was not made to Messrs. Willis, Percival & Co., but to H. Darling. The Master, the Judge in chambers, and the Divisional Court having successively refused to make the order, the defendant appealed.

*Oohen and Lamaison*, for the defendant.—The statement of claim does not set forth the true facts. If the true facts appeared on the statement of claim, it would at once appear that there is no cause of action, and we could demur—*Philippus v. Philippus* (1). An agreement should not be generally averred. It is not a fact, but a legal deduction from facts which should be set out, e.g. that a certain document has been made, and that certain conversations have taken place. The nature of the agreement, whether in writing or by parol, or partly by parol and partly by writing, should appear.

*Gully and Gee*, for the plaintiffs.—The writing is not the agreement, but only part of the evidence, and therefore need not be set out. It is enough to state generally that there was an agreement, and it is then for the defendants to set up the Statute of Frauds, or impugn the agreement in any other way. The plaintiff has not been embarrassed, for the defendant has set out all the documents on which he intends to rely in his particulars.

BRAMWELL, L.J.—I am afraid that this appeal must be dismissed. Really there is no pretence at all for the application in the form in which it was put before us. It would come to this, that because the plaintiffs have, as is alleged, made an untrue statement, therefore the defendants can have it struck out. But that is not within the rules. You ought to take issue on the untrue statement, and I

\**Coram* Bramwell, L.J.; Baggallay, L.J.; and Thesiger, L.J.

(1) *Ante*, p. 185; s. c. Law Rep. 4 Q.B. D. 127.

*Turquand v. Fearon (App.), Q.B.*

think this appeal must be dismissed with costs. But, in my judgment, the claim ought to have specified that the agreement was in writing, if the written agreement was relied on, and that the effect of the writing should have been set out; and I think that the claim was embarrassing from this not having been done. I cannot help thinking that the intention of the rules was, and it evidently was so, if people would only avail themselves of them properly, that in the pleadings themselves a Special Case should be evolved, so as to save the trouble and expense of pleading first, and then, after all, having to state a Special Case. For this purpose the actual facts of the case ought to be stated. It is idle for anyone to suppose that a party can by this system of burying his head in the sand escape detection when he has no case; though he may possibly manage to scrape along to one step further in the action. If I had to plead to a statement like this, I would meet it this way. If the plaintiff would not state the actual facts, so as to give me an opportunity of demurring, I would; so as to give him an opportunity of demurring to my statement of defence.

BAGGALLAY, L.J.—I agree in thinking that this appeal ought to be dismissed with costs, for the same reasons as were in the first place given by my Lord. My strong inclination is to think that in pleading it should always be specified whether a contract relied upon is in writing or not.

THESIGER, L.J.—I think that this appeal ought to be dismissed on the ground upon which judgment was given in the Court below. It is no reason for striking out a statement of claim that it is untrue. At the same time, but for what has already occurred in the case, I think the defendant would have been justified in applying to have the statement struck out as embarrassing. It alleges "that it was agreed" between the plaintiff and the defendant that certain things should happen. Looking at Order XIX. rule 4, it seems to me clear that in the contemplation of the Legislature such a statement ought not to be made. When the

plaintiff relies on an agreement, it is for him to state whether it was an agreement in writing or by parol, or partly by parol and partly by letter, or whether it is the result of a series of documents. That is quite clear when we look at Order XIX. rule 4. An agreement is not a fact, but an inference which the law draws from facts. The real fact is the existence of a document in writing, or that certain letters were written, or that a certain conversation took place. The matter is made more plain when we look at Order XIX. rule 24, which is as follows:—"Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible; without setting out the whole or any part thereof, unless the precise words of the document, or any part thereof, are material." The reasonable inference from that is, that whereas as a rule material documents are to be set out and set out as a whole, in some cases where parts of the document may be immaterial, the immaterial part used need not be set out. The same thing follows from the words of Rule 27, which lays down that where a contract is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it shall be sufficient to allege such contract as a fact, and to refer generally to such letters, conversations or circumstances without setting them out in detail. What is the obvious inference? Again, that where a written agreement or document is relied on, the fact that it is an agreement in writing or a document must be set out; but as such documents are sometimes voluminous, only the effect and not the words in full need be given. To meet the difficulty raised by Mr. Gully, that the plaintiff cannot always tell whether the writing amounts to a complete agreement, or whether the agreement must be proved *aliunde*, the plaintiff may set up his claim in the alternative.

The result is, that it is not as a rule necessary to set out the agreement *verbatim*, but it is necessary to state whether the agreement is in writing or by parol, and if it was in writing, to set it out so far as to shew the effect of it. In addition,

*Turgand v. Fearon (App.), Q.B.*

though the forms in the Appendix to the Rules are not binding in any way, it may be observed that in the form given for a statement of claim on a guarantee, the agreement is specified as having been in writing.

Solicitors—Henry Kimber & Company, for plaintiff; Herbert & Kent, for defendant.

*Stoofordine 51 L.J. 263.*  
*Abouloff v. Oppenheimer 52 L.J. 310*  
[IN THE HOUSE OF LORDS.]

1879.  
May 26, 27. } KENDALL AND OTHERS v.  
June 17, } HAMILTON.  
20, 23.  
July 28. }

*Partnership Debt—Joint and several Liability—Judgment recovered against one Partner—Merger of Debt in Judgment.*

The appellants recovered judgments against W. & Co. for breach of contracts, in respect of which the respondent was a partner with W. & Co. and jointly liable to the appellants. W. & Co. became bankrupt, and the appellants having received a dividend in the bankruptcy sued the respondent for the balance due upon the contracts:—Held, that there was no principle of equity which would prevent the operation of the rule laid down in *King v. Hoare* (13 Mee. & W. 494; s. c. 14 Law J. Rep. Exch. 29), that judgment recovered against one or more of several joint contractors is a bar to an action upon the same contract against the others.

The expression, that partnership debts are in equity joint and several, is only to be taken *sub modo*, that is to say, as meaning that there is no survivorship of liability in favour of a deceased partner.

Held also (dissentiente LORD PENZANCE), that the abolition of pleas in abatement under the Judicature Acts did not take away the right of a defendant to insist on his co-contractors being joined as defendants, and consequently did not affect the validity of the rule in *King v. Hoare*.

Per LORD PENZANCE. Under the Judicature Acts a defendant has no longer an ab-

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*absolute right to insist, by plea in abatement or otherwise, on being sued together with his co-contractors or not at all; and, inasmuch as that right formed the ground of the rule in King v. Hoare, that rule is no longer law.*

The appellants in this case had sued a firm of Wilson, McLay & Co. for money due upon certain commercial transactions and had recovered judgments against them. Wilson, McLay & Co. became bankrupts, and the appellants proved in the bankruptcy for their judgment debts and received a dividend in respect thereof. The respondent Hamilton was a partner with Wilson, McLay & Co. in respect of the said transactions, but the appellants alleged that they were ignorant of such partnership until after they had obtained their judgments against Wilson, McLay & Co. They afterwards on the 5th of July, 1877, issued a writ in the Common Pleas Division against Hamilton for the balance due upon the said transactions after allowing for the amount received as dividend.

Huddleston, B., who tried the case without a jury, gave judgment for the appellants, but his decision was reversed by the Court of Appeal (see report 47 Law J. Rep. C.P. 665; s. c. Law Rep. 3 C.P. D. 403).

This appeal was then brought.

The case was first argued before Lord Hatherley, Lord Penzance, Lord Blackburn, and Lord Gordon.

Kay and O. Bowen (*Watkin Williams* with them), for the appellants.—The liability of partners for partnership debts in all cases in which it has come under the consideration of a Court of Equity has been treated as both joint and several. In *Lane v. Williams* (1), the earliest reported decision on the point, a creditor after an action against the executor of a surviving partner, whose assets were insufficient, obtained a decree against the estate of the other partner. See also *Jacomb v. Harwood* (2) and *Rice v. Shute* (3), where Lord Mansfield lays down

(1) 2 Vern. 277, 292.

(2) 2 Ves. sen. 265.

(3) 5 Burr. 2611.

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that all contracts with partners are joint and several—*Daniel v. Cross* (4). In *Gray v. Chiswell* (5), Lord Eldon having an insolvent estate to administer adopted, after anxious thought, the rule in bankruptcy and postponed a partnership creditor to the separate creditors. But he expressly said that it was extremely difficult to understand on what the rule in bankruptcy was founded, and only adopted it in order that the estate of a deceased partner might not be administered on different principles from those of a living one. In *Ex parte Kendall* (6) Lord Eldon treated it as settled in equity, though doubted by Lord Thurlow in *Hoare v. Contencin* (7), that the liability of partners did not pass by survivorship, but remained against the estate of a deceased partner. In *Devaynes v. Noble*; *Sleeche's Case* (8), *Sumner v. Powell* (9), *Wilkinson v. Henderson* (10), *Brown v. Douglas* (11), *Hills v. M'Kee* (12), *Ridgway v. Olare* (13), *Lodge v. Pritchard* (14), it was assumed as the ground of the decisions that partnership debts are joint and several. The same doctrine is the foundation of the law under the winding up Acts—*Robinson's Executor's Case* (15). It does not extend to other joint debts—*Jones v. Breach* (16), overruling *Thorp v. Jackson* (17).

The above cases may be explained upon the principle that "where there is in equity no survivorship of property, there is in equity no survivorship of liability." But that principle does not explain another class of cases, those, namely, in

which a written instrument, in form joint, was treated as joint and several in equity, because given to secure a partnership liability—*Bishop v. Church* (18), *Beresford v. Browning* (19), and against competing creditors in *Burn v. Burn* (20). In *Gray v. Chiswell* (5), Lord Eldon, referring to *Bishop v. Church* (18) said, that the Court would, during the life of the debtor, have rectified the bond.

It is true that there is no instance in which an injunction has been granted to restrain a partner from setting up as a defence the judgment obtained against his co-partners. But it was not till 1844 that it was decided in *King v. Hoare* (21) that such a defence was good at law. There is no instance of an injunction being applied for and refused. The rule at law is a purely technical one according to Willes, J., in *Brinsmead v. Harrison* (22).

It is allowed by all the Judges that if the contract is in equity joint and several, there is jurisdiction to give relief here under the Judicature Act, 1873, section 24, sub-section 7, and section 25, sub-section 11.

As to the objection that the appellant had elected to treat the contract as joint, it is submitted first, that no one is bound by election unless at the time of making it he knew all the facts; secondly, the appellant had the right to treat the contract as joint and several, and by treating it as joint he does not preclude himself from also treating it as several.

*Benjamin and Rigby*, for the respondent.—While partners are all alive and solvent equity does not interfere, but leaves creditors to bring an action at law. There is then no distinction between joint and separate estates. The creditor has at law a joint right against the partners, but the judgment can be enforced against their separate property. If bank-

- (4) 3 Ves. 277.
- (5) 9 Ves. 118.
- (6) 17 Ves. 514.
- (7) 1 Bro. C.C. 27.
- (8) 1 Mer. 539; s. c. on appeal, 2 Russ. & M. 496.
- (9) 2 Mer. 30; s. c. on appeal, Turn. & R. 423.
- (10) 1 Myl. & K. 582; s. c. 2 Law J. Rep. Chanc. 191.
- (11) 11 Sim. 283.
- (12) 9 Hare, 297; s. c. 20 Law J. Rep. Chanc. 533.
- (13) 19 Beav. 111.
- (14) 1 De Gex, J. & S. 610; s. c. 32 Law J. Rep. Chanc. 775.
- (15) 6 De Gex, M. & G. 572.
- (16) 2 De Gex, M. & G. 886; s. c. 21 Law J. Rep. Chanc. 543.
- (17) 2 You. & C. Exch. 553.

- (18) 2 Ves. sen. 100, 371.
- (19) 45 Law J. Rep. Chanc. 36; s. c. Law Rep. 20 Eq. 564, 1 Ch. D. 30.
- (20) 3 Ves. 573.
- (21) 13 Mee. & W. 494; s. c. 14 Law J. Rep. Exch. 29.
- (22) 40 Law J. Rep. C.P. 281; s. c. 41 Law J. Rep. C.P. 190; s. c. Law Rep. 6 C.P. 584; 7 C.P. 547.

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ruptcy intervenes the rights become different. The Court of Bankruptcy, which is a Court of Equity, introduces the distinction between joint and separate estates. It deals with partnership creditors as with other joint creditors, by confining them in the first instance to the joint estate—*Ex parte Clarke* (23); *Ex parte Rowlandson* (24); whereas a joint and several creditor is allowed to elect which estate he will go against.

If the death of one of the partners intervenes, his estate is administered in Equity. *Lane v. Williams* (1) lays down that there is no survivorship of liability in equity, a rule which is the necessary correlative of the rule against survivorship of assets. Every debt has to be made good out of the separate estate if it cannot out of the joint estate, but the question is whether you can come against the separate estate in the first instance. In *Gray v. Chiswell* (5) Lord Eldon adopted for partnership debts the rule in bankruptcy treating them as joint.

In *Cowell v. Sykes* (25), where partnership creditors were allowed to resort to the separate estate, there was no joint estate. In *Wilkinson v. Henderson* (10) all the separate creditors had been paid. Equity would not have adopted the rule merely because it was the rule in bankruptcy, for in respect to joint and several debts its practice is different from that of bankruptcy, allowing double proof instead of election—*Ex parte Thornton* (26).

If Courts of Equity had held that the common law rule is wrong, and that partnership debts are *inter vivos* joint and several, there must have been some case in which they had given relief. The conclusion to be drawn is that the *dicta* in which partnership debts are spoken of as joint and several are not to be taken literally; the debts are joint and several only in a sense, for the purpose of applying the equitable doctrine, *Qui sentit commodum sentire debet et onus*. In *Ex parte Higgins* (27) the doctrine of

merger, which it is contended applies here, was adopted in the Court of Bankruptcy, which is a Court of Equity.

A different consideration is required for the class of cases of which *Bishop v. Church* (18) is the type, those, namely, in which it has been laid down that the Court will reform a joint bond given for a partnership debt so as to make it joint and several—*Simpson v. Vaughan* (28); *Thomas v. Fraser* (29); *Burn v. Burn* (20). The conclusion drawn from them is not warranted. In all there was an intention to give a joint and several bond, and the Court acted upon the intention.

*Kay* in reply.—*Ex parte Higgins* (27) is distinguishable, for there had been a judgment against one partner, and the creditor sought to prove against all the partners, including that one. Further, it appears that Turner, L.J., thought the plaintiff was bound in equity by election, not by the technical rule as to merger. Here there could be no election, since election implies knowledge—*Vyryan v. Vyryan* (30); and the plaintiff was ignorant of the defendant's liability.

*Ex parte Waterfall* (31) shews that there may be an equity to allow a proof in bankruptcy after a judgment in which the debt would merge at common law. But in the absence of special circumstances giving rise to such an equity the Courts will not interfere. Such circumstances (which are to be found here) are rare; it is not surprising, therefore, that there should be no precedent for equitable interference *inter vivos*, especially as the legal rule was not settled till the decision in *King v. Hoare* (21).

[LORD HATHERLEY.—The pleadings do not raise a case of equity on the ground of mistake.]

As to the cases relating to the rectification of instruments, even if there were other circumstances to aid the Court, yet the fact of the debts for which the securities were given being partnership debts was referred to as a ground of the decisions, but if that fact could lend any

(23) 4 Ves. 677.

(24) 3 P. Wms. 405.

(25) 2 Russ. 101.

(26) 3 De Gex & J. 454; s. c. 28 Law J. Rep. Bankr. 4.

(27) 3 De Gex & J. 33; s. c. 27 Law J. Rep. Bankr. 27.

(28) 2 Atk. 31.

(29) 3 Ves. 399.

(30) 30 Beav. 65; s. c. on appeal, 31 Law J. Rep. Chanc. 158.

(31) 4 De Gex & S. 199.

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assistance at all in rectifying a joint bond it must be because in consideration of equity a partnership debt is several as well as joint.

The case was ordered by the House to be reargued.

*Kay* for the appellant.—Even at law judgment can be obtained against one joint debtor after judgment against the other, unless there be a plea in abatement. The previous judgment is no ground for a non-suit—*Rice v. Shute* (3). So also, after judgment against several joint debtors, execution can be enforced against one for the whole amount.

*Ex parte Christie* (32), contrasted with *Ex parte Waterfall* (31), shews that the decision in the latter case was not that there was a merger in equity, but that there was not any equitable ground of interference.

The following authorities were also referred to in addition to those above cited: —*Stephenson v. Chiswell* (33); *Orr v. Chase* (34); *Ambrose v. Clendon* (35); *Ex parte Griffiths* (36).

*Rigby* for the respondent.—The right of creditors against a deceased partner is an indirect equity arising from the fact that the surviving partners are entitled to an indemnity against the deceased. The creditors are allowed to stand in the place of the surviving partners, just as an executor's right to an indemnity from the estate gives rise to a similar right of creditors. He also referred to *Ex parte Honey* (37), and the Mercantile Law Amendment Act (19 & 20 Vict. c. 97), s. 11.

*Kay* in reply.

*Cur. adv. vult.*

THE LORD CHANCELLOR (EARL CAIENS).—In the arguments in this case at your Lordships' bar, as well as in the arguments and judgments in the Court below,

(32) 2 Deac. & C. 155.

(33) 3 Ves. 566.

(34) 1 Mer. 729.

(35) 2 Strange 1042; s. c. Lee's Cas. temp. Hardwicke, 267.

(36) 3 De Gex, M. & G. 174; s. c. 22 Law J. Rep. Bankr. 50.

(37) 41 Law J. Rep. Bankr. 9; s. c. Law Rep. 7 Ch. App. 178.

the facts of the case were presented in a form which may be thus described: It was said that the appellants were creditors to whom a debt was due from Wilson, McLay, and the respondent Hamilton; that this debt was in the nature of a partnership debt due from the three jointly; that the appellants brought an action for the debt against Wilson & McLay alone; that at the time they brought the action they were not aware that the debt was contracted by Hamilton jointly with Wilson & McLay; that Wilson & McLay did not plead in abatement, or otherwise object to the non-joinder of Hamilton; that judgment was obtained by the appellants against Wilson & McLay, but this judgment, by reason of the insolvency of Wilson & McLay, did not lead to satisfaction of the debt; that the appellants afterwards discovering the interest of Hamilton, brought an action against him for the debt, which is the action out of which the present appeal arises; that thereupon two questions arose for the determination of the Court—first, was the judgment recovered against Wilson & McLay, even without satisfaction, a bar, according to the principle hitherto prevailing in Courts of Common Law, to the action against Hamilton? and, secondly, was there not a doctrine in Courts of Equity that all partnership debts were several as well as joint, and, if so, ought not that doctrine to be applied just as if the debt in this case had been the several debt of Hamilton, so as to prevent him setting up the judgment against Wilson & McLay as an impediment to the appellants suing him, Hamilton?

I will presently endeavour to express to your Lordships what my opinion would be upon these questions if they were really the questions to be determined in the case. But I must first suggest to your Lordships that the facts of the case, when properly considered, would seem to me to make it doubtful whether the questions which I have mentioned really arise in the case, and whether the case does not fall to be determined upon considerations somewhat different.

Between 1870 and 1874 the appellants were merchants carrying on business in London. Wilson & McLay were carrying

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on business in Glasgow and London under the firm of Wilson, McLay & Co. Wilson & McLay undertook certain speculative shipments of old iron, and the appellants agreed to provide, through the acceptance and discounting of bills of exchange, the money necessary to carry on these speculations. In point of fact, although the appellants did not know it at the time, the respondent Hamilton was interested in these shipments. Hamilton had agreed that the shipments should be for the joint benefit of himself, Wilson & McLay, and that the financial arrangements should be managed by Wilson & McLay. Wilson & McLay were, therefore, in reality the agents authorised to borrow money for undisclosed principals, who were Wilson, McLay and Hamilton. The persons advancing the money would have the right, on becoming aware of the interest of Hamilton, to sue Wilson, McLay and Hamilton, as the principals on the contract, and if they sued Hamilton alone he would have a right to plead in abatement the non-joinder of Wilson & McLay. But the persons advancing the money would also have the right to treat Wilson & McLay as the principals, and to sue them alone; and Wilson & McLay would have no right in such an action to plead in abatement, or otherwise object to the non-joinder of Hamilton.

In the present case, the transactions to which I have referred resulted in a large sum of money being due to the appellants. For this sum they brought an action against Wilson & McLay. This they were clearly entitled to do, whether they knew or did not know of the interest of Hamilton. They might, it is true, at any time before judgment, have discontinued the action against Wilson & McLay, and have brought a fresh action against Wilson, McLay and Hamilton, as principals, but, if they did not do so, Wilson & McLay could not in any way have objected to the non-joinder of Hamilton, or have contended that they were not the persons, and the only persons, to be sued. In this state of things the action went on, and resulted, as I have already said, in a judgment against Wilson & McLay.

Now, I take it to be clear that, where

an agent contracts in his own name for an undisclosed principal, the person with whom he contracts may sue the agent, or he may sue the principal, but if he sues the agent and recovers judgment, he cannot afterwards sue the principal, even although the judgment does not result in satisfaction of the debt. If any authority for this proposition is needed, the case of *Priestly v. Fernie* (38) may be mentioned. But the reasons why this must be the case are, I think, obvious. It would be clearly contrary to every principle of justice that the creditor who had seen and known and dealt with and given credit to the agent, should be driven to sue the principal if he does not wish to sue him; and, on the other hand, it would be equally contrary to justice that the creditor on discovering the principal, who really has had the benefit of the loan, should be prevented suing him if he wishes to do so. But it would be no less contrary to justice that the creditor should be able to sue first the agent and then the principal, when there was no contract, and when it was never the intention of any of the parties that he should do so. Again, if an action were brought and judgment recovered against the agent, he, the agent, would have a right of action for indemnity against his principal, while, if the principal were liable also to be sued, he would be vexed with a double action. Farther than this, if actions could be brought and judgments recovered, first against the agent and afterwards against the principal, you would have two judgments in existence for the same debt or cause of action; they might not necessarily be for the same amounts, and there might be recoveries had, or liens and charges created, by means of both, and there would be no mode, upon the face of the judgments, or by any means short of a fresh proceeding, of shewing that the two judgments were really for the same debt or cause of action; and that satisfaction of one was, or would be, satisfaction of both. In the present case I think that when the appellants sued Wilson & McLay, and

(38) 3 Hurl. & C. 977; s. c. 34 Law J. Rep. Exch. 172.

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obtained judgment against them, they adopted a course which was clearly within their power, and to which Wilson & McLay could have made no opposition, and that, having taken this course, they exhausted their right of action, not necessarily by reason of any election between two courses open to them, which would imply that, in order to an election, the fact of both courses being open was known, but because the right of action which they pursued could not, after judgment obtained, co-exist with a right of action on the same facts against another person. If Wilson & McLay had been the agents, and Hamilton alone the undisclosed principal, the case could hardly have admitted of a doubt; and I think it makes no difference that Wilson & McLay were the agents and the undisclosed principals were Wilson, McLay, and Hamilton. If the view which I have taken of the facts and of the law applicable to them is correct, it is not necessary to look at Wilson, McLay, & Hamilton in the position of co-contractors; but looking at them in this light, I must say that the case of *King v. Hoare* (21) appears to me to have been decided on satisfactory grounds. It is the right of persons jointly liable to pay a debt to insist on being sued together. If, then, there are three persons so liable, and the creditor sues two of them, and those two make no objection, the creditor may recover judgment against those two. But should he afterwards bring a farther action against the third, that third may justly contend that the three should be sued together. It is no answer to him to say that the other two were first sued and made no objection, for the objection is the objection of the third, and not of the other two. Nor is it any answer to him to say that whatever he pays on the judgment against himself he may have allowed in account with the others, because he may fairly require, with a view to his right of account or contribution, to have the identity and the amount of the debt constituted and declared in one and the same judgment with his co-contractors. If, therefore, when the third is sued, and requires that the other two should be joined as parties, the creditor

has to admit that he cannot join the other two because he has already recovered a judgment against them in the same cause of action, this is equivalent to saying that he has disabled himself from suing the third in the way in which the third has a right to be sued.

It has been suggested that even assuming the case of *King v. Hoare* (21) to have been rightly decided, the law as laid down in that case has been altered by the Judicature Acts and by the abolition of the plea in abatement. I am unable to agree to this suggestion. I cannot think that the Judicature Acts have changed what was formerly a joint right of action into a right of bringing several and separate actions. And although the form of objecting, by means of a plea in abatement, to the non-joinder of a defendant who ought to be included in the action, is abolished, yet I conceive that the application to have the person so omitted included as a defendant ought to be granted or refused, on the same principles on which a plea in abatement would have succeeded or failed. In this particular case, indeed, I observe the judgment against Wilson & McLay was obtained before the Judicature Act came into operation; and if this judgment then became pleadable in bar, according to *King v. Hoare* (21), by Hamilton in answer to an action against himself, I cannot see how this defence is taken away from him by the Judicature Act subsequently coming into operation.

If, then, this was the attitude of defence which Hamilton was entitled to take up in opposition to the present action, it does not appear to me that any difference is made by the doctrines of the Court of Equity with regard to partnership debts. There is no doubt that in many cases and text-books we find the expression that a partnership debt is in equity joint and several. This, however, is only a compendious expression, which must be interpreted with reference to what were the functions of the Court of Equity as to partnership debts. The only interposition of a Court of Equity with regard to partnership debts took place in the administration of the assets, either of the partnership or of a



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deceased member of the partnership. Where a member of the partnership died, the debts became in the eye of a Court of law the debts of the survivors; but the survivors, on the other hand, in a Court of equity, had the right, as against the estate of a deceased partner, to say that his representatives should not withdraw any part of the partnership property until all the debts were paid or provided for. If, therefore, a Court of Equity was administering the assets of a deceased partner, it would, in order to clear his estate, ascertain his liabilities to the partnership, and for this purpose would ascertain the debts due from the co-partnership at his death. From this the transition was easy to giving the creditors of the partnership a direct right, and not merely an indirect right, through the surviving partners, to come for payment against the assets of the deceased partner; and from this again the transition was easy to the expression which said that partnership debts, in the eye of a Court of Equity, were joint and several—not thereby meaning that a Court of equity altered or changed a legal contract, but merely that the Court, in order, before distributing assets, to administer all the equities existing with regard to them, would go behind the legal doctrine that a partnership debt survived as a claim against the surviving partners only, and would give the creditor the benefit of the equity which the surviving partners might have insisted on.

This is so clearly expressed by Lord Eldon in the case of *Ex parte Williams* (39) that I will take leave to read his expressions which appear to me to render unnecessary any comment on the numerous authorities which were cited on this head at your Lordships' bar. Lord Eldon says, "Among partners clear equities subsist, amounting to something like lien. The property is joint; the debts and credits are jointly due. They have equities to discharge each of them from liability, and then to divide the surplus according to their proportions. . . . But while they remain solvent, and the partnership is going on, the creditor

has no equity against the effects of the partnership. He may bring an action against the partners and get judgment, and may execute his judgment against the effects of the partnership. But when he has got them into his hands, he has them by force of the execution, as the fruit of the judgment, clearly not in respect of any interest he had in the partnership effects, while he was a mere creditor, not seeking to substantiate or create an interest by suit. There are various ways of dissolving a partnership—effluxion of time, the death of one partner, the bankruptcy of one, which operates like death, or, as in this instance, a dry, naked agreement that the partnership shall be dissolved. In no one of those cases can it be said that to all intents and purposes the partnership is dissolved, for the connexion still remains until the affairs are wound up. The representative of a deceased partner or the assignees of a bankrupt partner, are not strictly partners with the survivor or the solvent partner, but still, in either of those cases, that community of interest remains that is necessary, until the affairs are wound up; and that requires, that what was partnership property before shall continue for the purpose of a distribution, not as the rights of the creditors, but as the rights of the partners themselves require; and it is through the operation of administering the equities, as between the partners themselves, that the creditors have that opportunity; as in the case of death it is the equity of the deceased partner, that enables the creditors to bring forward the distribution." I imagine that the words "bring forward" are probably an inaccurate report; but it obviously means to insist upon the distribution.

If, therefore, this case is to be looked at as a case in which judgment has been recovered for a partnership debt against two out of three co-partners; it appears to me that, on the principle of *King v. Hoare* (21), the judgment would be a bar at law to a subsequent action against the third co-partner; and I know of no principle on which a Court of Equity could hold the debt to be several for the purpose of preventing such a result.

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In any view of the case, therefore, I am of opinion that the judgment of the Court of Appeal was correct, and I have to move your Lordships to dismiss the appeal with costs.

LORD HATHERLEY.—I am of the same opinion as to the result which must be arrived at in this case. The question here is, whether or not a person who was unknown to the plaintiffs at the time they were advancing their money as being one of the borrowers of the money, and who was acting through the agency of Messrs. Wilson & McLay, is now, in consequence of anything which has taken place under the Judicature Act (for that was the principle of the argument at the bar) placed in a different position from that in which he would have been if that Act had not been passed. If it had not been passed, I think his position would have been sufficiently clear.

Now if *King v. Hoare* (21) is to subsist as an authority—and having stood so long I apprehend it would be difficult to shake it as an authority now—then the plaintiffs in this case having sued two of the partners and having omitted to sue the other partner, of whose existence they were unconscious (as I think the whole of the evidence goes to shew), having proceeded against two partners and obtained a judgment against them, their co-contractor could not, according to *King v. Hoare* (21), be sued, because the debt, which was a simple contract debt in the first instance, contracted by the firm, had passed into *rem judicatam* under the operation of the judgment which had been obtained against the two.

I would therefore, for the purpose of considering this case, which has been discussed by my noble and learned friend the Lord Chancellor upon the general question of agency, prefer to consider it as a simple question of partnership, in which a debt has been contracted; and I assume for the present purpose that it was originally joint, in order that we may see what remedies were at the time open to the plaintiffs, independently of death. This case not being like the numerous cases cited, in which the Court of Chan-

cery held a partnership deed to be joint as well as several (there being no death in this case), it is obvious that such remedy as the plaintiffs then had was entirely at law. The Court of Chancery could offer no assistance in this case where there was a legal contract, unless there was found in that contract some element which made it inequitable that the debtor should be allowed to set up the defence now relied on. In the case of a person setting up a term of years at law the Court of Chancery can interfere by injunction, and prevent his doing so, but that case would be very different. If the defence in *King v. Hoare* (21) be, as has been supposed by some, and as was urged and alleged at your Lordships' bar, contrary to what one may call the equitable engagement between the parties, then I apprehend the proper course would have been to take some proceedings for preventing the defendant from setting up such a defence as was effectually set up in *King v. Hoare* (21), on the ground that it was an equitable defence, and that a judgment obtained against two of the co-contractors in the absence of the third, should prove no bar to a subsequent suit against the third. But not only was no such attempt made in this case, but in no case that I ever heard of, in equity, has there been any injunction applied for, much less obtained, with regard to that particular position of the parties. What happened in *King v. Hoare* (21) was, that one of the parties died, and then an application was made that the equity which has been administered from time to time in Chancery with regard to the assets of a deceased partner, and the distribution of those assets among the several creditors, might be made available on account of that death. But then that was met by the averment that the death had happened since the suit, and that it could not interfere with the previous suit, but that that must meet with the common fate of such suits.

That being the position of the parties at Common Law, what was their position in Equity? Numerous cases were cited to your Lordships to shew that the Equity Courts recognised a partnership

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debt as being, in its nature and essence, a joint and several debt. I have had an opportunity of seeing the opinion about to be delivered by one of your Lordships, which goes into more detail than I think it is necessary for me to go into at this moment; but I can say with confidence, having gone through the cases cited before you, that no case will be found in which any such assertion has been made with reference to the nature of the debt except *sub modo*—that is to say, except in those cases where the remedy has been given against the assets of the deceased partner, upon the grounds which are stated very distinctly by Lord Eldon in the case of *Ex parte Williams* (39), cited to your Lordships by my noble and learned friend on the woolsack.

These cases are numerous, but although they are so numerous there is no single case existing in which an attempt was made to administer that particular species of equity which would induce the Court to turn a contract at law joint, into a joint and several contract. In all these cases there has been a necessary administration of assets for the purpose of clearing the assets as between the partners themselves.

That being so, there is, I apprehend, no mode in which the relief now asked in this action, and asked under the new procedure, could be obtained. A Court combining law and equity under the Judicature Act is authorised to adopt the procedure of a Court of Equity, and the Court of Equity is compelled to avail itself of the powers given to it as a Court of law. There is nothing in those circumstances which can, as it appears to me, assist the plaintiff at all, if he had not at the time of the passing of the Act any remedy, which could be given him by law, or any remedy which could be given him by equity. It does not seem to me possible that two powers combined, neither of which could effect anything of itself, would have a more efficacious result than when taken separately, except in this sense, that if there was really a remedy in the one Court which was not given by the other, you can understand that the assistance of the one might give a more complete, perfect and

effectual remedy than the other separately. In this case, before the passing of the Judicature Act, nothing could have been recovered at all, in respect of legal debt, in a Court of Equity, and a Court of Law having once given judgment on a contract, had no power to authorise any procedure against a third person as a party to that contract.

Now, during the argument in the Court below, the remark was quoted as having been made by a very eminent Judge, that this rule which was adopted in *King v. Hoare* (21) was entirely a rule of procedure. I do not take that view of the case, because I apprehend that when Mr. Hamilton contracted, together with others, to pay the debt, in contracting jointly he gave rights to those others. Suppose the debt was enforced against one of those who were jointly liable for the debt, rights would be acquired by the one who paid the whole debt against those who had not taken part in that payment. One great object in bringing all the parties concerned before the Court is this: in equity it is always considered essential that, if there be a suit upon a debt for which two parties are jointly liable, you must have both those parties present in order to enforce the payment of that debt. The reason is, that the person who has entered into this joint contract has a right to have the whole matter settled at once. Otherwise you might bring an action against the co-contractor, and having established your case against the co-contractor, having established it, we will say, for 1,000*l.* as principal moneys and interest between the two, you might then proceed to bring a totally distinct action against the other, and obtain from him payment of a larger or a smaller sum, as the case might be. But you would obtain a judgment which would settle nothing as between the two co-contractors; it would settle nothing as regarded the debt due, by way of suretyship, from one co-contractor against the other contractor. Each of the co-contractors has a right to be sued, and to have the matter settled at once, instead of its being settled piecemeal. He ought not to be compelled to submit to another suit, which would indeed be

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equally disadvantageous to the plaintiff himself, because of course the defendant in that suit would naturally have a right to insist upon having the debt proved against him, if at all, to the extent to which it had been proved against his co-contractors.

When it is said here that the co-contractors did not plead that the whole of the three were not parties to the suit, Mr. Hamilton has nothing to say to that whatever; he remains ignorant; there is nothing to shew that he necessarily was aware of what was coming upon him with regard to the question in dispute. He would have no opportunity of defending that other action when it was brought against the co-contractors, and it would not lie with him to raise a plea in abatement, if it ever could be raised. Those who ought, if they intended to have set up that plea, to insist upon it in the first instance, were his co-contractors, and if the plaintiff himself, being unaware of the existence of this partner, did not introduce him in the first instance, he must take the consequence of losing the advantage which might have been obtained from having Mr. Hamilton as one of the co-contractors. That advantage could not be retained by the plaintiffs, and ought not in justice to be retained by them after they had attained the result they were aiming at, namely, the judgment against the two co-contractors.

It has been observed during the course of the argument here, that, in truth, as to the abstract justice of this case, there is a pretty even balance between the two, because it is only by the fortunate accident of Mr. Hamilton being a solvent party that the plaintiff finds that he has a solvent co-contractor, of whom he was unaware. He did not contract with Mr. Hamilton except as an undisclosed person, and this undisclosed person with whom he entered into no engagement that he knew of, turns out afterwards to be liberated in consequence of the plaintiff not having taken steps to ascertain who were the co-contracting parties when he was bringing the action. The plaintiff having advanced the money, looked to Wilson & McLay as the people who

should pay, but he has since discovered that there is another person whom he thinks he may sue. I think it would not be conducive to the advancement of abstract justice that he should have an opportunity of suing this person whom he did not sue when he sued the two co-contractors. I see nothing, I confess, in the case of *King v. Hoare* (21) which would lead one to doubt that this case was one, as the law stood, legally decided; and if there be any consequential injustice arising from any particular circumstances to persons similarly situated to Messrs. King & Hoare, the evil would preponderate over any advantage there might be in requiring all co-contractors to be made parties liable. If there is any injustice in it, it can only be remedied by the Legislature, should it think fit to afford this remedy. At this distance of time, after so much reliance has been placed, from time to time in other cases, upon the law as laid down in *King v. Hoare* (21), it cannot be now altered by a decision of your Lordships' House, the ordinary practice of which would require, that which has been so long established as the law amongst mercantile men to be continued until it has been reversed by Act of Parliament.

I am therefore of opinion that the resolution you are asked to come to sustaining the decision of the Court below, and dismissing the appeal, is a correct conclusion, and that no substantial injustice will be done in that way.

LORD PENZANCE.—The plaintiff in this action has advanced a large sum of money to the defendant in conjunction with two other persons. The defendant has had the full advantage and benefit of the plaintiff's money to the extent of his share in the joint adventure. In every aspect of the case, therefore, the plaintiff has no doubt acquired a legal, equitable and moral right against the defendant to repayment; nor has this been, even in argument, denied. The defence set up against this just claim rests upon this, and upon this alone, that in accordance with a certain rule of procedure established some five-and-twenty years ago by the single case of *King v. Hoare* (21),

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which has never yet had the sanction of a Court of Appeal, the plaintiff, by bringing a previous action against two out of the three partners, has wholly lost his remedy against the defendant, who is the third. I will presently examine the technical grounds upon which this rule is based, but before doing so I cannot forbear asking myself how far such a rule is consistent with justice. What justice, then, is there in saying that when three persons are, all and each, individually liable to pay a debt, an action and judgment (still unsatisfied) against two of them should extinguish the liability of the third? The most that can be said is that by two actions being brought instead of one, additional costs have been incurred. The joint contractors or partners may reasonably insist that the plaintiff should not pursue his remedies against them in a vexatious manner, and if two actions are, without good reason, brought where one would have sufficed, it may well be that to the extent of the extra costs thereby involved the loss should be borne by the plaintiff. But this is a very different penalty from the extinction of the defendant's liability, which may be the same thing as the loss of the plaintiff's debt altogether. Even this consideration, however, as to unnecessary costs, applies only to a case in which the plaintiff, with his eyes open, has chosen to sue some of the partners first and the others afterwards. It cannot apply to a case like the present, in which the two first sued concealed the fact that the third was a partner in the adventure, a fact of which the plaintiff was himself ignorant, and, being ignorant, could not possibly have sued the whole three together. This circumstance removes at once all blame from the plaintiff, and with it all semblance of justice from the defence now made. So entirely is this the case that no argument has been ever offered at your Lordships' bar, to shew that the defendant has been prejudiced by the plaintiff's conduct, or that anything has taken place which ought, in reason or justice, to render the defendant less liable to pay this debt now than he was at first. The defence is, and has been rested throughout, wholly and solely upon the

technical rule to which I have adverted, and the authority of the case by which that rule was laid down.

In this state of things I confess I am unwilling that your Lordships should confer the high sanction of this, the ultimate Court of Appeal, upon a rule of procedure which, without affecting to assert any just rights on the part of the defendant, denies the aid of the law to enforce those of the plaintiff. Procedure is but the machinery of the law, after all—the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when, in place of facilitating, it is permitted to obstruct, and even extinguish, legal rights, and is thus made to govern where it ought to subserve.

With these observations I proceed to consider the case of *King v. Hoare* (21), upon which the present case is rested. The proposition that a cause of action which has never been before the Court at all has become *res judicata* is a startling one. The present plaintiff has never before impleaded the present defendant—has never made any previous attempt to enforce the liability which he now asserts, and yet is met at the threshold of his suit with the plea that the matter between him and the defendant has already become *res judicata*.

The doctrine of law regarding merger is perfectly intelligible. Where a security of one kind or nature has been superseded by a security of a higher kind or nature, it is reasonable to insist that the party seeking redress should rest upon the latter, and not fall back on the former. In like manner, when that which was originally only a right of action has been advanced into a judgment of a Court of Record, the judgment is a bar to an action brought on the original cause of action. The reasons for this result are given by Parke, B., in *King v. Hoare* (21). He says—"The judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of attaining the same result.

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Hence the legal maxim, *Transit in rem judicatam*. The cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy merged in the higher."

This reason is satisfactory and conclusive upon the assumption that the cause of action attempted to be sued upon is the same cause of action with that upon which a judgment has already been obtained. But is it so in a case like the present? If a man deliver goods or lend money to two partners, the promise which the law implies is a joint promise. The effect of such a promise, as distinguished from a joint and several promise, is that in case of death the debt is enforceable only against the survivor. If the farther effect of such a joint promise in point of law were that it could not constitute a cause of action against one only of the two contractors, then the reasoning in the case of *King v. Hoare* (21) would be unquestionable, for there could be but one cause of action resulting from it, and that a joint one, and the cause of action having been advanced to a judgment, could not support a second action. But this is not what the cases establish the effect of a joint promise to be. If a man contracting, as above supposed, with two partners, likes to bring an action against one only, and to allege against him a promise by him alone (taking no notice whatever of the other partner or of his promise), he has a good cause of action, and one which cannot be defeated by the defendant's proving that the promise was not made by him alone, but by him jointly with another. Now, if a joint promise by two were a thing so different in point of law in its quality and character, from a promise by one only, that it could not be held to include within it a promise by each; and if it did not in point of law give rise to a separate cause of action against one, the defendant in the case above supposed ought to be able to defeat the plaintiff's claim by shewing that the promise sued upon was not the promise made, and that the promise which was in reality made was a joint one only, and as such did not give rise to the separate claim. This was exactly what the de-

fendant attempted to do in the case of *Rice v. Shute* (3), but it was adjudged against him. In that case the Judge who tried the cause considered that a declaration upon a separate promise of the defendant was not supported by proof of a joint promise by the defendant and another—that there was in consequence a variance between the allegation and the proof—and he nonsuited the plaintiff. This nonsuit the Court set aside, and the language of Lord Mansfield is so instructive that I quote it. "To be sure, a distinction is to be found in the books between torts and assumpsits; that in torts all the trespassers need not be made parties, but in actions upon contract every partner must be made a defendant. Many nonsuits, much vexation and great hindrance to justice, have been occasioned by this distinction. It must have been introduced originally from the semblance of convenience, that there might be one judgment against all who were liable to the plaintiff's demand. But experience shews that convenience, as well as justice, lies the other way. All contracts with partners are joint and several; every partner is liable to pay the whole. In what proportion the others should contribute is a matter merely among themselves." And again—"It is cruel to turn a creditor round and make him pay the whole costs of a nonsuit in favour of the defendant, who is certainly liable to pay his whole demand, and who is not injured by another partner's not being made defendant; because what he pays he must have credit for in his account with the partnership." He then goes on to say that he had consulted the other Judges, and that "they were all of opinion that the defendant ought to plead in abatement; he must then say who the partners are. If the defendant does not take advantage of it at the beginning of the suit and plead it in abatement it is a waiver of the objection. He ought not to be permitted to lie by, and put the plaintiff to the delay and expense of a trial, and then set up a plea not founded on the merits of the cause, but on the form of proceeding." "No injustice is done to the defendant by allowing the plaintiff to recover, but

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great injustice is done to the plaintiff by allowing the nonsuit to stand." It is clear, therefore, that, although the defendant in such a case may, if he like, compel the plaintiff to discontinue his action and bring a fresh one against both by means of a plea in abatement, there is yet a good cause of action against him which will sustain the verdict and judgment if that course be not followed.

This, therefore, might happen; the plaintiff upon a joint promise might bring and carry forward two actions *pari passu*, one against each of the joint contractors, and provided that neither of them chooses to plead an abatement (which they may have no object in doing, as it does not get rid of their liability) these actions may go on to judgment, and in neither of them, though the fact of the promise being joint only, and not joint and several, were to appear on the record, by bill of exceptions or otherwise could the judgment be arrested or declared erroneous. Now, if two judgments against two different defendants can be supported upon one joint promise, does not that shew that there are in reality two causes of action involved in the breach of one joint promise? And if so, the principle upon which *King v. Hoare* (21) was decided, resting as it does upon the assertion that the joint promise gives rise to one cause of action and one only, cannot be sustained. The true position of the creditor would appear to be this; that he has a cause of action against either of his debtors separately or both together, subject to a plea in abatement. Now what is a plea in abatement? It is not a plea which affirms that the plaintiff has no cause of action, or that, having had one, it has been barred. It affirms only that the plaintiff is bound to pursue his remedy in another form of proceeding, and an essential quality of it is that it should shew that such form of proceeding is available to him. I will quote Mr. Chitty's description of it (40): "Whenever the subject-matter of the plea or defence is, that the plaintiff cannot maintain any action at any time whether present or future in respect of the sup-

posed cause of action, it may, and usually must, be pleaded in bar; but matter which merely defeats the present proceeding and does not shew that the plaintiff is for ever concluded, should in general be pleaded in abatement (from the French *abattre*). The criterion or leading distinction between a plea in abatement and a plea in bar is, that the former must not only point out the plaintiff's error, but must shew him how it may be corrected, and furnish him with materials for avoiding the same mistake in another suit in regard to the same cause of action, or in technical language, 'must give the plaintiff a better writ.'"

By such a plea, therefore, either of the two joint contractors being sued alone, might insist upon the plaintiff bringing his action against both. But it is obvious that this right can only be exercised, on the part of both, by him who is first sued. If one of the two allows his liability to be enforced in a separate action, it is too late afterwards for the other, if sued, to plead in abatement, for he cannot give the plaintiff a better writ.

The conduct of his co-contractor in permitting the plaintiff to go on to judgment against him alone, has rendered a joint action against the two impossible. The plaintiff has no longer a joint promise upon which to sue the two; the promise of one having passed into *res judicata*. The technical grounds, therefore, upon which the decision in *King v. Hoare* (21) is based appear to me to be insufficient and unsatisfactory.

When the Judges of the Queen's Bench, in the case of *Rice v. Shute* (3), under the guidance of Lord Mansfield, determined that a joint promise of several might give rise to a separate action against one only, contrary to the rule of law previously established that it could not do so (a rule which he said had led to "many nonsuits, much vexation, and great hindrance to justice"), they destroyed the basis upon which the Court in *King v. Hoare* (21) built the decision, namely, that the second action was brought for the same cause of action as the first.

Passing from mere technical views, and regarding this rule of procedure in

(40) 1 *Chitty on Pleadings* (7th ed.), p. 462.

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the light of convenience and fitness to promote the ends of justice, there is still less to be said for it. For it is to be observed, that the rule is unbending and indiscriminate. No exception is permissible under it for a case in which one or more of several partners may be abroad, in which case the plaintiff must either wait to bring his action until they are all within the jurisdiction, or bring his action at once, at the cost of losing the responsibility of those who are out of the country. Nor is any exception possible for a case like the present; in which the plaintiff could not possibly sue all the partners at once, being ignorant that the defendant was one of them. In the first case the rule impedes and obstructs justice, and in the second, denies it altogether.

No doubt rules of procedure must be framed on general considerations, though they may work hardships in individual cases, and when a rule is once established, those who practise the law must be assumed to be aware of it, and frame their proceedings accordingly; but then the rule ought to be such that it can be acted on, and a rule that on a joint promise all partners must be sued jointly cannot be acted upon by one who does not know the existence of some of the parties liable, and so becomes a mere trap and pitfall which the creditor has no means of escaping.

But I must now advert to the Judicature Act. Assuming that the case of *King v. Hoare* (21) was well decided in the then state of the law—a time when the defeat of just rights by non-joinder or misjoinder of parties, defects of pleading, and the non-observance of technical rules, was a matter of daily occurrence—a farther and most important question, in the present action, appears to me to be this: whether since the passing of the Judicature Act, and in a proceeding taken under that Act, such a defence as the present can be maintained. Every provision and every line of that Act prove it to have been based upon the broad principle of making forms rules and modes of procedure subordinate to the prime and paramount object of reaching the justice of the case, and I should be surprised to

find that a doctrine so wholly foreign in its spirit and objects as that upheld by the case of *King v. Hoare* (21) had survived the sweeping changes in procedure which the Judicature Act introduced. I think I can shew that it has not done so.

That Act abolished all the old forms of action; it abolished all the old technical forms of procedure, and established a new procedure for the enforcement indiscriminately of both legal and equitable rights, which is independent of all the old rules of law on that subject. Particularly it did away with all objections and defences arising out of the misjoinder or non-joinder of parties, either plaintiff or defendant. Since that Act no such thing as a plea in abatement is possible. The non-joinder of any party under any circumstances has ceased to be an answer, objection or defence to the action. In such a case the action goes on, and “the Court or a Judge may on such terms as appear to be just, order that the name of any party who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, shall be added.” This is the language of the rule 9 on procedure in the first schedule to the Act of 1873.

Now these provisions appear to me to have entirely altered the rights of joint contractors in respect of procedure. They have no longer any absolute right to insist that they should be sued together or not at all. The creditor may bring and pursue his action against one or more of them, and if the defendants desire that others should be joined, they must apply to a Judge, who will hear what is to be said on both sides and decide that additional parties shall, or shall not, be joined according to the requirements of justice, and not according to the election of the defendants, or any imperative rule that all who jointly contracted must be jointly sued.

The joint contractor having thus lost the right (for it was a right, and an absolute one, though only a right of procedure) to be sued only in conjunction with



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his co-contractor, he can no longer be heard to maintain either that his co-contractor must be sued with him, or that, it being impossible so to sue him by reason of his having been sued already, he is himself discharged. The necessary connexion in matters of procedure which the law before the Act had established (as Lord Mansfield said "for convenience") between the joint contractors, and had enforced by the plea in abatement, is now by the Act severed and put an end to.

When the plea in abatement was swept away the legal right of a joint contractor to have the other joint contractor joined in any action brought upon the joint promise was swept away too, and the creditor became entitled to sue the parties severally, subject no longer to the will of the defendant, but to the discretion of the Court exercised for the furtherance of justice.

And this again cuts the ground from under the doctrine of *King v. Hoare* (21), in which case Parke, B., laid great stress upon the argument that if after the first action the defendant could not plead in abatement, "he would be deprived of a right by the act of the plaintiff without his privity or concurrence in suing and obtaining judgment against the other."

Upon the whole, then, it seems to me that the right of persons making a joint promise to be sued jointly, first broken in upon by Lord Mansfield in *Rice v. Shute* (3), when he allowed an action to be maintained against one only of several joint contractors, was finally put an end to by the Judicature Act when the right to plead in abatement was withdrawn from them; and that the question properly arising in this case may be shortly dealt with as follows: The plaintiff sues for a debt which the defendant, originally at least, must be held to have owed him. The defendant answers that the debt was due from him jointly with others, and not otherwise, that the plaintiff's only right is to sue him jointly with the others—that he cannot sue the others now, having already done so, and that he has then lost the only right of action he ever had. The answer to this is simple. Since the Judicature Act it is not true

that the plaintiff's only right is to sue the defendant jointly with the others.

I will not occupy your Lordships' time farther on the proper view to be taken in regard to the authorities in equity. I willingly adopt the opinions of the Lord Chancellor and others of your Lordships much more competent than I am to read those decisions aright, but for the reasons which I have given, I think that the judgment of the Court below ought to be reversed, and the plaintiff have judgment for his debt in this action.

LORD O'HAGAN.—I have had the opportunity of reading and considering the opinion which has been delivered by my noble and learned friend on the woolsack in this case, and I concur generally with the views he has expressed and the reasons by which he has sustained them.

There is no question of fact in the case, and in the argument at the bar it seemed to be conceded that unless the doctrines of a Court of Equity intervene to establish that the defendant Hamilton and his co-partners, McLay and Wilson, may be dealt with as joint and several debtors, and not as joint debtors only, the appeal must be dismissed.

The plaintiffs obtained judgment against Wilson & McLay, whom they sued as their sole debtors, in ignorance that Hamilton was a partner, and, therefore, responsible for the payment of the debt, and it was asserted that the judgment so obtained was, at law, a bar to the suit against him, on the ground that the original cause of action had thereby passed *in rem judicatam*, and could not be the foundation of any further proceeding. Unless your Lordships are prepared to overrule the decision in the case of *King v. Hoare* (21), the proposition cannot be disputed. That decision is clear upon the point, and it has been followed in a number of cases, and generally recognised by Courts of Law in accordance with the statement of Parke, B., that "the cause of action is changed into matter of record which is of a higher nature, and the inferior remedy is merged in the higher," and that the judgment bars it, "because it is thereby reduced to a certainty, and the object of the suit attained so far as it can be at

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that stage, and it would be useless and vexatious to subject the defendant to another suit for the purpose of attaining the same result."

I do not deem it necessary to go further into a consideration of the grounds of decision. They are stated in the judgment of the Court of Exchequer, and have been sufficiently explained by my noble and learned friends. On those grounds it seems to me sustainable, as well as on a view of the right which a joint debtor has to be sued with others, upon a promise made by him jointly with them, his relations with whom may be injuriously affected, if, a judgment having been obtained for the same cause of action, he cannot have the advantage which might otherwise have accrued to him for the purposes of contribution and account, and the establishment of joint-responsibility.

The question is one of procedure, and the rule may operate harshly in conceivable circumstances. But it has been justified from the desirableness of preventing repeated litigation for the same cause, and maintaining the claim of the debtor to have any such benefit as may accrue to him if, his liability being joint, he is required to answer jointly.

In this case the merits are certainly not with the defendant, but it is to be noted that the plaintiffs have had the opportunity of enforcing their demand against the persons with whom they meant to contract, and on whose credit only they made the sale and delivery of their goods. And I am afraid that rules of procedure (adopted because they are convenient and effective generally for assisting in the rightful administration of justice), from the imperfection of human tribunals will sometimes, in particular instances, be found to defeat equitable claims. But, be the merits as they may, I do not see sufficient reason for overruling a well considered judgment, sustained as it is by such considerations and such a series of authorities, and not assailed at the bar as far as I remember, by any argument or suggestion on behalf of the appellants. As regards the operation of the principle recognised by the case of *King v. Hoare* (21), it does not

seem to me, reserving the consideration of the effect to be given to the doctrine of equity on the joint and several liability of contractors, that the Judicature Act meddles with that principle. The procedure is changed. The plea in abatement is abolished. The Court is required to intervene where the parties to the action were formerly obliged to plead, but it does not seem to follow that the change in the machinery of enforcement alters the rights to be enforced, or takes from the joint contractor any privilege which formerly belonged to him. It may be guarded in a different way, but I do not think it is abrogated by any express proviso or any necessary implication. It is clear, however, that the doctrine of *King v. Hoare* (21) is not applicable if the debt sued for be joint and several, and the real contention of the appellants has been that, although at law the contract in the case was joint, inasmuch as equity would have dealt with it before the passing of the Judicature Acts, as joint and several, the appellants are entitled, under the 24th section of the Act of 1873, to the same relief as would have been given to them by the Court of Chancery in a suit or proceeding instituted there.

Now in the first place, in ordinary cases, and unless in exceptional circumstances, a deviation from ordinary principles of construction has been allowed, a contract is construed in the same way by a Court of Equity and by a Court of Law, and it lies upon those who seek such a deviation to produce authority which may clearly justify it. The presumption is the other way. Here the contract at law was confessedly joint. The burthen of shewing that, in equity, it was joint and several, lies upon the appellants.

It is conceded that the precise contention which grounds the argument has never been sustained in the exact circumstances to which it is now applied. In another state of facts, and as between parties having other relations than those of the plaintiffs and defendants, Courts of Equity have, not without difficulty and hesitation, dealt with a contract, joint at law, as joint and several. But if the distinction so established in a particular

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case was meant to apply not merely to it but generally to all cases, it seems scarcely conceivable that the point should not have heretofore arisen, for it must have often been the interest of suitors to avoid, by a recourse to equity, the embarrassments created by legal strictness as to joint contracts and their incidents.

A great many cases have been cited to your Lordships in which *dicta* of learned Judges are embodied, and successive text-books seem to represent without limit or qualification, that the debts of co-partners are in equity joint and several. And if those *dicta* are to be taken without reference to the subject matters to which they apply, they would undoubtedly countenance the contention of the appellants. But, as has been made very clear by my noble and learned friends, they have been in fact applied merely in cases of the administration of the assets of partners who have died. In those cases only has effect been given to them for the purpose apparently of making the administration more full and equitable than it could have been if the debt had been held good, without a provision for the proportional discharge of liabilities out of the estate of the deceased in reciprocity with its claims on the estate of the survivors. James, L.J., explains succinctly the equitable rule as to partnership contracts—"So far as regards partners when there is in equity no survivorship of property there is in equity no survivorship of liability."

The reason of the rule, as far as it is ascertainable, has already been discussed. It is well explained in the passage from Lord Eldon, which has been cited by my noble and learned friend on the woolsack, and needs no farther exposition. It is notable that Lord Eldon himself (*Ex parte Kendall* (6)) expressed his surprise that "where parties think proper to enter into a joint instead of a joint and several contract, Courts of Equity have not left that to its fate as a joint contract." He admits the force of the authorities deciding "that there is a remedy against the assets of one deceased if the survivor cannot pay," but he admits it with apparent reluctance.

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He repeats, in the same case, referring to a doubt of Lord Thurlow upon the point, the expression of his own surprise "that a Court of Equity should have interposed to enlarge the effect of a legal contract." And, again, he carefully confines the enlargement as warranting only "resort to the assets of a deceased debtor." I see no valid ground for extending it further, and no sufficient reason for holding, according to the contention of the appellants, that in equity, all partnership contracts are, in all circumstances and for all purposes, joint and several. I think that Cotton, L.J., correctly states the result of the cases; and that the effect of the judgment at law against Wilson & McLay is not done away by any equitable principle.

I have not adverted to the peculiar view presented to this House by my noble and learned friend on the woolsack. It has originated with him, and was not suggested or discussed in the course of the argument. The House could scarcely act upon it, as against the appellants, without affording to their counsel the opportunity of considering, and, if possible, encountering it. I base my opinion, therefore, on the conclusions to which I have arrived with reference to the points mooted at the bar. I shall only say that, at present, I am disposed to concur with the Lord Chancellor, although the same objection as to the evil of giving procedure the effect of defeating a fair demand would apply as much to the result of his opinion as to the decision in *King v. Hoare* (21).

On the whole, for the reasons I have given, I think the appeal must be dismissed.

**LORD SELBORNE.**—The argument of the appellants was chiefly, if not wholly, founded upon the course of the Court of Chancery in the administration of the assets of a deceased person, who has been a partner in a trading firm, and upon the language held by several Judges of high authority with respect to the equitable position of partnership creditors.

If that language were found to be technically exact, when tested by the

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practice of Courts of Equity, upon all occasions where the rights of partnership creditors have come in question, it might (perhaps) be a sound conclusion that its principle ought to be extended to such a case as the present, though no precedent directly in point has been produced. But the fact is otherwise. If every debt of a trading partnership were regarded in equity as, from its commencement, joint and several, in the proper sense of those words, there could be no reason why in bankruptcy where equitable are regarded as much as legal rights, it should not have been treated in the same way as any other joint and several debts, nor why Lord Eldon should have made such a decree as he did in the case of *Gray v. Chiswell* (5). Nor do I think it possible that if, in equity, a separate debt due from a creditor of a firm to one of the partners could be set off against the debt of the firm, there would not have been ample authority for that proposition.

If no rule had been established in equity, giving partnership creditors a remedy against the assets of a deceased partner, it would have seemed clear, on principle, that in all these cases, when there was no mistake to be rectified in any written instrument, the legal contract between the creditor and the debtors was the only contract, and that its construction must be the same in equity as at law.

I conclude, therefore, that those expressions of eminent Judges in which partnership debts have been spoken of as, in equity, joint and several, were not meant by them to be understood in the proper and technical sense of those words; and that they cannot safely be used to establish any rule or principle extending beyond those limits within which Courts of Equity have hitherto given, to creditors of a partnership, remedies which they could not have obtained at law.

It is undoubtedly true that the remedy which a Court of Equity gives to a partnership creditor, in the administration of the assets of a deceased partner, has the effect of preserving to him the liability of an estate which, by the survivorship of the co-debtor or co-debtors, has at law become exonerated. Great Judges, such

as Lord Eldon and Lord Thurlow, have felt difficulty in referring this course of practice to any very clear or satisfactory principle. It has been said to depend upon, or to arise out of, the adjustment of the rights and liabilities of the deceased and the surviving partners *inter se*; but this explanation does not, to my mind, remedy the difficulty, because, upon that principle, it would seem that the creditors ought to be limited, in each particular case, by the extent of the rightful claims of the surviving partners upon the deceased partner, and to be wholly excluded if the state of the accounts between them were such as to make it just to leave the whole liability where the law had cast it, namely, upon the surviving partners. The actual course of administration (subject to the distinction between a personal action and proof against assets) has been to give the creditor as large and unqualified a remedy against the estate of the deceased partner, as he would have had by action at law in his lifetime. There is (as it seems to me) only one really consistent explanation of this course of practice, when taken in connexion with the rule in bankruptcy, and with the general principles of law and equity, namely, that derived from the doctrine "*jus accrescendi inter mercatores locum non habet*." As in several other well-known classes of cases (of which mortgages and security bonds, with penalties, may be taken as examples), equity controls the operation of a legal contract so as to give effect to the purposes and objects to which it was meant to be subsidiary, so in these partnership cases it controls *inter mercatores* the legal effect of survivorship. If that is the principle of the rule, it is one which arises upon death only. The partnership is dissolved by death; but in equity it is taken as still subsisting for every purpose of liquidation, just as if it had been dissolved *inter vivos*, and the creditors are taken as still creditors of that partnership. What was before joint thus becomes several by the dissolution, and by the exclusion in equity of the survivorship which takes effect in law; and although, when this rule was first established, it might well have been doubted

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whether it did not give creditors rights for which they had never contracted, there could be no doubt, after it had once become a settled rule, that the rights resulting from it were necessarily implied in all subsequent onerous contracts by co-partners. For this purpose (and, as it seems to me, for this purpose only, and only by the operation of death) all such contracts may be described, as in equity, joint and several.

My conclusion is that in the present case there is no equity upon which the appellants can be entitled to be relieved from the legal effect of the judgment obtained by them against Wilson, McLay & Co., if (as the equitable argument assumes) that judgment had the effect of extinguishing in the lifetime of all the partners the legal liability of the respondent as a partner for the debt previously due from the partnership of which he was a member. There is no question here of *jus accrescendi*; the question relates simply to the constitution of the appellants' debt. Before the action it was a joint debt; but by the result of the action (if the decision in *King v. Hoare* (21) is right, and is applicable to this case), it became the separate debt of Wilson, McLay & Co. only. If the joint debt, for which alone the respondent was ever liable, was merged and extinguished at law by this judgment (on which the respondent is clearly not liable, either at law or in equity), it seems to me to be impossible that equity should, on that ground, raise or imply against him, out of the original contract, a separate liability to the appellants from which he is free at law, whatever may be the rights by way of contribution, indemnity or otherwise, which Wilson, McLay & Co. may possess against him in respect of this judgment.

Upon the legal question, I understand it to be the opinion of all your Lordships, that a second action cannot be maintained upon a cause of action which has once passed in *rem judicatam*, and that this principle is not affected by any of the changes of procedure introduced by the Judicature Acts. What I understand to be the view of my noble and learned friend opposite (Lord Penzance), is, that the cause of action, in this case, is not the

same with that on which the judgment against Wilson, McLay & Co. was obtained. Apart from authority, I should myself have thought it clear that, if the contract was joint only, the cause of action was the same. The rule established in *Rice v. Shute* (3), on whatever principle it may have been founded, was, I suppose, applicable to all cases of actions against one (or less than all) of several joint contractors; and not only to partnership cases. Unless, therefore, that rule justifies the conclusion that all joint contracts are in law several, as well as joint, until survivorship takes place by the death of one of the contractors, I cannot see how it tends to prove that there are, in such cases, more causes of action than one upon the same contract. If that conclusion were sound, it is by no means clear to my mind, that even a plea in abatement ought to have been allowed, nor can I imagine any reason why the same principle should not equally hold in the converse case, of an action brought by one of several persons with whom, jointly, a contract has been made; in which case (whatever may have been the ground of the distinction) the rule has been that a plea of abatement was not necessary; but that it was sufficient to make the defence of joint contract available, if the facts came out in evidence.

I, therefore, agree with my noble and learned friend on the woolsack, that the appeal in this case ought to be dismissed; but I have preferred to rest my own judgment upon that view of the facts of the case which was taken by the counsel on both sides and in Courts below.

LORD BLACKBURN.—In this case the plaintiffs entered into transactions with the firm of Wilson, McLay & Co., then consisting of two persons — Matthew Wilson and Joseph Corrie Shutters McLay. They, at the request of that firm, and in consequence of contracts made with that firm, accepted bills and entered into other transactions, the result of which was that a large sum was owing to the plaintiffs for which they might have maintained an action for money lent against those two persons.

The plaintiffs did not, at the time when

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they entered into the contracts which resulted in this cause of action, know that any other person was interested in the contracts; they dealt with Wilson & McLay, and with them alone, and gave credit to them alone. But afterwards (in the view which I take of the case, it is immaterial when) the plaintiffs discovered that the defendant Hamilton had agreed to share with Wilson, McLay & Co. in certain adventures which would require the advance of money, and that "the financial arrangements should be managed" by Wilson & McLay.

This amounted to an authority to Wilson & McLay to borrow money for the joint account of Wilson, McLay and Hamilton, who were the undisclosed principals of Wilson & McLay in the contract of loan. And it is, I think, now firmly established at law that a person entering into a contract with one to whom, and to whom alone he trusted, may, on discovering that the contractor really had a principal, though he neither trusted to him nor gave credit to him, nor even knew of his existence, charge that principal, unless something has happened to prevent his doing so. He is not bound to do so. In the present case Wilson & McLay could not, if sued before the Judicature Acts, have pleaded in abatement the non-joinder of Hamilton; nor if Wilson & McLay had sued the plaintiffs could they have resisted a set-off of the money lent to them, on the ground that in borrowing it they were agents for a concealed principal.

I will first consider how this case would have stood at law before the Judicature Acts, and then inquire what difference these Acts make. I take it, for the reasons I have given, to be clear that, under such circumstances as exist in the present case, the now plaintiffs might have maintained an action for money lent against Hamilton, on the ground that he, jointly with Wilson and McLay, being undisclosed principals to Wilson & McLay, was, as such, liable to the plaintiffs. But the facts are such that Hamilton could have proved a plea that the contract on which he was sued, was made by the plaintiffs with the defendant, and Wilson and McLay jointly, and not with the defendant alone, and that the plaintiffs,

before action, had recovered judgment against Wilson and McLay for the same loan upon the same contract. And then the question would have arisen, whether a judgment recovered against one or more of several joint contractors was (without satisfaction) a bar to an action against another joint contractor sued alone. The decision in *King v. Hoare* (21) was that it is a bar.

I have already said that, in my view of the matter, it was immaterial when the plaintiffs first discovered that they had a right to have this recourse against Hamilton, which they had never bargained for, and which was to them a piece of pure good luck. If the principle on which *King v. Hoare* (21) was decided had been that, by suing some he had elected to take them as his debtors to the exclusion of those whom he had not joined in the action, it would be material; for I assent to the argument that there cannot be election until there is knowledge of the right to elect. But *King v. Hoare* (21) proceeded on the ground that the judgment being for the same cause of action, that cause of action was gone. *Transivit in rem judicatam*, which was a bar, partly on positive decision, and partly on the ground of public policy, that there should be an end of litigation, and that there should not be a vexatious succession of suits for the same cause of action. The basis of the judgment was that an action against one on a joint contract was an action on the same cause of action as that in an action against another of the joint contractors, or in an action against all the joint contractors on the same contract.

From very early times it was the law that a contract was an entire thing, and that, therefore, all who were parties to the contract must, if alive, join as plaintiffs and must be joined as defendants. If this was not done there must be a plea in abatement (*Com. Dig. Abatement, E. 12. F. 8*). That very learned lawyer cites 7 Hen. 4. 6 and 20 Hen. 6. 11, as authorities for this, and probably earlier authorities might be found, but I think it unnecessary to search for them, as it has never, as far as I know, been doubted that the defendant might plead the non-

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joinder of his joint contractors in abatement, and in that way compel the plaintiff to join as defendants all who were parties to the joint contract and were still alive. But there was long a controversy as to whether the plea in abatement was the only way in which the objection could be raised. If on the evidence it was proved that the contract was joint, it was thought that there was a variance between the proof of a joint contract with the parties to the action, and some one not a party to the action and still alive, and the allegation in the declaration which, it was thought, must be taken to be an allegation of a contract between the parties to the action and no others, and consequently that there should be a nonsuit or verdict for the defendant on the ground of variance. This, it has now been settled, is the law in cases where the objection is the non-joinder of a plaintiff, and consequently the non-joinder of a co-contractor as plaintiff was never in modern times pleaded in abatement. And it was long thought by many that the same course was open to a defendant. Such was the decision of Lord Holt and the Court of King's Bench in *Boson v. Sandford* (41). I need hardly point out that if this had been still followed as law, it would have made it clear that the cause of action against the one was the same as that against all; or rather that there was no cause of action at all against the one alone, and never could be judgment against one alone; and so the point could never have risen. But it was established by a series of cases, which may be found collected in Serjeant Williams' note to *Cabell v. Vaughan* (42), that though all the joint contractors must be joined as co-defendants, the only way of taking advantage of the non-joinder was by a plea in abatement. The first case, in which I find this decided, was *Rice v. Shute* (3). The last in which I find it controverted, though unsuccessfully, was *Evans v. Lewis* (43), in 1794. But though the mode of enforcing the joinder of all was thus cut down, it still

remained the law that all ought to be joined. And consequently I cannot doubt that the Judges in *King v. Hoare* (21) were accurate in holding that the two actions were upon the same cause of action. I cannot agree in what seems to be the opinion of the noble and learned Lord on my left (Lord Penzance) that the Judicature Act has taken away the right of the joint contractors to have the other joint contractors joined as defendants, or made it a mere matter of discretion in the Court to permit it. With great deference I think that the right remains, though the mode of enforcing it is changed.

I do not think the defence a meritorious one; but I think in the present case there is no great hardship. The plaintiffs had a right of recourse against Hamilton, for which they never bargained; but they did nothing inequitable in taking advantage of that which the law gave them. They have destroyed that remedy by taking a judgment against persons who turn out to be insolvent. I do not see that Hamilton does anything inequitable in taking advantage of the defence which the law gives him. The plaintiffs got a right by operation of law, without any merits of their own, by what, as far as regards them, was pure good luck. They have lost it by what was no fault of theirs, but was, so far as they were concerned, pure bad luck. If the plaintiffs were willing to take advantage of their good luck against the defendant, it seems no hardship that he should take advantage of their bad luck against them.

But in such a case as *King v. Hoare* (21), where the plaintiff had contracted with the provisional committee of a company, and consequently was very uncertain how many were joint contractors, it did operate harshly. He dared not join many in the first action, for, as the law then stood, if he failed as to any one he failed as to all; and it does seem hard that a judgment obtained under such circumstances against one should be without satisfaction a bar as to all the others. This hardship is very much removed by the provisions of the existing law, by which the plaintiff recovers judgment against those whom

(41) 2 Salk. 440.

(42) 1 Wms. Saund. 290a.

(43) 1 Wms. Saund. 291d.

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he proves to be his debtors, though he has joined others as defendants; he has only to pay the costs of those improperly joined. But I think that the hardness of the law, even if it exist, is a reason for altering it, not for refusing to act upon it; and I think no doubt has ever been expressed, unless perhaps in *Ex parte Waterfall* (31), that *King v. Hoare* (21) does truly state the law as it existed before the Judicature Acts, and it was not doubted in the Courts below, or I think seriously questioned at the bar, that it did so.

But since the Judicature Act, 1873, s. 24, Law and Equity are to be concurrently administered. And therefore if before the passing of those Acts the plaintiffs could have sued in Equity on these facts, or if they could have successfully applied for an injunction to prevent the defendant from pleading this defence, they may raise the same point in this suit in the Common Pleas Division. But the Judicature Acts do not create any equity applicable to this case which did not exist before. They only enable the Court to administer the equities already existing without the delay and expense formerly required.

On the first argument at your Lordships' bar, Mr. Rigby, in a very excellent argument, convinced me that in cases of joint contracts there was no difference between law and equity, except in the single case of the death of one of the parties to a joint contract, where the contract was such that the maxim *inter mercatores jus accrescendi locum non habet* applied; but I was diffident of my opinion on a question of such pure, and I might say, technical equity; and was therefore very willing that the case should be re-argued.

I have now heard the opinion of the noble and learned Lords who are conversant with the proceedings in the Courts of Equity, and have no diffidence in saying that I am of the same opinion.

LORD GORDON.—This case is attended with very much difficulty, as is evinced by the difference of opinion expressed amongst your Lordships. I have given it my most careful consideration with the

advantage I have derived from a perusal of the judgments which have been delivered by your Lordships, and I have come to the conclusion that the judgment of the Court of Appeal was right, and should be affirmed.

*Judgment appealed against affirmed,  
and appeal dismissed with costs.*

Solicitors—Freshfields & Williams, for appellants;  
John W. Sykes, for respondent.

[IN THE COMMON PLEAS DIVISION.]

1879. } DE BRUCHY V. WILLS AND  
June 19. } WIFE.

*Baron and Feme—Ante-nuptial Debt—Conflict of Laws—Lex Loci contractus—Married Woman's Property Act, 1874 (37 & 38 Vict. c. 50).*

*By the law of Jersey the husband is liable for the ante-nuptial debts of his wife, while by the law of England (Married Woman's Property Act, 1874) the husband is not liable for the ante-nuptial debts of his wife, except to the extent of certain assets derived from her and specified in section 5 of that Act.*

*The defendant and his wife were sued in England for a debt which had been contracted by the wife before marriage. The debt was for goods sold in Jersey to the wife while a feme sole residing there; she subsequently had come to England, and there married the defendant, an Englishman. At the time of the marriage, the Married Woman's Property Act, 1874, was in force. There were, however, no assets derived from the wife for which the husband could be rendered liable within section 5:—*

*Held, that the husband was not liable.*

Appeal by motion under the County Courts Act, 1875 (38 & 39 Vict. c. 50), s. 6, from the County Court of Hertford, held at Watford.

The plaintiffs, a firm carrying on the business of drapers and bankers at St. Heliers, in Jersey, sued the defendant and his wife for drapery goods supplied



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to the wife in Jersey before her marriage. The female defendant, then Miss Deane, was, previous to the 31st of October, 1875, residing in Jersey, and at that date was indebted to the plaintiffs for drapery goods supplied to the extent of 23l. (1). On the 31st of October, 1875, Miss Deane came to England, and on the 1st of December, 1875, she was married to the defendant, and since then and up to the time of action brought resided with her husband at Harrow, in the county of Middlesex. The plaintiffs took out a plaint against the defendant and his wife in the County Court of Hertford holden at Watford; Mr. Bertram, an advocate of the Royal Court of Jersey, was called as a witness and gave evidence, that by the law of Jersey the husband is responsible for the debts of his wife contracted before marriage. It was also shewn that by her marriage settlement Miss Deane had some interest in land in Ireland, expectant on the death of her father. The County Court Judge nonsuited the plaintiffs.

The plaintiffs moved the Divisional Court sitting as a Court of Appeal from inferior Courts and obtained a rule nisi to set aside the nonsuit and enter judgment for the plaintiffs or for a new trial on the ground that the decision of the County Court Judge was erroneous in point of law.

*Broadmead* shewed cause.—By the law of Jersey the husband is liable for the ante-nuptial debts of his wife, but by the Married Woman's Property Act, 1874, the husband is not liable for ante-nuptial debts of the wife except to the extent of the assets mentioned in section 5 (2). There was no evidence of such assets, and the question is whether the husband is to be made liable notwithstanding the English law.

(1) There was some dispute as to whether the goods were supplied to Miss Deane or to her sister, or to her jointly with her two younger sisters who were then with her, and dealt with the plaintiffs. The County Court Judge seems to have nonsuited the plaintiff on the ground that the contract was not proved, but it will be seen that the judgment of the Court proceeded on the ground that the husband could not be made liable.

The Court here called on

*Lamaison* in support of the rule. The Married Woman's Property Act, 1874, does not apply to Jersey, and that island is not bound by common Acts of our Parliaments, unless particularly named—1 *Blackstone's Commentaries on the Laws of England*, 106. By the law of Jersey the husband is liable for the ante-nuptial debts of the wife, and the contract is governed by the *lex loci*. It is the mode of suing and the time within which the action must be brought which must be governed by the law of the country where the action is brought. See per Tindal, J., in *Trinby v. Vignier* (3). The husband must be joined—*Hancocks v. Lablache* (4). The cause of action is the debt, and the marriage is merely a fact in the case. Evidence was given of assets of the wife for which the husband would be liable within section 5, and no evidence was given to displace it.

GROVE, J.—I am of opinion the judgment of nonsuit was right, and should be affirmed. The goods were supplied to the female defendant while she was a *feme sole* residing in Jersey. She afterwards came to England and married an Englishman. By the law of Jersey the husband is liable for ante-nuptial debts of the wife, but by the Married Woman's Property Act, 1874 (37 & 38 Vict. c. 53), which was in force at the time the marriage took place, the husband is not liable for ante-nuptial debts of the wife except to the extent of certain assets derived from her, which are specified in section 5.

The only evidence of any such assets was that there was a marriage settlement by which the wife has property in Ireland expectant on the death of her father,

(2) 37 & 38 Vict. c. 50. s. 2. "The husband shall in any action brought for damages sustained by reason of any tort committed by the wife before marriage or by reason of the breach of any contract made by the wife before marriage, be liable for the debt or damages respectively to the extent only of the assets hereinafter specified."

Section 5 specifies the assets (of the wife) to the extent of which the husband shall be liable.

(3) 1 Bing. N.O. 151.

(4) 47 Law J. Rep. C.P. 514; s. c. Law Rep. 3 C.P. D. 197.

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but it does not appear how this property came to be settled. It is of the vaguest nature and there is no evidence to shew what it is. Under these circumstances I do not think there was evidence of any such assets sufficient to bring her husband within section 5 of the Act.

We must first consider whether the contract to supply the goods was valid as against the female defendant originally, namely, whether the goods were ordered on her credit. There was some evidence to shew the goods were ordered for her sister, and it might be doubtful whether the goods were ordered for her or the sister or both jointly, and had the verdict been given for the plaintiff we should have sent the case back to ascertain this fact. As it is I shall assume the contract to have been with the female defendant.

The question then arises, can the husband in the present case be held to be liable for the ante-nuptial debt of his wife? As far as I understand the law he cannot. The Courts of this country in examining into a contract test its validity by the *lex loci contractus*, on the ground that the parties making the contract submit themselves to the law of the country in which the contract is made. Public policy enjoins this. *Prima facie* the female defendant was bound by the contract, and had she been sued in this country while a *feme sole* the validity of the contract would have been tested by the *lex loci contractus*.

If then the female defendant is liable in Jersey, and possibly liable in England while a *feme sole*, can that liability be transferred to a husband who is not liable to the Jersey law? I am of opinion the liability cannot be so transferred; if it could, then would follow this extraordinary result, that when a wife contracts debts in Jersey she would carry her liability with her, so to speak, in her blood, and inflict it on a husband she marries in England. It is not within the reason of the doctrine of *lex loci contractus*. The husband is no party to the contract, and he has no possibility of repudiating it. If a man marries a woman in England he knows his liabilities. So if he marries in Jersey he must be presumed to know the law of Jersey, but

how can the Englishman who marries in England be presumed to know the law of a foreign country affecting the woman he marries? I can find no case in the books by which a person who was no party or privy to the contract can be made liable by the *lex loci contractus*. I find that although the *lex loci contractus* is the law by which the contract is to be mainly tested, yet it is by no means a law by which all the incidents of the contract are to be governed. I find several cases which shew that the doctrine is to be applied to the validity of a contract, and not to all its incidents. In *Edmonstone v. Lockhart* (5) the law is thus laid down by Lord Robertson. At p. 396, he says:—"The regard which is paid to the *lex loci contractus* does not arise from any blind deference to the law of a foreign country, but is founded on the legal presumption that the parties had in view the law of the country where the contract was executed, and intended to bind themselves accordingly." Applying that test, how can it be said that the husband in the present case was a party who had in view the law of the country where the contract was executed, and intended to bind himself accordingly? He cannot be presumed to know the law of Jersey.

There are also many authorities to shew that though the validity of a contract is to be tested by the *lex loci contractus*, yet it by no means follows that all the incidents follow where those incidents are different in the country where the contract is sought to be enforced. I find this general proposition laid down by various authorities, and by Hallam, Kent and Story. In *Wheaton's International Law*, 2nd edit. part 2, chap. 2, p. 179, after stating that "a contract valid by the law of the place where it is made is, generally speaking, valid everywhere else," the author goes on to say that this doctrine "cannot apply to cases properly governed by the *lex loci rei sitæ*," or "where it would injuriously conflict with the laws of another state relating to its police, its public health,

(5) Ferguson's Reports in the Consistorial Court of Scotland.

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its commerce, its revenue and generally its sovereign authority and the rights and interests of its citizens." "Thus if goods are sold in a place where they are not prohibited, to be delivered in a place where they are prohibited, although the trade is perfectly lawful by the *lex loci contractus*, the price cannot be recovered in the state where the goods are deliverable, because to enforce the contract there would be to sanction a breach of its own commercial laws." [His Lordship also cited *Story's Conflict of Laws*, section 112, and *Huberus de Conflictu Legum*, lib. 1. tit. iii. section 9.] It follows, therefore, that though the law of Jersey follows the present contract, it does not govern the action brought in England so as to make the husband liable. It would be unjust if it were so. In my opinion, therefore, the nonsuit should be affirmed.

LOPES, J.—This case raises a point on which there is no direct authority. According to the laws of Jersey the husband is liable for the ante-nuptial debts of his wife, while according to the Married Woman's Property Act, 1874, the husband is not liable for the ante-nuptial debts of the wife except to the extent of assets mentioned in section 5. This is a transitory action and in adjudicating on such actions the Courts of this country are governed by the law of the country with reference to which the debt was contracted. The rule has been laid down that the *lex loci contractus* governs the contract and not the remedy. I do not hesitate to say—there being a cause of action against the wife at the time of marriage—I have had doubts whether the husband was not liable by relationship back. Had the marriage taken place in Jersey he would, I take it, have been beyond all question liable, the Jersey law would have attached. But as a matter of fact the marriage was in England and to an Englishman, and on the whole I am inclined to think that the incidents attaching to the marriage were the incidents of the English law, and one of these incidents is that the husband is not liable for the ante-nuptial debts of his wife except to the extent of assets specified in section 5 of the Married Woman's Property Act, 1874.

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I agree with my brother Grove that there was no satisfactory evidence given in this case of any assets coming to the husband within section 5. On the whole, therefore, I am of opinion that the judgment of nonsuit was right.

*Judgment for the defendant.*

Solicitors — Saunders, Hawksford & Bennett, agents for F. Hawksford, Jersey, for plaintiff; Walker, Martineau & Co., agents for G. Annesley, St. Albans, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1879. }  
June 27. } THE QUEEN v. SIR CHARLES REED.

*Elementary Education Acts—33 & 34 Vict. c. 75. secs. 53, 54, 57—36 & 37 Vict. c. 86. s. 10—General Expenses of School Board—Power of Board to borrow for Temporary Purposes—Deficiency of School Fund.*

*A school board is entitled to borrow money to defray general current expenses, when the school fund is deficient: such loan being temporary in its character, and to be paid off out of the next rate levied. Interest on such a loan is properly a charge to be allowed in the accounts of the School Board for the half-year in which the deficiency has occurred.*

This was a rule calling on the auditor of the Metropolitan District to shew cause why a writ of *certiorari* should not issue, to bring up the surcharge by him of a sum of 83l. 11s. 2d. upon Sir Charles Reed, the chairman of the School Board for London, that sum having been disallowed by him in the accounts of the School Board for the half-year ending the 25th of March, 1879, as being the payment of interest on a temporary loan.

The following is a copy of the auditor's certificate, which, with his reasons appended, sufficiently shews the circumstances under which the question now argued before the Court arose:—

"I do hereby certify that in the accounts for the half-year ended at Lady-

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day, 1879, of the School Board for London, I have disallowed the sum of 83*l.* 11*s.* 2*d.* as a charge or payment, and I do hereby surcharge the said sum of 83*l.* 11*s.* 2*d.* upon the said Sir C. Reed. And I hereby further certify that the said sum of 83*l.* 11*s.* 2*d.* is due from the said Sir C. Reed. 18th of April, 1879.

"Reasons for making the surcharge:—

"In the accounts for the half-year ended at Lady-day, 1879, of the School Board for London, I disallowed the sum of 83*l.* 11*s.* 2*d.* entered in the said accounts as and for a charge upon or payment out of the school fund of the said School Board, for interest to the Governor and Directors of the Bank of England, the treasurers of the said School Board, upon sums of money advanced as temporary loans by the said Governor and Directors of the Bank of England to the said School Board.

"The charge for such interest is made up as follows:—

	£	s.	d.
From Sep. 30 to Oct. 4 on 10,000 at 5 per cent.	5	9	7
" Oct. 4 to Oct. 7 do. do.	12	6	7
" Oct. 7 to Oct. 13 do. do.	32	17	6
" Oct. 13 to Oct. 18 do. do.	32	17	6
	83	11	2

"I made such disallowance for the following reasons:—

"1. Because such sums of money were not borrowed with the consent of the Education Department.

"2. Because such sums of money were not borrowed or advanced in compliance with the requirements of and with the consent required by the Statute 36 & 37 Vict. c. 86. sect. 10.

"3. Because the said temporary loans were either wholly or partially applied and used for the general or current expenditure of the Board, for which purpose School Boards are not authorised to borrow money.

"4. Because the said School Board had not obtained, under the provisions of sections 53 & 54 of the Statute 33 & 34 Vict. c. 75, adequate sums to meet the deficiency of the school fund, and they had consequently used or employed moneys raised by temporary and other loans to defray the expenses of the School Board.

"5. Because the said School Board had not any authority in law to borrow or obtain such loans, and to pay or charge in their accounts any amount for interest upon such loans.

"6. Because the Statutes 33 & 34 Vict. c. 75, and 36 & 37 Vict. c. 86, have provided means whereby school boards may supply themselves with the necessary funds for carrying out the duties entrusted to school boards; and the said sums of money so borrowed have not been raised in compliance with these provisions, and the said interest is not such interest as school boards may charge upon the school fund of the district by virtue of sect. 10 of 36 & 37 Vict. c. 86.

"And I surcharged the said sum of 83*l.* 11*s.* 2*d.* upon Sir C. Reed, the chairman of the said School Board, because he authorised the making of the illegal charge for payment.

"Dated 29th April, 1879.

"H. Lloyd Roberts, Auditor."

*M'Intyre* and *A. Glen* shewed cause.—This amount was properly disallowed, being illegal. The School Board is limited in its powers by the strict words of the Acts creating it. There can be no power to borrow unless given by the Act. Being a corporation not established for trading purposes, the School Board cannot borrow in the way it has done—*Broughton v. The Manchester Waterworks Company* (1).

Section 53 of the 1870 Act directs all expenses to be paid out of the school fund. It was never intended that the future rates should be bound to defray past expenses. This is analogous to the case of poor rates. *Towney's Case* (2) shews that a rate cannot be made to reimburse an overseer; and *The King v. Wavell* (3) decides that a rate cannot be made to repay money borrowed to repair a workhouse. The board must estimate the expenditure beforehand, and make a rate accordingly.

[LUSH, J.—The expenses are to be defrayed out of the school fund, but that is made up of a number of things, amongst

(1) 3 B. & Ald. 1.

(2) 2 Ld. Raym. 1009.

(3) 1 Dougl. 115.

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others school fees; how can the Board tell exactly what it will amount to at any particular time? Can they not borrow for a temporary purpose till the funds come in, for which they may have issued their precept?]

Section 10 of the Act of 1873 sanctions borrowing for a particular purpose, and in a particular way. That is the only power of borrowing conferred by the Act.

[COCKBURN, L.C.J.—By section 54 of the 1870 Act the fund may be enlarged if deficient; such deficiency is to be raised out of the rates. LUSH, J.—It is necessarily incident to the powers conferred on a school board by an Act such as this that they should be able to borrow money for temporary purposes.]

They ought to consider what will be required, and not to pledge the credit of the rates without the knowledge of the ratepayers. Section 57 of the first Act and section 10 of the second, prescribe the conditions of legal borrowing which is not for general expenses.

[COCKBURN, L.C.J.—I read section 53 as saying in effect this to the School Board: "You may raise money by loan for general expenses, if necessary; but if you do so, you must carry it to the school fund." Then section 57 says: "If you borrow for building you must have the consent of the Education Department, and must adopt a certain specified course."]

The words "raised by way of loan," in section 53, refer, it is submitted, to loans effected under the direct authority of the Act, and for the purposes prescribed.

*Sir H James* and *Jeune* were not called upon to argue.

PER CURIAM (4).—The rule must be made absolute.

*Rule absolute.*

Solicitors—Gedge, Kirby & Millett, for School Board; Frankish & Buchanan, for auditor.

[IN THE COMMON PLEAS DIVISION.]

1878. }  
April 4. }  
May 31. }

PARRY v. SMITH.

*Negligence—Dangerous Article—Duty attaching to Management of.*

The defendant, a gas fitter, was employed by M. & Co. to repair a gas-meter in a cellar on their premises. In order to repair the meter the defendant took it away, replacing it by a temporary connection consisting of a flexible tube, one end of which was pushed into the inlet pipe, and the other end into a pipe communicating with the house. The plaintiff, a servant of M. & Co., whose duty it was to light the gas in the cellar, afterwards went there with a light and was injured by an explosion of gas which immediately ensued.

The jury having found that the defendant was negligent in doing the work, and that the accident proceeded entirely from the defendant's negligence it was held, that the defendant was liable.

Case on further consideration, argued during Hilary sittings, 1879.

The action was brought to recover damages for personal injuries sustained by the plaintiff through the negligence of the defendant while employed in repairing the gas meter on premises of the plaintiff's masters.

The case was tried before Lopes, J., at the London sittings in 1878, when a verdict was found for the plaintiff for 50l. After argument on further consideration, Lopes, J., delivered a considered judgment, in which the facts and arguments will be found fully set out.

*Finlay* and *Gore*, for the plaintiff, cited *Farrant v. Barnes* (1); *Oorby v. Hill* (2); *Gladwell v. Steggall* (3); *Martin v. The Great Indian Peninsular Railway* (4);

(1) 11 Com. B. Rep. N.S. 553; s. c. 31 Law J. Rep. C.P. 137.

(2) 4 Com. B. Rep. N.S. 556; s. c. 27 Law J. Rep. C.P. 318.

(3) 6 Bing. N.C. 733; s. c. 8 Law J. Rep. C.P. 361.

(4) 37 Law J. Rep. Exch. 27; s. c. Law Rep. 3 Exch. 9.

(4) Cockburn, L.C.J.; Lush, J.; and Manisty, J.

*Parry v. Smith, C.P.*

*George v. Skivington* (5); *Southcote v. Stanley* (6); *Rapson v. Oubitt* (7).

*Waddy, Oppenheim and Bradford*, for the defendant, cited *Winterbottom v. Wright* (8); *Longmeid v. Holliday* (9); *Oollis v. Selden* (10); *Blackmore v. The Bristol and Exeter Railway* (11); *Robertson v. Fleming* (12).

*Our. adv. vult.*

LOPES, J. (on May 31).—This action was brought by the plaintiff to recover damages under the following circumstances. The plaintiff was in the employ of Messrs. Moses & Son, as one of their housekeepers. The defendant was a gas-fitter employed by Moses & Son to repair a gas-meter in a cellar belonging to Moses & Son on the premises where the plaintiff was employed. The defendant found it necessary to take the meter away to repair it, and replaced it by a temporary connection consisting of a flexible tube, one end of which was pushed into the inlet pipe, and the other end into the pipe communicating with the house. The ends of both the pipes were bound round with rags and string and puttied up, and a drawer was put under the curve of the tube so as to support it and take the weight off the fastenings. After the temporary connection had been so placed by the defendant, and he had gone away, the plaintiff, whose duty it was to turn on and light the gas in the cellar, went there for the purpose with a light. Directly the plaintiff opened the cellar door an explosion took place, and he was knocked down and seriously injured.

There was a large body of evidence called on both sides; the plaintiff's evi-

dence going to shew that the mode of connection was unsafe; the defendants' that it was safe. It was agreed that the damages, if the plaintiff recovered, should be 50*l*.

I left three questions to the jury: first, was the defendant negligent in doing the work; secondly, did the accident proceed entirely from the defendants' negligence; and, thirdly, was the plaintiff also negligent, and was his negligence such that but for his negligence the accident would not have happened. I told the jury that, if they answered both the first questions affirmatively, they need not consider the third. The jury answered these questions in the affirmative, and found a verdict for the plaintiff for 50*l*.

Mr. Waddy at the end of the plaintiff's evidence had submitted that there was no case for the jury. I thought there was, and did not stop the case, but said I would reserve judgment and consider the points of law. I also consented to make any amendments which might be necessary to raise the real question between the parties.

Subsequently the points of law were argued before me. Mr. Waddy contended, on the part of the defendant, that there was no cause of action, unless there was privity between the plaintiff and the defendant, or unless what was done by the defendant amounted to a public nuisance, or unless there had been on the part of the defendant fraud, misrepresentation or concealment. It was contended by Mr. Finlay, on the part of the plaintiff, that the action would lie, because the defendant knew he was dealing with gas, a thing highly dangerous in itself unless great care and caution were used in its management; that the plaintiff's right of action was founded, not on contract, but on the duty which attaches to the use or dealing with a thing in its nature highly dangerous and likely to cause damage unless managed with great care and caution.

I think the plaintiff's right of action is founded on a duty which I believe attaches in every case when a person is using or is dealing with a highly dangerous thing, which, unless managed

(5) 39 Law J. Rep. Exch. 8; s. c. Law Rep. 5 Exch. 1.

(6) 1 Hurl. & N. 247; s. c. 25 Law J. Rep. Exch. 339.

(7) 9 Mee. & W. 710; s. c. 11 Law J. Rep. Exch. 271.

(8) 10 Mee. & W. 109.

(9) 6 Exch. Rep. 761; s. c. 20 Law J. Rep. Exch. 430.

(10) 27 Law J. Rep. C.P. 233; s. c. Law Rep. 3 C.P. 495.

(11) 8 E. & B. 1035; s. c. 27 Law J. Rep. Q.B. 167.

(12) 4 Macqueen 167.

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with the greatest care, is calculated to cause injury to bystanders. To support such a right of action, there need be no privity between the party injured and him by whose breach of duty the injury is caused, nor any fraud or misrepresentation or concealment; nor need what is done by the defendant amount to a public nuisance. It is a misfeasance independent of contract.

It is strange that there is no direct authority on the point. A large number of cases were cited, but none of them directly in point. The case of *Collis v. Selden* (13) was relied on by Mr. Waddy in argument. This was a demurrer to a declaration; and it was held that the declaration was bad, because it did not disclose any duty by the defendant towards the plaintiff for the breach of which an action would lie. Willes, J., in his judgment, seems to have contemplated an action like the present; for, he says, "The declaration is not founded upon any duty of the occupier to protect persons lawfully coming there against any hidden danger of which the defendant knew or ought to have known, but is founded on alleged carelessness in doing an act, namely, hanging a chandelier. The chandelier is to be regarded as movable property; and the declaration should have shewn either that it was a thing dangerous in itself and likely to do damage, or that it was so hung as to be dangerous to persons frequenting the house."

*Rapson v. Cubitt* (14) is in point. There, the defendant, a builder, was employed by the committee of a club to execute certain alterations at the club-house, including the preparation and fixing of gas-fittings. He made a sub-contract with B., a gas-fitter, to execute part of the work. In the course of doing it, through B.'s negligence the gas exploded, and injured the plaintiff, who was the butler of the club. It was held that the defendant was not liable on the ground that B. was not his servant, but an independent sub-contractor. It seems however to have been

assumed that an action against B. would have been maintainable.

All the other cases cited are distinguishable from this case. They are not cases where the alleged cause of action is in respect of a breach of duty in using or dealing with a thing in its nature dangerous and likely to cause injury unless great care is used.

There must be judgment for the plaintiff for 50*l.* with costs.

*Judgment accordingly.*

Solicitors—E. W. Parkes, for plaintiff; Wild, Barber & Browne, for defendant.

[IN THE COURT OF APPEAL]

(Appeal from the Queen's Bench Division.)

1879. }  
June 29. } WILKINSON v. ALSTON.\*

*Sale of Ship—Principal and Agent—Commission—Introduction of Purchaser.*

*The defendant having ships for sale employed the plaintiff to obtain purchasers, agreeing to pay a commission if the plaintiff should be the means of introducing a purchaser.*

In February, 1876, plaintiff introduced a person who had been recommended to buy one of the plaintiff's ships by A., and the defendant agreed that if this resulted in a sale the plaintiff and A. should share the commission. No sale did result, and in March A. mentioned the defendant's same vessel to B., who chanced to call upon him in reference to a ship of another owner. Plaintiff hearing of this, informed the defendant of B.'s call, and suggested his seeing B. on the subject. Defendant did nothing in the matter, and B. had at that time no intention of purchasing the defendant's ship, and made no communication about it to anyone.

Defendant then told plaintiff that it was

(13) 37 Law J. Rep. C.P. 233; s. c. Law Rep. 3 C.P. 549.

(14) 9 Mee. & W. 710.

\* Coram Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

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*no use doing anything until the ship returned home, and the plaintiff thenceforth took no steps to find a purchaser.*

*A., however, in April, again reminded B. of the vessel, but B. took no notice of his letters, and neither plaintiff nor defendant were aware of A.'s having written. In May B. wrote as broker direct to the defendant in reference to the vessel, and after some negotiation, on the 13th of June, disclosed the name of the principal for whom he was acting, and the sale was effected.*

*Plaintiff, on hearing afterwards of the sale, claimed his commission, on the ground that the purchaser had been introduced through the medium of his original negotiations with A. The jury found on questions left to them, first, that the plaintiff was authorised to find a buyer for the defendant's vessel, and, secondly, that B. was induced to enter upon the negotiation for the purchase by the information he received from A.:—Held (reversing the decision of LUSH, J.), that the plaintiff was entitled to his commission.*

This was an appeal from a decision of Lush, J., reported *ante*, p. 37, where the facts will be found in detail. On appeal,

*Willis and Hindmarch*, for the plaintiff.  
*Day and A. L. Smith*, for the defendant.

BRAMWELL, L.J.—I am of opinion that judgment in this case should be entered for the plaintiff. As I apprehend, the facts are these:—The defendant practically said to the plaintiff, "If you or White can find me a purchaser, and the purchase is completed, I will pay you a commission." And the expression, "If you can find a purchaser," may be expanded as meaning, if you can introduce a purchaser to myself, or can introduce a purchaser to the premises, or call the premises to the notice of a purchaser.

That being the meaning of the expression, the jury had to find whether the plaintiff was employed to find a purchaser, and they found that he was. Then the next thing they find is this, that the plaintiff or White did find a purchaser. That is, they did introduce a person who, in consequence of the introduction, be-

came the purchaser on account of himself or some one else. Now I have no misgiving whatever as to the fact that Wise had an interest in this purchase; but assume against the plaintiff that he was purchasing for Learoyd only, still the introduction of the matter to his notice, which actually led to the purchase, is a thing which entitles the plaintiff to his commission. The findings of the jury are conclusive on this point, namely, that the plaintiff was employed to find, and actually did find, a purchaser.

Then it is said the authority was revoked. But I do not think so; for, to my mind, the letter relied upon contains nothing like a revocation. It contains a statement that nothing can be done until the ship's return, but there is nothing to indicate that the plaintiff's employment is at an end, and that he is not to look out for a purchaser. I am inclined to think the real meaning is, that the defendant thinks it is of no use to take any immediate steps, such as going to Hartlepool as proposed. And more than that, if the letter were a revocation, it came too late, as there had been already an introduction of the ship to the notice of Wise, so that the commission was already earned. Then it is said (and it was so said by Lush, J., in his judgment) that there was a solution of the continuity of employment; that though the plaintiff employed White, and White employed Wise, Wise instead of carrying out his instructions and communicating with Learoyd, in consequence of those instructions, stopped the current of communication, and made a new departure as it is called; and said, "I will act as broker if you will employ me, and I will find a purchaser." The probable explanation of his conduct is, that he wanted to earn a commission, and he thought he should have more certainty of earning it if Wilkinson were not entitled to earn commission too. So "he tried it on," to use a popular expression. But if the defendant thought fit to promise Wise a commission, that did not disentitle the plaintiff. I believe that Wise was purchasing on his own account. But I do not base my judgment on that; it would be the same if I thought he was merely an agent. It



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seems to me that there can be no difference between the case where a person is employed to sell on commission, and communicates with the agent of a person who buys in consequence of that communication, and the case where the person so employed communicates with the buyer personally. I can understand this proposition—that where A. has given a commission to B. to sell, and C., another agent, comes to B. and ascertains who is his principal, and then goes to A. and asks to be employed, and is employed, and then finds a purchaser, B. is not entitled to a commission on the transaction. For then there is clearly a breach of the continuity by C., who acts not as B.'s agent, but for his own advantage, and has made a fresh departure. But here the case is as if White had himself dealt with Learoyd.

That being my opinion on the case, I think I ought to examine the judgment of Lush, J., and shew in what points I respectfully differ from him. After stating the facts of the case, he says, "White mentions the vessel to Wise, with a view of his buying it, and let it be assumed that he does so as Wilkinson's agent. Wise declined to buy, Wilkinson's authority to look out for another purchaser is revoked, and the whole transaction as between Wilkinson and the plaintiff is at an end." But I do not agree that the whole transaction as between them was at an end. Then he says, "Afterwards Wise having to find a vessel in the capacity of agent for Learoyd" (now he was no more in that capacity than when he was before the revocation of authority) "makes use in that capacity of the information he had before received from White, and treats with the defendant as an independent broker, stipulating for commission to himself." If that means independent in the sense in which I have used the term, I agree with it. But he was not in a condition to treat independently with the defendant, for he was already the agent of Learoyd when acting for the defendant. The defendant was no doubt acting *bona fide* by treating Wise as an independent broker; but he seems to have had some doubts about his liability to pay commission. "The chain

of continuity is broken. Even supposing White's act was Wilkinson's act, when he proposed the vessel to Wise, Wise's act in proposing it afterwards to Learoyd was not Wilkinson's act; it was his own act." No doubt, but it was as agent for the purchaser, and it was as much a consequence of what White had done as if White had gone to Learoyd himself. I do not see any difference between a proposal made to the agent of a purchaser and one made to the purchaser himself. In conclusion, Lush, J., says, that Learoyd was not in fact introduced either by Wilkinson or by an agent of his. The mistake here is, in my opinion, in not regarding Wise as identical with Learoyd, as persons introduced by means of the plaintiff. From that point of view Wise was Learoyd's agent, introduced to the defendant as a purchaser through the medium of Wilkinson and White. It is very difficult to lay down a general rule in such cases, but I think in the present case Wilkinson did introduce a purchaser, and became entitled to his commission.

BRETT, L.J.—I am of the same opinion. We are to take it that the plaintiff was employed by the defendant to find a purchaser for the ship, on the terms that if he did he should be paid a commission. The plaintiff would, in point of law, fulfil the contract if he introduced the ship to the notice of the purchaser, and the latter purchased it in consequence of that introduction, though all proceedings subsequent to that introduction were carried on between the principals without any further intervention by the agent.

Now the plaintiff is not bound to give that information which is called an introduction by his own mouth, and therefore was entitled to employ White, and if White found a purchaser that would be a sufficient fulfilment of the plaintiff's undertaking. White introduced the ship to Wise, and Wise acted on the information he obtained from White. Now I think it was proved beyond all question that at the time of the communication made by White to Wise, Wise was acting at least as the agent of Learoyd for the purchase of a ship, and at the time he received the

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information it was exactly as if the information had been given directly by White to Learoyd. It is true that the subsequent negotiations were all between Learoyd and Wise and the defendant, without any further reference to the plaintiff. But upon that introduction, in point of law, the plaintiff had fulfilled his contract by introducing the ship to the agent for the purchaser.

But Lush, J., has said that the continuity of the employment by the defendant was broken, for Wise was not the agent of the plaintiff; that he was not a person employed by the plaintiff or by White to find out their purchaser, Learoyd. But that does not break the continuity, for Wise was the agent of Learoyd to find a ship, and therefore information given to Wise has the same effect as information given to Learoyd himself. The law applicable to each case is so different, and the circumstances of each case are so different, that I will not give any opinion except on the special facts before me. I will not therefore give an opinion as to what would have been the rights of the parties if at the time when the information was given to Wise he had not been the agent of Learoyd. I will not say whether, even in that case, the plaintiff might not have been entitled.

As to the cancellation of the plaintiff's authority, the letter relied on, in my opinion, does not amount to any such thing, and it was too late for any such cancellation after the plaintiff, through White, had done the act which entitled him to his commission, if, in consequence of that act, there was a contract for the sale or purchase of the vessel between the defendant and Learoyd.

COTTON, L.J.—I cannot agree with the opinion of Lush, J., in this case.

In the first place, it appears that the plaintiff was fully authorised to obtain a purchaser for the ship *Madras*. And I also understand that it is conceded that he was employed on the terms that if he found a purchaser he was to be entitled to a commission. But in expanding the terms of the contract, it was argued for the defendant that the plaintiff was to introduce a purchaser, but that he was

not to be considered as introducing a purchaser if he did not point out the person who was actually going to buy. But I think the better interpretation is that he would fulfil his contract by introducing to the defendant a person who would afterwards become the purchaser. That the name of the purchaser should be communicated cannot be material, if the plaintiff really introduces a purchaser, and through that introduction the purchase takes place.

Then in the present case the jury find that Wise was induced to enter into negotiations by the information given him by White.

It is necessary to state that for the purposes of this judgment it is conceded that White stands in the same position as Wilkinson, and anything that White did for the purpose of giving effect to the contract must be considered as done by the plaintiff. In my opinion, as a matter of law, if the plaintiff having such a contract as he had with the defendant, introduced the subject of the ship to the agent of the proposing buyer, that is equivalent to an introduction to the buyer himself, because as between the agent of the vendor and the agent of the purchaser, the agent represents the purchaser himself, and every communication made by him to the agent for the vendor must be considered as made by the buyer to the vendor himself. Then we have to consider whether at the time of the communication Wise was the agent of the purchaser. I think he was; for at that time he was authorised to act for Learoyd with reference to the purchase of a ship. The communication, then, that the ship was for sale, was made to Wise at a time when he might properly be considered as agent for Learoyd, and therefore the plaintiff is entitled to recover, not on the ground that Wise made the communication to Learoyd as agent for the plaintiff, but that Wise must be considered in the transaction as agent for Learoyd.

Then it is said there was a revocation of the plaintiff's authority. But the principal cannot defeat the agent's right to commission when the agent who has been employed has already before the revocation done all that is

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necessary to earn it. If it were so, a dishonest principal could always defeat the claim of the agent. As soon as he knew that the agent was in communication with some one who was likely to become a purchaser he might put an end to his authority, though that had already been done which would lead to a sale.

I quite agree, however, that the letter of the 13th of March cannot be considered as a revocation of authority. It probably refers to some particular step, such as the proposed journey to Aberdeen or Hartlepool, and merely indicates an opinion that nothing can be done at present.

I do not decide this question on any supposition that the defendant was guilty of fraud. There is no question of fraud in the case, but merely the question whether the plaintiff is entitled to his commission under the contract, and I only need add that if the plaintiff was otherwise entitled, nothing which passed between the defendant and Wise could defeat his claim. If the plaintiff agreed to pay a commission also to Wise, that is his own fault.

Solicitors—Ingledew, Ince & Greening, for plaintiff; Lumley & Lumley, for defendant.

[IN THE COMMON PLEAS DIVISION.]

1879. } THE COMPANY OF THE PROPRIETORS OF THE SHEFFIELD WATERWORKS (*appellants*)  
Mar. 14, 18. } v. WILKINSON (*respondent*).  
THE SAME v. CORBRIDGE (*respondent*).

*Water—Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17)—Supply of Water to Houses—Supply after Water had been stopped for Arrears of Water-rate.*

[For the report of the above case, see 48 Law J. Rep. M.C. 145.]

[IN THE COMMON PLEAS DIVISION.]

1879. } THE DUKE OF NORFOLK v. THE  
May 17. } REV. GEORGE ABBUTHNOT.

*Church—Private Chapel annexed to Church—Chancel—Evidence of Acts of Ownership.*

*The church of St. Nicholas, Arundel, regarded as one building, is a cross church, with a nave and aisles, a central tower, transepts rather shorter than would be usual in a church of such proportions, and eastward of the central tower and transepts, a building called the Fitzalan Chapel, which occupies the place commonly filled by the parish chancel, but which has never been used as such:—*

Held, by LORD COLERIDGE, C.J., on motion for judgment, on evidence of numerous acts of ownership by the plaintiff and his ancestors for more than three hundred years in respect of such chapel, to the exclusion of the vicar and his parishioners, and on documentary title, beginning from the time of the founder in the fourteenth century, not inconsistent with such rights of ownership, that the said Fitzalan Chapel was the private property of the plaintiff, and not the parochial chancel of the church.

STATEMENT OF CLAIM.—1. The plaintiff is tenant in tail male in possession of a piece of land with the building thereon called the Fitzalan Chapel, in the parish of Arundel, in the county of Sussex.

2. On or about the 2nd of July, 1877, the defendant, by himself and his servants, broke and entered the said piece of land and building of the plaintiff, and wrongfully pulled down and destroyed a certain wall therein, and divers of the bricks composing the said wall.

3. The defendant threatens and intends to commit similar trespasses and injuries on and to the said premises, unless he is restrained by the injunction of the Court.

The plaintiff claims 100*l.* damages, and the costs of the action; and an injunction to restrain the defendant, his servants, agents and workmen, from further entering upon the land and building, and from doing further damage to the wall.

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The statement of defence and counter-claim, so far as is material, was as follows:—

3. Before and at the time of the alleged trespasses, the defendant was, and still is, vicar, incumbent, and officiating minister of the church of the parish of Arundel.

4. The building mentioned in the first paragraph of the statement of claim is the great chancel or choir of the ancient church of the parish of Arundel, and the defendant, as and being such vicar, incumbent and officiating minister as aforesaid, was and is entitled to the possession of the great chancel or choir and of the nave of the said church, and also was and is entitled to have free ingress and egress betwixt the great chancel and nave, and also to have the light and air pass without obstruction betwixt the great chancel and nave.

5. The vicar of the said church for the time being has as such always been possessed of the nave of the said church of the parish of Arundel, which nave has also adjoined the piece of land in the first paragraph of the statement of claim mentioned; and the defendant, as such vicar, was, at the time of the alleged trespasses, so possessed as aforesaid. The vicar of the said church has been accustomed to have the light and air enter into the said nave through a certain ancient arch and screen, and has always been accustomed to pass through the said arch into and from the said nave. The said vicar has been so accustomed to have such access of light and air, and such ingress and egress, actually and without interruption from time immemorial, or for forty years, or for twenty years, or for a long time before the bringing of this action, and, except in the case of the access of light and air for such period of twenty years, such user has been of right.

6. The user in the last paragraph mentioned establishes the defendant's right to the said access of light and air, and his right to the said ingress and egress, under 2 & 3 Will. 4. c. 71, or by prescription, or in virtue of a grant or charter now lost, of which the former existence is to be presumed or inferred, or otherwise; and the defendant relies on such rights,

or one of them, as a justification for his acts.

[There was also a justification by the defendant as "one of the parishioners or one of the inhabitants of the said parish of Arundel."]

10. The plaintiff wrongfully and improperly, and without the consent or authority of the ordinary, or of the defendant, or of the parishioners or inhabitants, erected the wall mentioned in the second paragraph of the statement of claim, across the church at the part where the piece of land in the first paragraph of the statement of claim mentioned adjoins the nave, thereby completely separating the said piece of land from the nave, and wrongfully obstructing and interfering with the defendant's possession of the said piece of land, as and being the great chancel and nave, and the defendant's right to free ingress and egress, and the passage of light and air betwixt the said piece of land, as and being the great chancel and nave, and the passage of light and air through the said arch and screen.

11. The defendant, because the wall so obstructed and interfered with some or one of the rights hereinbefore claimed by him, necessarily pulled down and destroyed the wall, or part thereof, doing no unnecessary damage in that behalf; which pulling down and destroying were the trespasses complained of.

The defendant claimed by way of counter-claim:—1. 100*l.* damages in respect of the wrongful erection and continuance of the said wall by the plaintiff. 2. An injunction restraining the plaintiff from continuing the wall, or so much thereof as hindered or obstructed any of the rights claimed by the defendant, and ordering the plaintiff to remove the wall, or such part thereof as aforesaid, and to restore the church and the site of the wall to the condition in which they were before the plaintiff began to build the said wall.

The plaintiff, in reply, set out the provision against alienation contained in an Act of 3 Car. 1, for the settlement of the family estates of the Earls and Dukes, and denied that the building in question was the great chancel or choir of the pa-

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rish church, as alleged, or that the defendant or the parishioners of Arundel possessed or had exercised the rights claimed therein. Issue thereon.

The case was tried before Lord Coleridge, C.J., without a jury, and was argued on motion for judgment by

*Dr. Stephens (O. Bowen and Dr. Walter Phillimore with them), for the plaintiff, and by*

*Charles (Jeune with him), for the defendant.*

*Our. adv. vult.*

The following judgment was given (on May 17) by

LORD COLERIDGE, C.J.—This is an action of trespass for breaking down a wall built on the plaintiff's land. The defendant is the vicar of the parish of Arundel, and he pleads, in substance, that the wall was built so as to obstruct his right of entrance into the chancel of his church, and to prevent the passage of light and air from the chancel to the church, and that he broke down the wall because it obstructed and interfered with his rights. The case was tried before me without a jury, and I reserved my judgment on the conclusion of the hearing, rather because of its interest and importance than that I had any serious doubt as to the view which it is now my duty to express.

Its interest and importance, however, are rather in the past than for the future, and arise chiefly out of the ancient institutions and great historical families of which during the evidence and the arguments we heard so much. The principles of decision are simple and familiar, and whether I apply them rightly or wrongly can be of little consequence except to the parties to this particular proceeding; for the facts of this case are, as far as I know, peculiar. Neither my own limited knowledge, nor the far wider learning and research of the able counsel engaged in the argument have furnished me with any case exactly in point, or even with one in which the circumstances are so far analogous as to afford me either an authority or a guide. I have also received many communications since the hearing of the case from a great

variety of persons, which I have not sent to the parties in the action before me, only because they had no real bearing upon the case, being no more than statements of what the writers supposed to be the legal rights of persons in respect of other chapels in other churches under other circumstances. I did, indeed, at the close of the hearing invite, not further argument, but further information on one definite point, namely, whether an integral portion of any church (the church being one and undivided, considered architecturally) had ever itself been called in any authentic legal or historical document, not chancel, or chapel, or chantry, or choir, or aisle, but *church*. It was perhaps unwise to invite any communication after the close of a full and deliberate argument; but though I have received various papers, they have none of them been confined to this definite point, nor has any one conveyed to me the information I desired. It was not a matter decisive of the case, though it leaves the interpretation of one interesting document conjectural or doubtful. I proceed to state what I conceive to be the fair effect of the documents and facts proved before me, and if these are accurately set forth, the conclusion almost inevitably follows.

It is not very clear what were the relations between the parish of Arundel and the small monastic body which at the time of the Norman Conquest, or very soon after that event, was undoubtedly established there; nor, except as a matter of antiquarian curiosity, is it at all important to ascertain them. It is indeed clear that they were rectors of the parish and performed the sacred offices in the parish church of Arundel, then as now dedicated to St. Nicolas. But the real history of the case begins with the foundation of the College of Arundel by Richard, Earl of Arundel and Surrey, in the third year of Richard 2, A.D. 1379 or 1380. I mention, to shew that I have not forgotten, but I do not think it the least necessary here to comment in detail upon the inquisition of the 3rd Richard 2, which forewent the license of the King. The license of the King to the Earl for the foundation, the instrument by which the Earl founded, and the statutes by which

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he ordered the government of the college, are all preserved. The license is in Dugdale; the other documents are preserved in the registry at Chichester, and have been produced before me. The monastic priory was suppressed, dissolved or annulled (*adnullare* and *adnullatio* are the words used); at any rate, it ceased to exist, and a college consisting of twelve seculars, called chaplains, and a master or warden, was created in its stead. Both in the royal license and in the instrument of foundation the priory is said to have existed "*in the parochial church of Arundel*" (1) and "*in the parochial church of St. Nicolas, Arundel*" (2). The Earl is empowered by the license to give a name to the *College*, and when he founds it, he says it is to be "*ad honorem Omnipotentis Trinitatis, Patris, Filii, et Spiritus Sancti, ipsius Ecclesiæ jam patroni, Gloriosæ Virginis Mariæ omniumque sanctorum.*" The 7th chapter of the statutes,—it being recited that the college "*in Ecclesia prædicta*" (i.e. the parish church of St. Nicolas) "*ad augmentationem Divini cultus pro noto sit astrictum,*" goes on to enact that the members of the college are to reside "*in ipso collegio,*" and are never to absent themselves "*a quibuscunque officiis Divinis in eadem ecclesiâ observandis.*" It enacts further in great detail the duties of the members in respect to the divine offices, so that the offices "*in ecclesiâ præfatâ provisius et honorificentius celebrentur;*" and, further, that none of the members of the college shall go to perform service "*ad ecclesias convicinas,*" manifestly neighbouring parish churches, except in certain cases specified in the statute. The 8th chapter makes provision for the celebration of divers masses,—one, "*magna missa,*" "*in magno altari;*" another, "*missa de Gloriosâ Virgine,*" "*ad summum altare,*" till a special altar for the Virgin shall be provided,—and other masses, all to be celebrated "*in dictâ*" or in "*eadem ecclesiâ.*" It also provided that, on certain occasions, "*post magnam missam in cancellis celebratam,*" certain psalms and prayers shall be recited in

the *choir*,—"chancel" and "choir" being used apparently as synonyms. And, further, that certain masses shall be celebrated "*ad diversa altaria,*" so that the parishioners "*dictæ ecclesiæ*" and others may hear them. So far is the language of these documents.

It appears, further, that the whole fabric as it stands now is of substantially the same date, and was probably all built continuously, with no break between the building of one portion and another, at the close of the 14th or the very beginning of the 15th century. It appears also that the iron lattice-work or grille filling the arch which would be commonly called the chancel arch, is as old as the building, and that the lock and key in it are of the same date.

It may be convenient shortly to state that the church, regarded as one building, is a cross church, with a nave and aisles; a central tower; transepts rather shorter than would be usual in a church of such proportions; and, eastward of the central tower and transepts, the disputed building consisting of a long and beautifully proportioned chapel occupying the place commonly filled by the parish chancel; a north aisle called, and no doubt rightly called, the Lady Chapel; and at the north-east corner a room probably originally used as a sacristy, now disused, but which, as will appear in more detail by-and-by, was for many years used as a schoolroom, and as the place where the elections to the office of mayor certainly, and I think to other offices in the corporation of Arundel, habitually were held.

I am of opinion that the church spoken of in these documents is the whole parish church of St. Nicolas, Arundel, including what is now used by the parish, and what is claimed by the Duke of Norfolk. Speaking only, as only I can speak as a man of ordinary education and experience, I cannot help knowing that there are numerous instances in different parts of England of churches still called collegiate, which were before the Reformation the churches of colleges of secular priests, which were also the churches of parishes of which these colleges were rectors, the freeholds of which churches were in

(1) Deed of Foundation.

(2) Royal license.

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the colleges in the sense in which the freehold of any church is in an ordinary ecclesiastical rector and in which the parishioners had certain rights and the colleges had certain other rights,—rights co-existing and not conflicting; which churches were nevertheless one, not two, and that not merely architecturally and to the eye, but really and in law.

We shall see as we go on whether the documents shew that in after time it was different; but, at and soon after the foundation of the college, I do not at all doubt that, if it had been asked what was the parish church of Arundel, the present church of St. Nicolas in its architectural integrity would have been pointed out; and if it had been asked what was the church of the college of the Holy Trinity of Arundel, the questioner would have been shewn the very same building in its architectural integrity; yet, as the grille shews, the college practically had the exclusive use of the part eastward of it, the parishioners as a rule had the use only of the nave with its aisles and of the transepts. It may be that, as we were told by a very great and learned architect, the pulpit in the nave, and the high altar at the extreme east end of the church, which was in view from the pulpit, were, as he phrased it, "worked together," meaning, I suppose, that, as the preacher could see the high altar, he might, and perhaps did, direct the attention of his hearers to it and to the sacred elements upon it. But the existence of the iron-work filling the whole arch, a circumstance admitted to be most unusual, seems to me to shew that there may have been a reservation to the college and to its members only of that part of the church which was eastward of the iron-work. That the Earl of Arundel who founded the college and built the church might, if he pleased, so distribute his gift between the college and the parishioners is, I think, quite clear. There is nothing in the documents I have examined to shew that he did not. Is there anything in those which follow? Certainly not, in my opinion, in the will or wills of Earl Thomas, executed in 30 Hen. 5, A.D. 1415, not many years after the foundation of the

college and the building of the church. He desires to be buried "in our college of Arundel before the high altar;" and, again, "in the choir of the college of the Holy Trinity of Arundel." Neither of these expressions appears to me to mean, nor to be even capable of meaning, that the building now claimed by the Duke of Norfolk was the college, which it certainly was not either in 1415 or at any other time; both of them appear to me to imply that in 1415, this building was a part of the college in the sense that either it belonged to the college or was at least a building in which the college had peculiar and perhaps exclusive rights.

I do not think that anything is to be gathered from the admissions by the Bishops of Chichester to the vicarage of Arundel and to the mastership of the college of Arundel, several of which to each office between the years 1405 and 1528 have been put in evidence. They shew that there was besides the rectory a vicarage of Arundel, to which the college presented and the bishop instituted, sometimes a member of the college and sometimes not. But this shews nothing, and the instrument by which the vicarage was created, and which might possibly have shewn something, does not exist, or at any rate has not been produced.

But there is a document of 1511 to which both sides have appealed,—the Duke as shewing that at that date the building he now claims belonged absolutely to the college and that the parish had no rights therein,—the vicar of Arundel as shewing that this building was then really the great chancel of Arundel church; and he thence contends that, if this was so in 1511, nothing has happened since to deprive it of its character. The document is curious. It appears that in 1511 there had been disputes between the college and the corporation and parish of Arundel as to the repair of "*y<sup>e</sup> crosse partes*," or, as we should now say, the transepts, the bell-tower of the church, and the bells and bell-furniture therein; and that all parties had agreed to submit the matters for arbitration to the then Earl of Arundel and the then Bishop of Chichester. These "*crosse partes*" are described as going from

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south to north "inter chorum et navem ecclesie;" and the award of the Earl and Bishop was as follows: The college are solely to repair the south transept, "quæ cancellus parochialis vulgariter nuncupatur;" the corporation and the parish are solely to repair the north transept and the whole of the nave and its aisles; and the expense of keeping up and repairing the bell-tower, bells and bell-furniture is to be defrayed by the corporation and parish on the one part and the college on the other part in equal moieties. I do not notice the temporary provision as to the key, as it applies to the bell-tower only.

Such is the effect of this document; and it appears to me to make out with tolerable certainty several propositions. First, that in 1511 the whole building was commonly spoken of as one church. Next, that the parish did at that time in fact use the south transept as their chancel, and that the south transept was commonly called the parish chancel. Next, that at that time in fact the building now in dispute was not used as a chancel by the parish, and that the high altar of the parish was not then there. Next, that the college were charged with the repair of the parish chancel as well as with that of the disputed building and of the Lady Chapel, because being rectors, it was equitable that they should repair what was in fact the chancel of the parish. Next, that, the nave and aisles and north transept being in fact the portion of the entire church used by the parish other than their own chancel, it was fair that the parish should repair them. Lastly, that the bell-tower and the bells therein being used alike for the college services and for the parish services, the college should bear half of that expense, the whole of which in ordinary cases would have been borne by the parish. Such appears to me to be the evidence of fact supplied by the award; and I think it is strong evidence to shew that the distribution of the building between the college and the parish which might have been made by the Earl who founded the college and built the church, was made by him in fact and was existing

in practice some 130 years after his foundation.

Then we come to the surrender of the college to Henry 8, and the re-grant by Henry to the Earl of Arundel of that date. These are interesting documents apart from their bearing on the case; for, the ecclesiastical Latin in which the surrender is written appears almost unable to express the absolute willingness and eager self-sacrifice with which the members of the college stripped themselves of all they possessed, and reduced themselves to beggary, without any pressure whatever from their most illustrious and invincible prince and lord Henry 8. Recent history teaches us to believe implicitly the absolute truth of such statements in such documents from such persons at such a time; and no statements certainly can be stronger. The master or warden and the fellows of the college or chantry of the Holy Trinity of and in Arundel surrender to the King "totam cantariam sive collegium nostrum prædictum; ac etiam totum scitum, fundum, circuitum, ambitum vel procinctum, ac ecclesiam campanile et cimiterium ejusdem cantariæ sive collegii, cum omnibus et omnimodis domibus edificiis, hortis, pomariis, gardinis, terrâ et solo infra dictum circuitum et procinctum cantariæ sive collegii prædicti." They then surrender their whole property real and personal to the sole use of the King, his heirs, successors and assigns; and at the conclusion of the document they warrant, and assure to the King, *inter alia*, "dictam cantariam sive collegium nostrum, ac etiam totum scitum, fundum, circuitum ambitum et procinctum mansionem et ecclesiam nostram prædictam, ac omnia et singula maneria," and so forth.

Much reliance was placed by the counsel for the defendant upon the word *ecclesia* in the beginning and end of this surrender as shewing that the college surrendered to the King the disputed building only; for that, as the parish church did not belong to them, they could not surrender it. But they had a certain property in the parish church, as they had in the churchyard, and what they had they surrendered. They had other rectories and



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benefices belonging to them in the counties of Sussex and Southampton, and these they speak of and surrender as "*ecclesias nostras prædictas*," in the plural, shewing that they used "church" in its popular and ordinary sense, and that where they possessed an advowson or a presentation, they spoke of the church connected with such advowson or presentation as their church. I think there is no ground whatever from the language of this surrender for contending that at the date of it the architectural whole of the parish church of Arundel was divided into two churches; and that under the term "*ecclesia*" only the building now in dispute was intended to be or was in fact surrendered.

I pass to the re-grant of the college and its possessions (together with other properties) by the King to the Earl of Arundel in the same year as the surrender. The King grants to the Earl "*totum scitum, fundum, ambitum, circuitum et procinctum nuper ecclesiæ collegiæ sive collegii Sanctæ Trinitatis de Arundel in comitatu nostro Sussexiæ; alias dictæ nuper collegii sive cantariæ Sanctæ Trinitatis in villâ de Arundel in comitatu nostro Sussexiæ modo dissolutæ. Ac ecclesiam campanile et cimiterium ejusdem nuper collegii sive cantariæ. Ac etiam omnia et singula messuagia, domos, . . . infra scitum, ambitum, circuitum et procinctum dictæ nuper ecclesiæ collegiæ collegii sive cantariæ prædictæ existentes aut dictæ nuper ecclesiæ collegiæ collegio sive cantariæ aliquo modo dudum spectantes sive pertinentes; ac parcellum possessionum et reversionum ejusdem ecclesiæ collegiæ collegii sive cantariæ dudum existentes.*" I have set out this somewhat long passage in detail to shew that in this document collegiate church, college and chantry, are used over and over again as simple synonyms. They are used in a precisely similar collocation at least a dozen times more in the course of the grant, and always in a like sense.

It was argued, as I understood, that in the grant the word "*ecclesia*," in connection with *campanile et cimiterium* might mean, and that in truth it did mean, the building now in dispute, and

not the whole church in its architectural integrity. But I think the argument untenable. The King is careful (see p. 6 of the printed grant) to grant to the earl only what the college surrendered to him, and professes to grant no right or estate in the granted premises except the right or estate of the college.

I have said already that the college did in my judgment grant the whole church to the king, *i.e.* according to their estate and right in it, as part of their property; and I have given my reasons for so thinking. If therefore the college granted it in any sense to the King, in that sense the King granted it to the Earl. The language also fairly considered appears to me to lead to the same result. The church of the college I could understand being at least possibly the disputed building; but the church of the collegiate church, the church of the chantry, must mean in my judgment the church of the corporate body called by these various names, *i.e.* the church of which the advowson was in them, the freehold of which and of the churchyard was in them, *i.e.* the whole undivided church of St. Nicholas, Arundel, in which the college and the parish had the respective rights which I have already indicated. The grant of the bells and lead, amongst a variety of other goods and chattels, makes no difference; and I mention it lest I should be thought to have overlooked it.

The estates of the Earl of Arundel, and amongst them what had been granted by Henry 8, became forfeited to the Crown by the attainder of the then Earl in the reign of Elizabeth. They were re-granted to Thomas Earl of Arundel by James 1, in the second year of his reign. There is nothing in the language of the grant of James 1 which calls for observation. In the third year of Charles 1 a private Act of Parliament settled certain estates inalienably upon the then Earl of Arundel and his heirs, and, in default of heirs male, upon Lord William Howard and his heirs male,—the present heir male being the Duke of Norfolk, the plaintiff. The value of this Act is only as a piece of evidence respecting the names which certain things bore at the

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time when it was passed; for it grants nothing; it only settles and assures what was already the Earl's. But it is to be observed that it treats as property and as subjects of settlement things the property in which and the rights in respect of which were of very various sorts. It settles, for instance, the borough of Arundel, the manor of Arundel, the rectorie of Arundel, the forest of Arundel, the college house called the college of Arundel, the almshouse of Arundel, with a great multitude of other things, each, it is to be assumed, according to the estate and interest which the Earl of Arundel then had in them respectively. A sum of 210*l.* a year is reserved out of certain properties, to be paid to the Fishmongers' Company in London, to be by them expended in repairing "the castle of Arundel and the chapel adjoining to the church of Arundel wherein some of the Earls of Arundel lye buried;" and some reliance was placed in argument upon these last words. But they are, after all, a description only in a private Act of Parliament; and, though I do not at all doubt that they describe the building now in dispute, they do not by themselves shew its legal relation to the church, still less do they ascertain whether this chapel was then used as a chancel, as it might have been, or whether it was then as it had been for many years practically separated off from the rest of the building. And no evidence was given before me, either from the Fishmongers' Company or otherwise, to shew that the sum mentioned in the Act of Charles had been or was still paid to the company, or on what part of the whole fabric, if on any part, the money had been or was expended by the company if they received it.

This ends what may be called the documentary title to this building. There is no language in my opinion in any part of it conclusive either for the plaintiff or the defendant. The founder may have intended to grant to the college the exclusive use of so much of the church as lay eastwards of the transept. His language is at least patient of such an interpretation; and the award of the Bishop and the Earl in 1511 is at least

some, I think myself it is strong, evidence to shew that the usage of many years had at that time so interpreted it. Whatever the college had from the founder passed from Henry 8 to the Earl of Arundel, and from Henry Earl of Arundel to the Duke of Norfolk. If the words of grants are ambiguous or vague (I say, if they are so, because in my opinion the words here are plain enough), it is common law and common sense to have recourse to the evidence of fact to explain them. What have been in fact the rights enjoyed ever since the Reformation in respect of this building by the Earls of Arundel and their successors the Dukes of Norfolk? The answer must be, the most absolute rights of ownership which, regard being had to the nature of the property, were ever proved in a Court of justice. I confess that, when I sat to try this cause, knowing nothing about it but what the pleadings disclosed, and having passed a day at Arundel endeavouring to get into my mind a clear view of the buildings and of their surroundings, I fully expected that there would be disputed or conflicting facts, that at the least there would be some things proved which would call upon the plaintiff for careful explanation. But there is scarcely a fact proved by the plaintiff which has been disputed; scarcely anything which can be called a fact proved on the part of the defendant.

I proceed to state some of the facts of ownership, most of them undisputed, all established before me by the clearest proof. Since the surrender of the college to the King in 1544, no act of religious worship has taken place within the walls of the disputed building, with the exception of the reading of the Church of England burial service over some of the bodies which have been interred therein,—an exception which I will separately notice. No prayers have been said; no Holy Communion has been administered. During the whole of that time the plaintiff and his predecessors have claimed to exclude, and have in fact excluded the vicar and the parishioners from the whole of the disputed building. The iron lattice-work was locked on the eastern side, and the Earls or Dukes have kept the key. In the fact that the lock was

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on the eastern side there is nothing : but it is quite otherwise as to the custody of the key. There are other entrances to it, and of those likewise the keys have been kept in the same custody. In 1858, the key, not of the lattice-work, but of a door, was lent by the then Duke to the then vicar ; but after a while it was reclaimed by the Duke and returned by the vicar. Vaults have been made and interments have taken place in the building, both in that part of it which has been called the Fitzalan Chapel, and in that part which no doubt was the Lady Chapel, at the sole pleasure of the Dukes. No faculty has been applied for, no registration has taken place, no fees have been paid in respect of such vaults and such interments. Further, the Dukes have at their pleasure disinterred bodies in this building, and have changed the places of their sepulture, without any faculty being obtained for the purpose.

These are acts done by the predecessors of the plaintiff, and done during more than three hundred years, with nothing to set against them. The utter neglect of this beautiful and interesting building by the same line of owners is almost equal proof of the absolute character of their ownership. It is, no doubt, the privilege of an owner to let his property fall into decay ; a privilege of which former Dukes of Norfolk have availed themselves in respect of this building to the utmost extent. A hundred years ago, as a print of that date shews, there was a rich carved roof which, whether it was removed or fell down, at any rate no longer exists. There are costly and noble monuments of the Fitzalans, amongst them a singularly rich and splendid alabaster altar tomb with two recumbent figures on it, all in a state of dirt, neglect and mutilation, which families far less illustrious than those of Howard and Fitzalan seldom allow to exist in the monuments of their ancestors. It was proved also that the building had been used as a lumber-room and as a workshop ; and that the access to it which was denied to the vicar and parishioners, was freely granted to the owls and bats. There may have been reasons why this state of squalor and ruin was permitted, of the

weight of which I am no judge, for I do not know them ; but, certainly, a stronger assertion of an absolute right of property in a patron of an ecclesiastical building than to exclude every one from it, to treat it as a store-place for tools and ladders, and to suffer it to become almost a ruin, can hardly be conceived.

It is quite true that from time to time members of the family of the Dukes of Norfolk have been buried in the disputed building, whose burials are registered, or who appear to have been buried with the rites of the Church of England ; and that in these latter cases the body has been borne into it from the nave of the church through the iron lattice-work and the service said there by the vicar or some English clergyman representing him. The registers from 1691 to the present day contain the registry of sixteen burials of the Norfolk family ; and of these seven appear to have taken place with Church of England rites, the earliest of this latter class, at least so far as the registers afford evidence on the subject, in 1824. But, first, this has been the exception, not the rule ; and, whereas the rule is very difficult to explain, except upon the view of the case presented by the Duke : the exceptions are readily capable of an explanation, which renders them of little weight in favour of that presented by the vicar. Every time that the Duke buried without service, or built a vault, or removed bodies in this building—especially since 1847, when the church of Arundel was closed against burials by Order in Council—he was, unless the building belonged to him, breaking the law and defying ecclesiastical authority. But, as the burials within it with Church of England rites, some of the bodies may have been those of Protestants (for there have been Protestants in the Howard family) or of Roman Catholics either who had had no objection in their lives, or as to whom their kinsmen had no objection after death, that the Church of England service should be read over their remains. This state of feeling is in fact not uncommon in the old Roman Catholic families in England ; and the fact, therefore, that such burials as I have mentioned have taken place, though proper to be

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noticed, cannot countervail the weight which attaches to the length and prevalence of the contrary practice.

While such has been the assertion of property in respect of this building for more than three hundred years on the part of the duke and his predecessors, and such the user to which they can point in support of the legality of what they assert, what has been the conduct on the part of the vicar and the parishioners? Absolute acquiescence is an expression hardly strong enough to be applied to it. This, indeed, there has been. No vicar has asserted any right; no bishop or archdeacon has attempted to exercise any authority; no churchwardens or parishioners have ever made any claim, till a very few years ago, in respect of this building. But this is by no means all. Articles of visitation both episcopal and archidiaconal have been put in before me, ranging from 1844 to 1875. In these articles questions are asked as to the state of repair of the church "as well the chancel as the body thereof." The answers are "good," "very good," "excellent;" and this at a time when the utter squalor and total disrepair of what is now claimed as chancel was notorious, and has been proved. Questions are asked as to the existence of the Tables of the Ten Commandments "at the east end of the church according to the canon." The answers are, that they exist, that they are in excellent order; in one instance, "quite a pattern," is the parochial language. This at a time when, according to the present contention, the east end of the church was ruinous, and there were no commandments on it according to the canon. In more than one instance, they are expressly said to be in the chancel. All these answers shew conclusively that the vicar and churchwardens treated the south transept as the chancel; and that, if they ever heard of, they expressly abstained from giving any countenance to the contention of the present defendant.

In two instances alone is there some trace to be found of the present contention. In 1850, the churchwardens state, in answer to the question as to the state of repair of the church and chancel, that the church is in good repair, "but we

have nothing to do with the chancel." In 1865, the churchwardens at first state that the chancel as well as the body of the church is in very good repair; but, as to the Ten Commandments, they say that they are "set up in the chancel (so called) over the Communion Table, but the chancel proper has been usurped by the Duke of Norfolk; and, in answer to the question whether there have been interments recently within the walls of the church, they say, "No: the last interment was in the chancel claimed by the Duke of Norfolk now as private property." These answers are signed by Mr. Holmes, a highly respectable and intelligent solicitor, who was a witness before me, and who appears to have been one of the churchwardens of Arundel for a great many years. But this is the only instance in which this claim appears while he was churchwarden. Both before and after 1865, he signs answers in the ordinary form, which assume the south transept to be the chancel of the church, and the east wall of the south transept to be the east end of the church. He said, indeed, that he signed these answers without much thought; but that can hardly be so as to the answers of 1865; and, as to the others, I must observe that they do not all follow one form of words, that the language of them is occasionally individual and characteristic, and that, if it were otherwise, those who sign formal and important documents of this kind cannot escape from the fair effect of their language by saying that they used it carelessly; and, further, that, if the claim now put forward had been persistently made in the answers to these articles, I should undoubtedly have heard much as to the great weight to be given to these answers from the learned and able counsel for the defendant. The answers which I have noticed in 1850 and 1865 do indeed shew that at those dates some of the parishioners at least held opinions in favour of the claim now put forward by the vicar; but, as nothing was done, at the furthest and the utmost they shew no more. I have had no articles proved before me of an earlier date than 1844; but, as far as they go, and making due allowance for the two

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exceptions I have noticed, the weight of evidence to be deduced from them is entirely in favour of the Duke and against the vicar and the parish. If, therefore, I felt bound to say, as I did, that the evidence of the acts done by the Duke's predecessors was almost as strong as evidence could be in favour of the plaintiff, I am bound to say further, that the evidence afforded thus far by the conduct of former vicars and parishioners is almost as strong as evidence can be against the defendant.

There is a transaction of the year 1848, between the Duke of Norfolk and the corporation of Arundel which, and the building in relation to which it took place, it is necessary to notice. At the north-east end of the Lady Chapel there is a small building connected internally by an ancient passage with the Lady Chapel, which, it seems agreed, was used before the Reformation as a sacristy. Down to the year 1848, at least within twenty years of that date, but from what point of time was left uncertain, it was shewn to have been used as a school-room, and as the place where elections to offices in the corporation of Arundel had annually been held. In or about 1848, the Duke had turned a road, had given a piece of ground to the churchyard, and had built at considerable expense the present town hall of Arundel; and by a mutual conveyance in 1848, the Duke conveys certain premises to the corporation, and the corporation, "as far as they lawfully or equitably can or may, convey to the Duke, *inter alia*, the old school or court house and the site thereof." I do not myself think this transaction of any great importance. It is barely thirty years ago. The cautious and hesitating language of the deed seems to shew great doubt on the part of those who advised the corporation whether the corporation had any such right or property to convey, and whether, if it had, it could now by such an instrument convey it. As far as it goes, however, the inference to be gathered from the transaction is in favour of the plaintiff. No one except the corporation appears to have claimed any right in this building against the Duke; and if it did belong to the corporation,

then it is another instance of an integral part of an ecclesiastical building having in times long beyond living memory become the property of laymen, and having been used for purposes wholly secular and entirely alien from those to which in the time of the college it had in all likelihood been devoted.

Why should I hesitate to give its natural effect to evidence such as I have described? It has been argued that the Dukes of Norfolk were great and powerful noblemen, and that, as the vicar and parishioners of Arundel had no power to contest their usurpations; so acquiescence in these usurpations is not to be used as evidence of their legal origin. I do not know that, as Judge of law, or as in this case of fact, I can, or that if I can, I ought, so to deal with such evidence as this. But the argument, whatever it may be worth, is I think completely met by the fact that, if the Howards were a powerful family, as in one sense no doubt they were, they were also a family belonging, not indeed exclusively, but on the whole and generally, to a religion for many long years proscribed and persecuted. Their ecclesiastical patronage, if Roman Catholics, was exercised by the Universities; they were, if Roman Catholics, the objects of a penal legislation which is to be found described in the burning words of Mr. Burke (3), and which I take the freedom to say was a disgrace to a civilized country; and I cannot and do not believe, in fact, that, if this building had belonged to the parish of Arundel, there would have been no attempt on the part of any vicar or parishioners to revindicate it, none on the part of any Bishop of Chichester or Archdeacon to exercise any authority within it, claimed and held as it was by Roman Catholics during so many years of the centuries which rolled by from the time of Queen Elizabeth to the time of George 4.

I felt some difficulty from the fact that the Lady Chapel appears to have been treated exactly on the same footing, and to have been as exclusively as the build-

(3) Speech at the Bristol election in 1780; 3 Burke's Works, 423, 424.

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ing called the Fitzalan Chapel in the possession of the plaintiff and his predecessors in title, at least from the time of the Reformation. It is, as far as my knowledge of such matters extends, more difficult to suppose that the Lady Chapel was not originally open to the use of the whole parish, than under the circumstances of this particular case it is as to the rest of the building in dispute. But the alleged trespass here committed was not on any part of the Lady Chapel, and, except indirectly, no question arises as to the Lady Chapel itself regarded as a separate building. Further, the evidence as to user is wholly indistinguishable as to its effect, and includes the Lady Chapel as well as the rest of the building. And, further, I observe that, in the award of 1511, it seems to be assumed that the college is to repair the Lady Chapel as well as the rest of the disputed building; which is some, indeed is strong evidence to shew that at that time the college had the exclusive use of the Lady Chapel, and that the parishioners of Arundel had then no rights therein. I come to the conclusion, therefore, that, in this case, any facts proved as to the Lady Chapel, are by no means inconsistent with the claim of the plaintiff.

It is said, however, as I understand the defendant's argument, that, in an ecclesiastical building one and entire, as this is, it is almost impossible to suppose that there would not be one and the same organisation throughout it, one and the same set of rights exercised over all its parts. The nave at Carlisle, the south transept at Chester, the Lady Chapel at Ely, the crypt (I believe) at Canterbury (but on this I speak without certain knowledge), the transepts at Merton College, Oxford, are instances in which parts of a physically united building are used by different bodies with different rights. It may be that at Wymondham, at Dunster, and in several other places to which I have been referred in the very able paper of Mr. Freeman, a state of things more or less analogous to the state of things at Arundel is to be found. I do not, however, go into, for I do not know the circumstances of, any one of these cases.

Probably they differ in each case, and give rise in each case to different considerations. Probably a man better informed than myself in these matters could largely multiply the examples. In each case it is a question of evidence; and in this case it appears to me that the evidence shews that the vicar and parishioners of Arundel never had any rights in what they now claim as their chancel.

That an aisle or a chancel under the same roof with and open to the rest of a church may be shewn by evidence to be the property of a private person, is too clear for argument. Such cases exist in considerable numbers in all parts of England. Few of us but are aware of instances which establish this fact. That there is no legal principle to prevent it is determined by the cases of *Churton v. Frewen* (4) and *Chapman v. Jones* (5). The judgment of Vice-Chancellor Kindersley in the one case, and the argument of Dr. Stephens in the other, are indexes to the display of various learning upon the subject in which any one who thinks fit may indulge. I think it enough to say that the cases I have cited establish the proposition for which I have cited them; and, although it is true that the chancels or chapels which were the subjects of decision in those cases were not direct continuations of the nave, it is obvious that except as matter of evidence this can make no difference in the principle. It may be more unusual, and therefore more difficult to establish in fact that a chapel or chancel in the position of this building was not the parochial chancel of a church, and was a private chapel. But, once establish the proposition that a chapel or a chancel may be private property, and the question whether this or that building is private property in fact becomes a question of proof. I am of opinion that the proof of this building being always private property is as strong as the nature of the case allows.

I do not refer to text-books or to cases for the proposition that, with evidence of

(4) 35 Law J. Rep. Chanc. 692; s. c. Law Rep. 2 Eq. 634.

(5) 38 Law J. Rep. Exch. 169; s. c. Law Rep. 4 Exch. 273.

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the fact of possession such as exists here, a legal origin for such possession, if a legal origin is possible, is to be presumed. If an authority is needed, *Jenkins v. Harvey* (6), which was twice tried, is sufficient to refer to. I content myself with saying that, if the evidence of exclusive user in this case is insufficient to establish the right of property in the plaintiff, the defendant must get a declaration that it is so from the Court of Appeal.

It is argued, indeed, that if a place is once a parochial chancel, it always remains so; that there can be no prescription against the public; and that the evidence of 350 years is to go for nothing. In the sense in which and for the purpose for which this proposition was pressed upon me, I doubt its truth. I apprehend that, even if this building could be shewn clearly to have been the parochial chancel in the fourteenth and fifteenth centuries, every presumption possible in point of law ought to be made in favour of a possession so exclusive, so old, and so unbroken as the possession in the present case. But I need not stay to discuss this question. Here the presumption fails. I am myself convinced, and I think all the evidence shews, that this building never was the parochial chancel, and that the possession of the seventeenth, eighteenth and nineteenth centuries was but the continuation of the possession of the fourteenth and fifteenth. In truth there is nothing on the other side but the architectural evidence of a great and learned artist. There is no reason why I should hesitate to say that, if an opinion were proof of fact, there is no opinion in England to which I should listen with more respect and deference than the opinion of Mr. Butterfield. But I must determine this case to the best of my ability by proof of facts; and all the facts are, not merely according to technical rules of law, but according to sense, against his opinion. Externally, and as an affair of building, any one who looks at Arundel church would, simply from what meets his eye, come to the same conclusion as Mr. Butterfield. It does not need his great authority to say that the general look of

the building is in favour of the defendant. In truth his evidence was, as might be expected, a highly intelligent exposition of the architectural reasons for arriving, from the view of the building, at the conclusions at which, from the view only, every one would arrive. His evidence as to the facts of the building is unquestionable, but not really very important; when we follow him into the regions of opinion, the documents and the user of centuries appear to me to part company with him. Upon the first and most important question, therefore—the property in the disputed building—I am of opinion that the plaintiff has made out his case, and is entitled to my judgment.

The second question, *i.e.*, whether the nave of the church is entitled to light and air through the arch which leads into the eastward chapel, need not detain us long. It occupies, no doubt, a large space in the pleadings, but to the defendant at least it is manifestly unimportant. If the vicar and parishioners of Arundel have no rights eastwards of the transepts, whether they have a physical division between their church and the Duke of Norfolk's chapel cannot much signify. I must, however, decide this question, as it is raised; and I must decide it for the plaintiff.

The defendant justifies the trespass he has committed by pleading that the plaintiff had by building a wall obstructed the light and air to which he on the part of his parish had a right, and that therefore he broke the wall down. But, in the first place, the very foundation of such a defence is wanting here. Assuming for his purpose that light and air did come from the Duke of Norfolk's chapel to Arundel church, there is no evidence whatever that any sensible or serious diminution of either has been occasioned by the building of the wall which has been knocked down by the defendant. But, further, from 1811, or at latest from 1816, the parish had filled up the arch with boards on the western side of the iron lattice-work, which effectually shut out all light and air from the church, except what might come from a door at the bottom of the arch, which was proved before me to have been occasionally opened in hot

(6) 1 Cr. M. & R. 877; s. c. 2 Cr. M. & R. 393; s. c. 6 Law J. Rep. Exch. 17.

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weather. An attempt was made to shew that there had been an opening in the boards higher up in the arch; but the attempt failed, and there was no proof of this. In 1872 the church was restored, under a faculty, by Sir Gilbert Scott. He placed an altar and reredos right across the space where this door had been, and therefore, if the old state of things had remained, no light and scarcely any air could have come through this archway. I do not mean to decide whether this was or was not evidence of abandonment by the defendant of the rights which he now claims. But it is at any rate the strongest possible evidence that the rights were worthless, and that, if they have been interfered with in fact, it has not been to any extent which would give a legal ground of action.

It further appears to me that the 3rd and 4th sections of the Prescription Act, 2 & 3 Will. 4. c. 71, are fatal to the maintenance of the action on this latter ground. The wall was erected by the plaintiff in September, 1873; the trespass committed by the defendant was in July, 1877. It appears from the correspondence that from the beginning the Duke made the claim which he now makes; that he declined negotiation, and stood upon his rights; and that, if the vicar intended resistance, he at any rate did nothing whatever on which the Duke could bring an action for nearly four years after the wall was built. If ever, therefore, there was a right, which I gravely doubt, it has never been interfered with so as to give ground to an action, and, if it has been, the interference has been acquiesced in so as to destroy the right of action, if it ever existed. Indeed, I cannot but regret that the correspondence began with an assertion by the vicar of right to this building, which, whether so intended or not, could be met only by a counter assertion of right on the part of the Duke. It was unwise, because it was unnecessary, to throw down the gauge of battle; but, having thrown it down, it was matter of course that it should be taken up. If a man is told that he and his ancestors for centuries have been holding property which belongs to another, he must, unless he is prepared at once to yield the claim, decline all dis-

cussion which proceeds on such a basis. With the evidence now before me, I cannot wonder that the Duke of Norfolk did decline all such discussion. Possibly—I do not know, but at least possibly—if he had been approached in a different spirit, the result to the vicar and parish might have been very different. Possibly, even now, as this contest has been conducted, though with no concession on either side, yet with courtesy on both, possibly some solution might be arrived at which, while preserving for the Duke of Norfolk all the rights in this building which he would care to preserve, might obtain for the parish all such use of it as would be of any benefit to them. I have no right, indeed, to mediate between the parties; but I have not, I think, gone beyond the duty of my office in suggesting that arrangement is possible, and, if possible, that it is on every account desirable.

Now, however, the parties are before me standing on their legal rights; and in this state of things, and for the reasons which I have set forth, I give judgment for the plaintiff for 40s. damages and costs; and I award an injunction, as prayed for in the statement of claim. It follows that I give judgment against the defendant on his statement of defence and counter-claim, and upon the injunction he prays for therein.

*Judgment accordingly.*

Solicitors—Few & Co., for plaintiff; Brooks, Jenkins & Co., for defendant.

[IN THE DIVISIONAL COURT FOR THE Q.B., C.P. AND EXCH. DIVISIONS.]

1879. } THE QUEEN v. THE JUSTICES  
July 30. } OF SURREY.

*Prison Act, 1877—40 & 41 Vict. c. 21.  
ss. 4 and 57—3 & 4 Vict. c. 54. s. 2—  
Maintenance of Insane Prisoners.*

[For the report of the above case, see  
48 Law J. Rep. M.C. 188.]



[IN THE COMMON PLEAS DIVISION.]

1879. }  
 March 29. } HARTLEY v. HUDSON.

*Landlord and Tenant—Covenant to pay Rates, Taxes and Charges—Charge upon Premises or Persons in respect thereof—Public Health Acts, 1848, 1858 and 1875.*

*Defendant was tenant of a public-house under a lease by which he covenanted to pay "all rates, taxes, charges and assessments whatsoever which now are or may be charged or assessed upon the said premises or any part thereof, or upon any person or persons in respect thereof, land tax and property tax excepted." The plaintiff, who had acquired the lessor's interest in the premises, received a notice from the local Board of Health, under the Public Health Act, 1848, s. 69, requiring him as owner to sewer, level, pave, &c., a street adjoining the premises. The plaintiff failing to comply with this notice, the local board executed the required works themselves, and under the above Act and the Acts amending the same, demanded and obtained from the plaintiff the proportion of the expenses and interest, assessed in respect of these premises:—*

*Held, that the plaintiff was entitled to recover these expenses from the defendant, for that such expenses were a "charge upon the premises" as well as "upon a person in respect thereof," which the defendant by his covenant had undertaken to pay.*

On the 16th of August, 1867, the defendant became tenant of a public-house within the borough of Stockport, under a lease by which he was to pay to the lessors the yearly rent of 40*l.*, "free from all present and future parliamentary, parochial and other taxes, rates, charges, deductions and impositions whatsoever (the land-tax and property-tax, if any, only excepted)." The lease also contained a covenant by which the defendant undertook to pay "all rates, taxes, charges and assessments whatsoever which now are or may be charged or assessed upon the said premises, or any part thereof, or upon any person or persons in respect thereof (except as aforesaid)."

Prior to the year 1874, a street was made by certain persons unconnected with the plaintiff or defendant, but adjoining the demised premises; and such street, as found by the jury, was prior to 1874 existing as a street. In April, 1874, the corporation of Stockport, as local board of health, gave notice under the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 69, to the plaintiff (who had acquired the lessor's interest in the premises) as owner, that he was required to sewer, level, pave, &c., this street. The plaintiff did not comply with the requirement of this notice, and subsequently the required works were done by the corporation; and the proportion of the expenses in respect of these premises was settled by the surveyor of the corporation.

An action was brought by the plaintiff to recover these expenses from the defendant, and was tried at the Manchester Winter Assizes, 1879. The case was afterwards argued on further consideration by

*O. Russell and S. Taylor*, for the plaintiff, and *Ambrose and Edge*, for the defendant.

LINDLEY, J., after stating the facts as above set out, delivered judgment as follows:—

The notice above mentioned was clearly given under the Public Health Act, 1848; it may be doubtful whether the work actually was done under that Act or under the Public Health Act, 1875 (38 & 39 Vict. c. 55), which came into force on the 11th of August, 1875; but as the provisions of the latter Act (ss. 150 & 257) are, so far as regards this case, identical with that of the former Act, and of the Local Government Act, 1858, and as in argument the Acts of 1848 and 1858 were assumed to apply, I shall consider the case as under the Act of 1848 and the Acts amending the same.

The question here is upon the construction of the covenants in the lease. The expense of paving, &c., can scarcely be said to be a rate, tax or assessment; and hence it only remains to consider whether it was a *charge* "charged or assessed upon the said demised premises,

*Hartley v. Hudson, C.P.*

or upon any person or persons in respect thereof."

There is a distinction to be drawn between a charge upon premises and a charge upon a person, as the former would be binding on the realty, whilst the latter would be a mere personal liability for expenses incurred in respect of the premises; but in this case it may be said that there was a charge upon the premises and a charge upon the person, namely, upon the plaintiff as owner of the premises. By the Public Health Act, 1848, such expenses are to be paid by the owner in default, in such proportion as shall be settled by the surveyor, and such expenses may be recovered from the owner in a summary manner, or the same may be by order of the local board declared private improvement expenses, and be recoverable as in the Act provided. There was no evidence produced to shew that these expenses had been declared private improvement expenses; they were demanded from the plaintiff, and he paid them with interest due under the provisions of the Act to which I shall now call attention.

By the Local Government Act, 1858, which made corporations the local board of health in boroughs, it was provided (s. 62), that "where the local board has incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable, either by application of or agreement with the owner, or by the Public Health Act, 1848, or any Act incorporated therewith, or this Act, the same may be recovered from the person who is owner of such premises when the works are completed for which such expenses have been incurred, in the manner provided by the Public Health Act, 1848, and such expenses shall be a charge on the premises in respect of which they were incurred, and shall bear interest at the rate of 5*l.* per cent. per annum till payment thereof." Now, these expenses paid by the plaintiff were incurred in respect of the demised premises, and by the terms of the above section were a charge upon the premises until payment. The fact of the plaintiff paying them because he was compellable by law to do so, does

not make them any the less a charge on the premises within the meaning of the covenant in the lease; and hence I am of opinion that the plaintiff is on this ground entitled to recover.

But I think the plaintiff is also entitled to recover because these expenses were a charge upon "a person in respect of the premises," i.e. they were a debt payable by the plaintiff in respect thereof. The plaintiff, by the Public Health Act, 1848, had a duty cast upon him to pave, &c., and he neglected to perform that duty, and in consequence this expense was incurred by the corporation; this expense then became chargeable by the corporation to the plaintiff, and it was so chargeable in respect of these premises. In *Tidswell v. Whitworth* (1) it was held that where the Act imposed upon the landlord the duty of performing the work, it could not be said that, upon the corporation charging the landlord with the expenses, these expenses could be called "taxes, rates, assessments or impositions payable in respect of the premises;" but that such expenses were payable in respect of the owner's default to do the work. But the covenant in the lease in that case did not contain the words "charged upon any person or persons in respect thereof," and in subsequent cases these words are shewn to be important. *Thompson v. Lapworth* (2), although distinguished from *Tidswell v. Whitworth* (1) on the ground that there was no duty on the part of the landlord to do the work, was also distinguished on the ground that the covenant there contained words by which the tenant undertook to pay "all taxes, &c., which should be taxed, &c.," on the tenant or landlord of the premises, and this distinction is pointed out in *Raulins v. Biggs* (3). In *Crosse v. Raw* (4), the tenant had covenanted to pay all "outgoings which should at any time during the said demise be taxed, rated, charged,

(1) 36 Law J. Rep. C.P. 103; s. c. Law Rep. 2 C.P. 326.

(2) 37 Law J. Rep. C.P. 74; s. c. Law Rep. 3 C.P. 149.

(3) 47 Law J. Rep. C.P. 487; s. c. Law Rep. 3 C.P. D. 368.

(4) 43 Law J. Rep. Exch. 144; s. c. Law Rep. 9 Exch. 209.

*Hartley v. Hudson, C.P.*

assessed or imposed upon the said demised premises or upon the landlord or tenant in respect thereof." Now there the local board had the right to compel the owner to make a drain connecting with the main sewer, or, in default, to do it themselves. Bramwell, B., there says:—"It is said it was the duty of the defendant (the landlord) to make the drain, and that, if he had done so, the expense would not have been an outgoing, 'taxed, rated, charged, assessed or imposed' upon, or in respect of the premises. Now the point so stated seem to be scarcely arguable, for the argument in substance is, that if the local board had a right to make the drain in the first instance and charge the expense on the defendant, it would be an outgoing imposed on the landlord in respect of the premises, but if they had a right to compel the defendant to do it, and he did it, it would not be an outgoing imposed on him in respect of the premises. This seems preposterous. It would certainly be something which had gone out, an expense which he had been at in respect of the premises, and it would have been an expense imposed on him."

In this case, whether the plaintiff had done the work himself, or paid the expense of its being done by the corporation, he would have done either by compulsion, and the cost of so doing would have been a charge charged upon him in respect of the premises. Hence I am of opinion that there must be a judgment for the plaintiff for 68*l.* 17*s.* 3*d.* and 2*l.* 11*s.* for interest.

*Judgment accordingly.*

Solicitors — Hughes & Son, agent for A. F. Vaughan, Stockport, for plaintiff; Norris, Allens & Carter, agents for Diggles & Ogden, Manchester, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1879. } DE OLEAGA & COMPANY v. THE  
June 20. } WEST CUMBERLAND IRON AND  
July 3. } STEEL COMPANY (LIMITED).

*Vendor and Purchaser—Sale of Goods—Monthly Deliveries—Stipulation in Contract as to Suspension of Deliveries—Right to rescind.*

The plaintiffs, merchants at Bilbao, contracted to supply the defendants in England with 30,000 tons of ore at a certain price per ton, including freight and insurance. By the terms of the contract deliveries were to be made at the rate of from 800 to 1,300 tons per month, provided that tonnage could be procured by the plaintiffs at or under a certain rate; it was also provided that no responsibilities should attach to the plaintiffs for failing to deliver any portion of the ore through circumstances beyond their control. The delivery of a portion of the ore was delayed beyond the time agreed upon by the parties owing to freights being above the limit, while another portion could not be delivered in time owing to warlike operations around Bilbao:—Held, that the plaintiffs were entitled to deliver any quantities of the ore which they had withheld while freights were above the limit, but not those which they were prevented from delivering by vis major.

PER CURIAM.—The limit of time within which the quantities so withheld must be delivered, is a reasonable time having regard to the contemplated duration of the contract.

This was a Special Case. The facts and arguments sufficiently appear in the judgment of the Court.

Charles Russell and Warr, for the plaintiffs.

Herschell, Bompas and Charles Crompton, for the defendants.

*Our. adv. vult.*

The judgment of the Court (1) was (on July 3) delivered by—

LUSH, J.—This is an action on a contract contained in an offer of the 12th of February, and an acceptance of the

(1) Cockburn, L.C.J.; Lush, J.; and Manisty, J.

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*De Oleaga v. West Cumberland Iron Co., Q.B.*

15th of February, 1872, by which the plaintiffs, who are merchants at Bilbao, and also at Liverpool, undertook to supply the defendants at Workington, Cumberland, with about 30,000 tons of Sommorostro ore at the price of 25*s.* 6*d.* per ton of twenty hundredweight, cost freight and insurance.

Payment to be made by cash on delivery of each shipment.

The portions of the contract material to the case are the following:—

"Deliveries to be made at the rate of from 800 to 1,300 tons per month, provided we are able to procure tonnage at or under the rate of 16*s.* 6*d.* per ton."

"No responsibility to attach to us should we be prevented from delivering all or any portion of the ore through any dangers and accidents of the mines, railway shoots, river, seas and navigation of whatever nature or kind, or through any circumstances beyond our own control."

The mines from which the ore is obtained are near Bilbao, which was the port of shipment contemplated by the parties.

If the 30,000 tons had been delivered regularly at the minimum rate of 800 tons a month, the contract would have been completed in December, 1874; if at the rate of 1,050 tons a month (the mean balance 800 and 1,300) the contract would have run out in July, 1874.

For the first few months after the contract, the plaintiffs had an opportunity of procuring freight under 16*s.* 6*d.* per ton for the minimum quantity, but they failed to do so. In the summer of 1872 freights rose above the limit.

In October, 1872, and again in April, 1873, a cargo of other ore was delivered and accepted in substitution of Sommorostro ore. With these exceptions nothing had been done in performance of the contract up to April, 1873. At that time, in consequence of the continued high freights, an agreement was come to at the instance of the plaintiffs, by which the contract price was raised to 28*s.* *ex* sailing vessels, and 29*s.* 6*d.* *ex* steamers, provided freight could be obtained at certain other specified rates.

In May, 1873, 390 tons were delivered

under the modified contract, in June, 303½ tons, and 501 tons 15 cwt. of other ore, which was accepted as delivered under the contract; and in July, 1873, 269 tons 14 cwt. more, making altogether 1,946 tons.

Between May and July, 1873, inclusive, there was nothing in the rate of freight to excuse the regular delivery.

From July, 1873, down to February, 1876, the plaintiffs were prevented by warlike operations around Bilbao and the mines from making delivery of any part of the ore.

On the 29th of February, 1876, by which time these troubles had ceased, the plaintiffs gave notice that the mineral trade at Bilbao had reopened, and they should proceed to deliver the ore according to the contract. The defendants refused to accept, on the ground that the contract no longer existed.

Upon these facts the following questions are submitted to us:—

First. Are the monthly quantities, the delivery of which, at the time they would in ordinary course have been due, was prevented or excused by the provisions of the contract, to be treated as quantities expunged from the contract, or as quantities, the delivery of which was postponed?

Second. Was the contract in force in February, 1876, or had it run out in July, 1874, or December, 1874?

There is, we think, a material distinction between the delivery clause and the clause by which the seller exempts himself from responsibility. The object of the one is simply to regulate the mode of performance, which is to be by monthly instalments, subject, however, to interruptions contingent on the rate of freight. So long as freight ranged above the limit, the seller was entitled to withhold delivery, but the contract for the quantity undelivered remained in force. The delivery was merely suspended until freights came down. If no other stipulation had been found in the contract, the seller would in that event have been both entitled and bound to resume the monthly deliveries, and if he failed to do so, the buyer would have been entitled to buy in against him and sue for the difference

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between the contract price and the then market price. And it would have been no answer to such an action to say that he was prevented from making delivery by accident to the mines, or railway, shoots, river or navigation, or any other circumstances beyond his control.

It is clear that in such a case the seller could not afterwards claim to deliver, nor the buyer claim to have, the quantities in respect of which the one had made default, and the other had had, or was entitled to have, a substitute in damages. Those portions could be as much struck out of the contract as if they had been actually delivered.

The object of the clause secondly before quoted, is to protect the seller from such liability, and nothing more, leaving the rights of the parties in other respects as they would have been if no such clause existed. The non-delivery under such circumstances is not a suspension of performance; it is a breach, but one for which the buyer agrees he will not hold the seller responsible.

The result is, that the seller was entitled to deliver the quantities which he withheld while freights were above the limit, but not those which he was prevented from delivering by *vis major*.

But then arises the question within what time must he deliver the quantities so withheld?

Some limit must necessarily be put, and the only limit which occurs to us, is a reasonable time, having regard to the contemplated duration of the contract, &c. It cannot be contended that such a contract remains open as long as the seller finds it to his interest to remain passive, with power to enforce it at any distance of time.

The reasonable limit is to be determined as a question of fact in view of the contemplated duration of the contract, the means which the seller had to make up the arrears, and possibly other circumstances. If that period expired during the time the shipments were prevented by the Civil War, the arrears must be treated like the accruing monthly deliveries, as struck out of the contract.

We cannot say, as a matter of law, that the contract ran out in July, 1874,

or in December, 1874. All that we can answer is, that it ran out at the expiration of what would have been a reasonable time if the seller had not been prevented from shipping by the *vis major*.

The case of *King v. Parker* (2) we cannot regard as a satisfactory decision upon this point. The main point raised and argued was whether the strike itself put an end to the contract. The Court held that it did not; and from that opinion, looking to the terms of the contract, we see no reason to dissent. The question whether it was too late, having regard to all the circumstances, for the seller to insist on delivery, was certainly raised, but does not appear to have been pressed, and the Lord Chief Baron gives no opinion upon the point.

A third question is submitted to us, to which we answer that in our opinion the plaintiffs were not bound under the circumstances stated to ship at any other port than Bilbao.

*Judgment accordingly.*

Solicitors—Field, Roscoe & Co., agents for Bateson & Co., Liverpool, for plaintiffs; Bischoff, Bompas & Co., agents for E. & E. L. Waugh, Cockermouth, for defendants.

[IN THE COMMON PLEAS DIVISION.]

1879. { THE GUARDIANS OF THE POOR OF  
June 25. { NOTTINGHAM UNION (*appellants*) v. TOMKINSON (*respondent*).

*Evidence*—*Evidence further Amendment Act, 1869—Proceedings "in Consequence of Adultery"—Evidence of Husband to prove Non-access.*

[For the report of the above case, see 48 Law J. Rep. M.C. 171.]

[IN THE QUEEN'S BENCH DIVISION.]

1879. }  
May 6. } BARNES v. LOACH.  
August 8. }

*Easement—Ancient Lights—Implied Grant—Unity of Ownership—Dominant and Servient Tenement—Sub-division of Property—Alteration in Premises—Destruction of Easement.*

*The principle of law that where the owner of an estate has been in the habit of using quasi easements of apparent and continuous character over the one part for the benefit of the other part of his property, and alienates the quasi dominant part to one part and the quasi servient to another, the respective alienees will, in the absence of express stipulation, take the land burdened or benefited by the qualities which the previous owner had a right to attach to them, applies, even though the owner were not in actual possession of both parts of the property at the time of alienation.*

*If the alteration in a dominant tenement or in the mode of using an easement is not of such a nature that the tenement is substantially changed or the burden on the servient tenement materially increased, an easement is not destroyed in consequence of the alteration.*

This was a Special Case, of which the following is the material portion:—

In 1810 one Harrison purchased the land, and the Globe public-house, coloured blue in the plan, attached to and forming part of the case, and also the strip of land on the north thereof, together with the cottages then in course of erection thereon, which are coloured yellow.

On the 12th of January, 1812, Harrison demised the "blue" and "yellow," which had then been completed, to one Yates, for thirty-one years from Christmas, 1811.

On the 17th of March, 1814, Harrison sold the "blue" and the "yellow" to Thomas Barnes.

Thomas Barnes died on the 21st of August, 1818, intestate as regards the "yellow" and the "blue." He left two sons, Robert and John, the former of whom inherited the "blue" and "yellow" as heir-at-law.

On the 20th of April, 1819, Robert Barnes was admitted tenant of the land coloured green on the plan which was copyhold, and adjoined the "yellow" land.

On the 18th of February, 1822, Robert Barnes by will specifically devised the "green" land to one Addison, the defendant's predecessor in title. The "blue" and the "yellow" passed under a residuary devise to his brother John.

Robert Barnes died on the 22nd of May, 1822, and on the 3rd of December, 1822, the said Addison was admitted tenant of the "green."

On the 18th of August, 1830, John Barnes devised the blue and yellow to the plaintiff's predecessor in title.

On the 8th of September 1836, John Barnes accepted a surrender of the thirty-one years' lease of the "blue" and the "yellow," and granted a new lease thereof for thirty-one years, as from the 24th of June, 1836, to Messrs. Hoare, the brewers.

John Barnes died in 1849, and in 1852 Addison sold the "green" to one Whyte, who subsequently enfranchised it on the 5th of November, 1852.

On the 30th of November, 1854, Whyte granted a lease of the "green" to Messrs. Hoare, the brewers, for fourteen years, from the 24th of June, 1852, which expired on the 24th of June, 1857, contemporaneously with the lease which they held of the "blue" and "yellow" land.

Up to the 24th of June, 1867, the "green" had been used as gardens to the cottages Nos. 4 to 20, Globe Road, each garden being separated from the next garden by a low fence. There was no fence dividing the garden from the cottage to which it was attached.

The cottages were built of a uniform plan in the front, but not so at the back. There were abutments or outhouses attached to the back of each cottage, but some of them have been materially altered as hereinafter appears.

On the determination of the two leases above mentioned a question arose between the plaintiff and the defendant's predecessor in title as to what was the boundary between the "green" and the

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"yellow." That boundary having been settled between them, it was found that Nos. 4, 6, 8 and 10 projected on the defendant's land; No. 8 only a few inches. Nos. 4, 6 and 10 were accordingly set back to the position in which they now appear. The windows in Nos. 4 and 6 are of the same size, and in the same relative position in the present wall as that which they had previously occupied in the former wall, but in a different place. No. 8 was allowed to remain.

There were windows in Nos. 8 and 10 overlooking the "green." The projection of No. 10 was built within the last twenty-five years. When the back wall of No. 10 was set back to the present position the plaintiff proceeded to open therein windows of the same size and in the same relative position as the former windows in the former wall. The defendant objected to this, and required them and also the windows in the rear wall of No. 8 to be blocked up, which was done.

The windows of Nos. 12 and 14 are the old original windows. The back part of No. 20 was not built at the same time as the house, but previous to the year 1822.

Nos. 16 and 18 have been extended outwards by the occupiers since the year 1822, but the original window of No. 18, which was at right angles to the present window, and similar to that now existing in No. 14, still exists inside the present window.

In 1868, when the boundary between the "green" and the "yellow" was settled by agreement, the wall as it now exists at the back of Nos. 4, 6, 12, 14, 16, 18 and 20 was built by the plaintiff with materials provided by the defendant, and it was agreed that that wall should be a party wall, but no agreement was made that it should not be raised.

Extracts from the will of Robert Barnes are annexed, but they do not expressly refer to any easement of lights, the residuary devise being of all the residue of the testator's lands, tenements and hereditaments according to the several natures, tenancies and qualities thereof.

The plaintiff contends that Robert Barnes when he devised the "yellow" to

his brother John, granted to the "yellow" an easement of light to the windows as then existed over the "green." The plaintiff further contends that if such grant were made she is entitled to an easement of light to the present windows of Nos. 4 and 6, which are in the same relative position as they formerly occupied in the former wall, though in a different place to the original windows, and to open windows in the present wall of No. 10, in the same relative position as they formerly occupied in the former wall though in a different place, and to reopen the former windows in No. 8.

The plaintiff further contends that as to No. 18, the fact of the present window having been put up outside the old existing windows does not deprive the plaintiff of the right of light to the old window inside the present window.

The defendant contends that no real easement was granted; moreover, if so granted, that it was destroyed by the above alteration.

The questions for the opinion of the Court were:

First. Whether Robert Barnes by his will granted an easement of light over the "green" land?

Second. If he did so grant such an easement, was it destroyed by the setting back of the walls and opening in the walls, so set back, of new windows of the same size and in the same relative position as were the windows in the former walls?

Third. Whether if such grant existed, the fact of the occupier of No. 18 having erected a wall and window in it outside and at a different angle to the old window destroys the easement of light to the old window?

*Archibald* (Tomlinson with him), for the plaintiff.—The doctrine of *Pyer v. Carter* (1) is applicable to the present case, and any quasi easements of an apparent and continuous character, such as an easement of light passed by the devise of Robert Barnes to his brother; and consequently the latter as devisee of

(1) 1 Hurl. & N. 916; s. c. 26 Law J. Rep. Exch. 268.

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the "yellow" was entitled to an easement of light for the windows, such as then existed over the "green"—*Swansborough v. Coventry* (2); *Orompton v. Richards* (3); *Watts v. Kelson* (4); *Pearson v. Spencer* (5). With reference to the moving back of some of the windows that would not destroy the easement, because there was no substantial change in the dominant tenement, nor has the burden on the servient tenement been materially increased. See *Blanchard v. Bridges* (6); *Jones v. Tipling* (7).

Lastly, the easement of light to the old window has not been destroyed by what the occupier of No. 18 has done, which in no way altered the old window—*The National Provincial Plate Glass Insurance Company v. The Prudential Assurance Company* (8). He also cited *Hinchcliffe v. The Earl of Kinnoul* (9).

*Finlay*.—The principles of law put forward by the other side have no application. Here the testator was never in possession, nor had he the control of the cottages; he was the owner in fee subject to a lease of thirty years, which had been granted by the previous owner in fee. An easement of the kind here claimed arises from what is designated by the French law *Destination du père de famille*, by which is meant "the disposition or arrangement which the proprietor of several heritages has made for that respective use," *Gale on Easements*, 5th Edit. 97. But the doctrine cannot apply when the owner is without power to interfere with the existing arrangements. Again, the easement if it existed was destroyed by the alterations that are made. He cited *Ellis v. The Man-*

*chester Carriage Company* (10), and *Suffield v. Brown* (11).

*Archibald* replied.

*Our. adv. vult.*

The judgment of the Court (12) was (on August 8) delivered by—

LOPES, J.—This was a Special Case settled by an arbitrator, in which three questions are submitted for our decision. The first is, whether an easement of light, over the part coloured green on the plan annexed to the case, passed by the will of Robert Barnes to the plaintiff's predecessors in title. If the owner of an estate has been in the habit of using *quasi* easements of an apparent and continuous character over the one part for the benefit of the other part of his property, and aliens the *quasi* dominant part to one person and the *quasi* servient to another, the respective alienees will, in the absence of express stipulation, take the land burdened or benefited, as the case may be, by the qualities which the previous owner had a right to attach to them. It is said, however, that in 1822, when Robert Barnes made his will and died, the yellow was under lease to one Yeates for thirty-one years from Christmas, 1811, and that consequently the law as above stated does not apply, because Robert Barnes was not in possession of the yellow and had therefore no control over it at the time he made his will. If this contention were to prevail, the salutary principle of law, with regard to the passing of manifest and apparent easements by implied grant on the subdivision of a property, would be defeated whenever one part of it was demised for any period however short, because the owner would not be in actual possession of both parts of the property at the time of alienation. This would create great inconvenience, and we should require strong authority to induce us to give effect to this contention. No authority bearing upon this point was

(2) 9 Bing. 305; s. c. 2 M. & S. 362.

(3) 1 Price 27.

(4) 40 Law J. Rep. Chanc. 126; s. c. Law Rep. 6 Chanc. App. 166.

(5) 1 B. & S. 571.

(6) 4 Ad. & E. 176; s. c. 5 Law J. Rep. K.B. 78.

(7) 11 H. L. Cas. 290; s. c. 12 Com. B. Rep. N.S. 826; s. c. 34 Law J. Rep. C.P. 342.

(8) 46 Law J. Rep. Chanc. 871; s. c. Law Rep. 6 Ch. D. 756.

(9) 5 Bing. N.C. 1; s. c. 8 Law J. Rep. C.P. 105.

(10) Law Rep. 2 C.P. D. 13.

(11) 4 De Gex, J. & S. 185; s. c. 33 Law J. Rep. Chanc. 249.

(12) Cockburn, L.C.J.; and Lopes, J.



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brought to our notice. *Suffield v. Brown* (11) and *Ellis v. The Manchester Carriage Company* (10) were cited. But these cases do not seem to us in point, having been cases in which the owner of two adjoining tenements parted with one of them, retaining the other himself.

The green was used as garden ground by the occupiers of the yellow, and the enjoyment of the easement of light and air over the green must have been acquiesced in by Robert Barnes, for it was a servitude which he might have resisted if he thought fit.

In these circumstances we think the enjoyment of the easement over the green by the occupiers of the yellow was the same as if Robert Barnes had himself been in possession of the yellow, and that the same incidents attached.

We are further asked whether, if an easement passed, it was destroyed by the setting back of the walls, and opening in the walls so set back of new windows of the same size and in the same relative position as the former windows in the former walls. We are of opinion that the easement was not destroyed. If the alteration in a dominant tenement, or in the mode of using an easement, is not of such a nature that the tenement is substantially changed, or the burden on the servient tenement materially increased, an easement is not destroyed in consequence of the alteration. Here the dominant tenement was not substantially changed, nor was the burden on the servient tenement materially increased but rather lessened.

We are also asked whether, if the easement passed, the fact of the occupier of No. 18 having erected a wall and window in it outside, and at a different angle to the old window, destroys the easement of light to the old window. It does not appear that there has been any alteration in the old window. It remains as it was, and light has always been enjoyed by it. We do not think that the occupier of No. 18 has, by what he has done, destroyed the easement of light to the old window. It is much the same as if the occupier of No. 18 had placed a new window by the side of the old one. In such a case it could not be contended

that because a new window had been so placed, the light through the old window had been lost without any evidence whatever of an abandonment. It is contended that the addition of this outside window changed the character of the easement so as entirely to destroy it. It is difficult to comprehend how this effect can be produced by an act which in no way alters the old window, which is carefully preserved in its original state inside the new one. We answer all these questions in favour of the plaintiff.

*Judgment for the plaintiff.*

Solicitors—Messrs. Tweedies, for plaintiff; Crouch & Spencer, for defendant.

[IN THE COMMON PLEAS DIVISION.]

1879.	}	WAGSTAFF AND OTHERS v. ANDERSON AND OTHERS.
May 2, 3,		
23.		

*Shipping—Charter-party—Master when not Agent of Charterer—Contract to receive Goods to be carried by Shipowner.*

*The defendants chartered the ship F. K. Dumas for a voyage from London to Callao under a charter-party which provided inter alia that the whole ship should be at the disposal of the charterers for the conveyance of goods, except the space necessary for the crew and stores; that the master and owners should give the same attention to the cargo, and in every respect be and remain responsible to all whom it might concern as if the ship were loaded in her berth by and for the owners independently of the charter; that the master should sign bills of lading at any rate of freight the charterers might require, without prejudice to the charter-party; and that the charterers' responsibility, except for freight, should cease on the vessel being loaded. Shortly after entering into such charter-party, the defendants by an agreement in which they described themselves as "acting for the owners of the F. K. Dumas,"*

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agreed with the plaintiffs to receive on board a certain cargo of cement and stone at a certain freight from London to Callao, which was to be paid, one-half on signing bills of lading and the remainder on final discharge at Callao. The defendants had previously written to the plaintiffs' brokers offering them "room" in the said ship for such cement and stone, at the same rate as that mentioned in the said agreement. The cargo of cement and stone was accordingly shipped, and the master signed bills of lading for its delivery at Callao, unto order or to plaintiffs' assigns, on paying a specific sum, being the residue of the freight, half having been paid when the bills were signed, pursuant to the said agreement. The ship during the voyage met with bad weather, and was obliged to put into Monte Video and was there properly condemned, and the master, without communicating with the plaintiffs, sold their cargo of cement and stone.

In an action for the value of such cargo, the jury found that the master was not justified in selling it, and DENMAN, J., on further consideration, having power to draw inference of fact,—

Held, that the master in selling the goods was not acting as the servant or agent of the defendants either in law or in fact, since the defendants contracted with the plaintiffs only that the owners of the ship should receive the plaintiffs' goods and enter into contracts by bills of lading to carry them, and that therefore the master was not the agent or servant of the defendants at all, except to receive the goods on board and to sign bills of lading, which should be binding on his owners as to the carriage of the goods.

Action for the value of a cargo of stone and cement which the plaintiffs had shipped on board the ship *F. K. Dumas*, of which the defendants were the charterers, on a voyage from London to Callao, and which had been, as alleged, improperly sold by the master at an intermediate port. The facts are fully stated in the following judgment of Denman, J., delivered after argument on further consideration by

*Watkin Williams (Hannen with him)*, for the plaintiffs, and by

*Cohen (Butt and J. O. Mathew with him)*, for the defendants.

*Our. adv. vult.*

DENMAN, J. (on May 23) delivered judgment as follows:—The plaintiffs in this case were the well-known contractors, Messrs. Brassey & Co., and they sued for the value of a cargo of stone and cement which had been shipped on board the ship *F. K. Dumas*, in London, for Callao, and sold in Monte Video under the circumstances afterwards mentioned. The defendants were the charterers of the ship under a charter-party of the 25th of June, 1872, which, amongst other things, provided as follows:—It was agreed between the master, on the part of the owners of the good ship *F. K. Dumas*, and the defendants, that the ship should perform a voyage from London to Callao; that she should be maintained in her class by the owners while under the charter; that she should receive on board, at such loading berth as the charterers might appoint, all such lawful goods as might be required; that the whole ship should be at the disposal of the charterers for the conveyance of goods, except the space necessary for the crew and stores; that the master and owners should give the same attention to the cargo, and in every respect be and remain responsible to all whom it might concern, as if the ship was loaded in her berth by and for the owners, independently of the charter; that the master was to sign bills of lading at any rate of freight the charterers might require, without prejudice to the charter-party; that the ship should be addressed to the charterers' nominee at the port of discharge; that the ship, being loaded, should proceed to Callao and deliver the cargo agreeably to bills of lading in the usual and customary manner, the act of God, &c., excepted. The total freight to be paid for the use and hire of the ship was agreed at the sum of 2,500*l.*, to be paid as follows against captain's order, namely, by charterers' acceptance payable at ninety days from the ship's final sailing from Gravesend, or in cash at five per cent. discount

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at captain's option; but the owners were to accept in satisfaction of freight all bills of lading bearing freight payable abroad, not exceeding one-third of the amount of the charter; and the charterers' responsibility, except for freight, was to cease on the vessel being loaded. On the 26th of June the defendants Moss and Mitchell, whose acts, it was admitted, were binding upon the other defendants as well as themselves, entered into the agreement with the plaintiffs, set out in the statement of claim, as follows:—"It is this day mutually agreed between Messrs. Moss and Mitchell, acting for the owners of the *F. K. Dumas*, and the plaintiffs, that the former shall receive on board in the London Docks 1,000 tons of cement in casks and stone in blocks, at the rate of 80s. per ton freight from London to Callao; the ship to receive the cement, &c., about the 25th of July, and sail about the 25th of August. The barges as they come alongside shall be immediately discharged, or Moss & Mitchell undertake to pay demurrage on barges. The cargo to be received at Callao as customary; freight to be paid, one-half on signing bills of lading, less two months' discount at five per cent. per annum, and the remainder on final discharge at Callao. Penalty for non-performance of this agreement, 1,500*l.*" Before entering into the charter-party of the 25th of June, the defendants had written to Messrs. Smith, Sundries & Co., the plaintiffs' brokers, on the 24th of June, offering "room" in the ship *F. K. Dumas* to Callao for 750 tons of cement, and 250 tons of stone at the same rate as that mentioned in the agreement of the 26th. About 1,000 tons of stone and cement were shipped, and the vessel sailed in due course. Before sailing, namely, on the 29th of August, 1872, the master signed bills of lading for the cement and stone, "to be delivered at Callao, the act of God excepted, unto order or to plaintiffs' assigns, on paying freight for the goods, 786*l.* 17*s.* 4*d.*" The sum of 780*l.* 6*s.* 1*d.* (the half freight, minus the discount of five per cent. for two months) was paid by the plaintiffs to the defendants before the ship sailed, leaving the residue, which

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was the sum mentioned in the bill of lading, to be paid at Callao. The vessel, having sailed, met with bad weather about the 30th of October, and was obliged to put into Monte Video. A survey took place, and on the 4th of December the cargo was discharged by the order of the surveyors, and the stone and cement were landed and warehoused. The ship was condemned on the 17th of January, 1873; and it was admitted that she was properly condemned. A portion of the cargo was sent on to Callao in other vessels; but the master, having made inquiry as to the possibility of obtaining vessels to carry on the stone and cement, without communicating with the plaintiffs, sold the cement on the 7th of February, and the stone on the 28th.

It was agreed at the trial that the only questions for the jury were: first, whether the sale was justified; and secondly, the amount of damages; and that, if any other question of fact remained, it should be disposed of by me after argument on further consideration. The jury found that the master was not justified in selling, and assessed the damages at 1,445*l.*, and said that if they were entitled to give interest from the date of the sale until the time of the verdict, they should do so. The 1,445*l.* was the value of the goods at the time of the sale; and I think that if the plaintiffs were entitled to recover they were entitled also to interest at five per cent. (that is, to 450*l.*) as fair damages for the conversion, according to the principle explained in the case of *The British Columbia Sawmill Company v. Nettleship* (1). The defendants proposed at the trial to give evidence of a custom that loading brokers are not liable after the goods are received on board; and it was agreed, that if I should be of opinion that evidence of such a custom would be admissible, I should, before giving judgment, either take further evidence as to the existence of such a custom myself, or appoint some one to report to me after taking evidence thereon. This contention was not seriously pressed in the argu-

(1) 37 Law J. Rep. C.P. 235; s. c. Law Rep. 3 C.P. 499.

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ment on further consideration, and I remain of the opinion I expressed at the trial, that such evidence was not admissible, and that the case must be decided according to the view to be taken of the relation between the parties to be gathered from the documents in the case, and of the proper inferences to be drawn from the facts proved at the trial. The defendants' counsel at the trial put in a great many documents to shew that the plaintiffs were for many weeks in correspondence with Smith, Sundries & Co. about their claim upon the underwriters in respect of the stone and cement in question; but I lay no stress upon this evidence, as it might well be that the plaintiffs, or Smith, Sundries & Co., might be doubtful as to their rights in a case of this description; and the only real question in the case is whether, under the circumstances which have occurred, they were entitled to sue the defendants for the unjustifiable sale of their goods by the master, or whether the master alone or the shipowner, was the proper person to be sued, which depends, not upon what the plaintiffs, or Smith, Sundries & Co., afterwards thought, but upon what was the relation of the master to the defendants at the time of the sale. The case was argued very fully and very powerfully before me; and a great number of authorities were cited, many of which, however, it is unnecessary to consider, upon the view which I take of the real relation between the parties in this case. On the part of the plaintiffs it was contended that though the charter-party of the 25th of June did not amount to an actual demise of the ship, yet, inasmuch as the defendants had hired the exclusive use of the ship, they were practically the owners of the ship for the voyage, and that the words in the contract of the 26th of June, "acting for the owners of the ship" meant "acting for the defendants;" and that the contract of the 26th of June, therefore, coupled with the bill of lading, amounted to a contract between the plaintiffs as shippers of the goods and the defendants as carriers from London to Callao; and that the master in selling the goods acted as the servant or agent of the defendants, and that they were there-

fore responsible for his acts. It was contended that, inasmuch as the master, though the sale itself was unjustifiable, was acting within the general scope of his authority as agent for the defendants; and inasmuch as there are certain cases in which a sale of the cargo is justifiable, therefore the sale, though unjustifiable in the particular case, was one for which the defendants were liable upon the principle acted upon in *Ewbank v. Nutting* (2) and other cases. For the defendants it was contended that the contract between the parties was not a contract for carriage, but only an agreement on the part of the defendants that the goods should be received on board the ship, and that room for them should there be found, so that they might be the subject of a bill of lading to be signed by the captain on behalf of the owners of the ship, without any undertaking on the part of the defendants in relation to the actual conveyance of the goods, or the dealing with them on the voyage between London and Callao. It was also contended that even the shipowner would not be liable for the unjustifiable sale of the goods by the master, and that even if the master was the agent of the defendants for some purposes in dealing with the goods at Monte Video, he was not acting as their agent in selling them so as to make them liable for his act. To this it was answered that looking at the conduct of all parties, it ought to be held as a fact, or concluded from the facts, that the master was throughout acting for the defendants, both in carrying and in dealing with the goods at Monte Video; and stress was laid upon the fact that what he had done was done in the interests of the defendants, and had to some extent been recognised by them as an act done for their benefit. It was agreed that I should draw any inferences of fact, or find any question of fact not found by the jury; and it was suggested that it might be a question of fact whether the master signed the bills of lading as agent for the defendants or for the shipowners. If this be a question of fact for me, I find it for the defendants; and I

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am of opinion that, notwithstanding the interest the defendants had in the due prosecution of the voyage and conveyance of the goods to their destination, the master in selling the goods was not acting as the servant or agent of the defendants either in fact or in law. Looking at the letter of the 24th of June, 1872, which is headed in print, "Messrs. Moss, Mitchell & Co., ship and insurance brokers," and sent to Smith, Sundries & Co., the plaintiff's brokers (in which they merely offer "room" in the ship *F. K. Dumas* at certain rates of freight), and at the terms of the letter of the 25th of June, constituting the contract between the plaintiffs and the defendants, I do not think that the latter document binds the defendants to any of the terms of the bill of lading, so far as relates to the carriage of the goods, or to the duty of the master after the goods are once received on board. It appears to me that it merely amounts to a contract that the owner of the ship shall receive the goods on board and enter into a contract by bills of lading to carry them at certain rates of freight, and that the ship shall sail on or about a certain day named, and that the defendants will pay certain demurrage if the barges are delayed. All the other stipulations are on the part of the plaintiffs, who are left to make their own contract with the shipowners through the master for the carriage of the goods, and who in fact did take bills of lading in the ordinary form from the master, not purporting to act in any other capacity than as master of the ship. If I am right in the above view of the case, it follows that, inasmuch as the master was not the agent or servant of the defendants at all, except to receive the goods on board, and to sign bills of lading which should be binding on his owners as to the carriage of the goods, the defendants cannot be held liable for the conversion of the goods at Monte Video. It was argued for the plaintiffs, that by the very fact of having entered into a charter such as that of the 25th of June, the defendants became the virtual owners of the ship for the voyage; and the cases of *Newbery v. Colvin* (3), *Major* (3) 1 Cl. & F. 283, per Lord Tenterden.

*v. White* (4), *Marquand v. Banner* (5), and *Schuster v. McKellar* (6), were relied upon, and it was argued from thence that the master became the agent of the charterers for arranging all matters relating to the carrying or not carrying on the goods, even to the extent of selling them, if necessary. But it appears to me that the very terms of the charter-party in this case are against any such liability on the part of the charterers; for the responsibility of the master and owners "to all whom it may concern" for proper attention to the cargo is expressly reserved by the charter-party, and it is provided that the charterers' responsibility under it, except for freight, shall cease on the vessel being loaded. Such being my opinion as to the relation created between the plaintiffs and the defendants in this case, it becomes unnecessary to consider the question whether the defendants would be liable on the ground that the sale, being within the general scope of the master's authority, was binding on the shipowners. The defendants, in my opinion, never agreed to occupy the position of shipowners so as to be responsible for the master's acts after the ship had sailed and before the completion of the voyage, but left the plaintiffs' rights to be wholly regulated by the bills of lading, except in the particulars above explained. I therefore give judgment for the defendants.

*Judgment for defendants.*

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Solicitors—Parker & Co., for plaintiffs; Hollams, Son & Coward, for defendants.

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(4) 7 Car. & P. 41.

(5) 6 E. & B. 232; s. c. 25 Law J. Rep. Q.B. 313.

(6) 7 E. & B. 704; s. c. 26 Law J. Rep. Q.B. 281.

[IN THE COMMON PLEAS DIVISION.]

1878.  
Dec. 19. }  
1879. } HILL v. WILSON.  
March 29. }

*Shipping—General Average—Adjustment at Intermediate Port—Pro Rata Freight.*

*Plaintiffs' goods were part of a general cargo shipped on board the defendants' ship at Riga for conveyance from that port to Hull. The ship was stranded on the voyage, part of the cargo was saved, part was washed out of her, and part jettisoned; she was afterwards got off and towed into Copenhagen, where her cargo was discharged, and she was repaired. After a detention of two months she was sent on to Hull with some of her cargo on board, another part having been sent on to Hull in two other ships belonging to the defendants. Plaintiffs' goods were so damaged as to be not worth forwarding, and were sold at Copenhagen. An average adjustment took place there, under which the plaintiffs' contribution was assessed according to Danish law, and they were further charged with pro rata freight from Riga to Copenhagen. It was admitted that the goods were properly sold, but the plaintiffs had no opportunity of exercising an option in the matter, nor did they assent to the Copenhagen adjustment:—*

*Held, first, that the plaintiffs were not bound by the Copenhagen adjustment; second, that the plaintiffs were not liable to pay pro rata freight.*

The plaintiffs in this action are the indorsees of certain bills of lading of goods shipped in November, 1876, at Riga, on board the *Virago*, for carriage to and delivery at Hull. The defendants are the owners of that ship.

The *Virago* sailed from Riga with a general cargo, and was stranded and injured. Part of her cargo was saved; part was washed out and lost; and part was jettisoned, and in respect of this part a claim for general average arose. The ship was got off, and was towed into Copenhagen on the 9th of December, 1876. Her cargo was there discharged on the 3rd of January, 1877. She was

repaired at a large expense between the 13th and 31st of January, and on the 7th of February was sent on to Hull, where she arrived on the 10th.

The plaintiffs' goods arrived at Copenhagen, but, being much damaged, were there sold; and it is admitted that they were properly sold. The present action is brought for the amount realised by the sale, after deducting such charges and general average expenses as the defendants would be entitled to deduct by English as distinguished from Danish law. As a matter of fact, the general average expenses had been ascertained at Copenhagen. The average had been thus adjusted according to Danish law; and the adjuster had charged the plaintiffs with pro rata freight from Riga to Copenhagen. The result was more favourable to the defendants than would have been the case if the adjustment had been made according to English law; and the defendants claim to deduct from the proceeds of the sale of the goods a larger sum than the plaintiffs considered them to be entitled to. The defendants paid 1,460*l.* 4*s.* 9*d.* into Court; and it was admitted that that sum was sufficient if the defendants were correct in their contention. It was also argued that, if they were in the wrong, the accounts should be referred to some third person for re-adjustment.

The *Virago's* cargo, when she left Riga, consisted of 1,893 tons of goods; of these, thirty tons were jettisoned, and 1,643 were sold at Copenhagen. There then remained 220 tons; of these, part was forwarded by the *Mito* on the 13th of December, 1876, part by the *Otto* on the 31st of January, 1877, and part by the *Mito* on the 31st of January, 1877. The rest (amounting to 127 tons) came to Hull in the *Virago* herself. The *Mito* and the *Otto* both belonged to the defendants; and full freight (by which was understood the full or original freight from Riga) was paid for that part of the cargo which came home in them. Full freight was also paid for so much of the 127 tons brought home in the *Virago* as did not belong to the defendants themselves. But about fifty out of these 127 tons consisted of lathwood, which had been abandoned by the defendants to the under-

*Hill v. Wilson, C.P.*

writers thereof; and in respect of these fifty tons no freight was payable.

The action was tried before Lindley, J., at the Michaelmas sittings, 1878, and was argued upon further consideration on the 19th of December, 1878.

*J. O. Mathew* (Butt and Watkin Williams with him), for the plaintiffs, cited *Simonds v. White* (1); 2 *Arnould on Insurance*, 5th ed. 875; *Benecke on Indemnity*, ed. 1824, p. 326.

*Edwin Jones* (*R. E. Webster* with him), cited *Fletcher v. Alexander* (2); *Mavro v. The Ocean Marine Insurance Company* (3); 1 *Parsons on Shipping*, 465; 2 *Parsons*, 366; 2 *Phillips on Insurance*, 5th ed. 1414.

LINDLEY J. (on March 29), after stating the facts as above set out, proceeded.—It thus appears that the ship with part of her original cargo on board arrived in Hull, the original port of discharge, and that the defendants received the original full bill of lading freight for such cargo, except for that part of it which belonged to themselves and paid no freight.

A long correspondence was put in evidence, and was referred to; and I have read the whole of it. That correspondence and the defendants' answer to the plaintiffs' interrogatories shew—first, that the cargo forwarded from Copenhagen was forwarded by the instructions of the consignees or the underwriters; second, that the whole of the undamaged cargo might have been brought on to Hull in the *Virago* herself after she had been repaired; third, that the plaintiffs never assented to, but always protested against, an adjustment of the average at Copenhagen.

Under these circumstances, I am of opinion that it is incumbent upon the defendants to shew that the Danish adjustment is binding on the plaintiffs; it is incumbent on the defendants to shew that

the voyage was terminated at Copenhagen by the occurrence of circumstances which necessitated or justified such termination, and, as a consequence, necessitated or justified a general average adjustment at that port.

Very little information is to be obtained upon the question what circumstances terminate a voyage at an intermediate port, when the ship with part of her cargo on board arrives at her original port of discharge. The only cases reported in our own books on this point are *Fletcher v. Alexander* (2) and *Mavro v. The Ocean Marine Insurance Company* (3).

In *Fletcher v. Alexander* (2) a ship laden with salt sailed from Liverpool for Calcutta. She got ashore, and returned to Liverpool. The whole cargo except 100 tons was lost or so damaged as to be worthless; and the 100 tons were not forwarded. The ship herself after being repaired went on to Calcutta, her original port of destination, but with an entirely new cargo, and in fact on a totally different voyage. It was decided, amongst other things, that, the voyage having been broken up at Liverpool, Calcutta was not the place for adjustment. The arrival of the ship at Calcutta, and the possibility of forwarding the undamaged salt to the same place, did not prevent the Court from holding the voyage to have been broken up at Liverpool, and from holding Liverpool to be the proper place for adjustment. In *Mavro v. The Ocean Marine Insurance Company* (3) a ship laden with wheat sailed from Varna for Marseilles. She became disabled, and put into Constantinople. Part of the cargo, which was damaged, was sold there; the rest was transhipped and sent on to Marseilles. The ship was repaired at Constantinople after a lapse of two months; but whether she ultimately proceeded to Marseilles does not appear. The above steps were taken by the direction of the Consular Court of Constantinople; and under its direction an adjustment of average was made there. This adjustment was made according to the law of France, which under any circumstances was the law applicable to the case. The Court held that the voyage had been properly broken up at Constantinople, and

(1) 2 B. & C. 805; s. c. 2 Law J. Rep. K.B. 159.

(2) 37 Law J. Rep. C.P. 193; s. c. Law Rep. 3 C.P. 375.

(3) 43 Law J. Rep. C.P. 339; s. c. 44 Law J. Rep. C.P. 229; s. c. Law Rep. 9 C.P. 595; s. c. Law Rep. 10 C.P. 414.

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that the adjustment there was binding, although some cargo arrived at Marseilles, and the ship was herself repaired and sent to sea. The real question in this case was the true construction of an English policy of insurance containing the words "general average as per foreign statement;" and the case does not throw much light on any other question.

In this state of the authorities it is necessary to consider the matter on principle. The duty of the ship-owner is to complete the voyage if he can. If owing to perils of the seas he is compelled to put into an intermediate port for repairs, his duty is, to refit and carry on such part of the original cargo as is fit to be carried on. If this is done, a policy on the ship for the original voyage will cover a loss after she has been repaired and is sailing from the port of repair to her original port of destination; and a policy on her original cargo will still cover so much of such cargo as is being carried in her between the same ports. In a case of this description, the original voyage is not regarded as broken up into two, namely, first into one voyage from the port of sailing to the port of refuge, and, secondly, into another voyage from such port to the port of destination.

Again, if the ship-owner, being unable to repair his ship, tranships the cargo and sends it home in some other ship, which he may do, still, as between him and the original consignees of the cargo, the original voyage is treated as continuing, in the absence of some agreement to the contrary. This appears from *Shipton v. Thornton* (4), where the freight payable in such cases is discussed. Further, in a case of this description, a policy on the cargo for the original voyage will cover such cargo when transhipped in order to complete such voyage—*1 Arnold on Insurance*, 2nd ed. 491.

These considerations appear to me to shew that, in order to uphold the Danish adjustment in this case as against the plaintiffs who have never assented to it, the defendants must prove two things, namely, first, that the original voyage was in fact terminated at Copenhagen,

(4) 9 Ad. & E. 314; s. c. 8 Law J. Rep. Q.B. 73.

and, second, that it was so terminated either by agreement or by necessity, i.e., the occurrence of circumstances beyond the control of the defendants, and such as rendered the completion of the voyage on the terms originally agreed upon physically impossible, or so clearly unreasonable as to be impossible in a business point of view.

As a mere question of fact, my opinion is that the voyage did not terminate at Copenhagen. With respect to ninety tons of the original cargo, there was no termination whatever of the voyage at that port, but only a suspension of it whilst the ship was under repair. The plaintiffs' goods were no doubt sold at Copenhagen, and as to them the voyage obviously terminated there; but this of itself cannot make an average adjustment there binding on the plaintiffs, as will be seen at once by supposing all the rest of the cargo to have been brought home in the *Virago* after a short detention for repairs.

But, assuming the original voyage to have in fact terminated at Copenhagen, neither the necessity for its termination there nor its termination by any agreement binding on the plaintiffs is proved. The desirability of having the average adjusted at Copenhagen, in order to obtain an allowance of distance freight, and the desirability of bringing about a separation of ships and cargo in order to obtain an adjustment at Copenhagen, were clearly seen by Hansen, and were pointed out by him to the defendants; and the correspondence satisfies me that the adjustment at Copenhagen was not the consequence of an inevitable breaking up of the voyage there, but was the cause of the voyage being broken up there, so far as it can be said to have been broken up with respect to the ship and the undamaged goods.

In coming to this conclusion, I do not accuse the defendants of bad faith. These letters of the 13th of January, 1877, and a letter from Mr. Bott to them of the 4th of July, 1877, shew that the defendants were under the impression that the proper place for adjusting the average was where the damaged goods were sold, or that the defendants as ship-owners had some option in the matter. This was, in my



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opinion, an erroneous view; and, for the reasons already stated, I decide that the plaintiffs are not bound by the Copenhagen adjustment.

The defendants, however, contend that, irrespective of this they are entitled to charge the plaintiffs *pro rata* freight on their goods which were carried from Riga to Copenhagen, and there sold. This contention can only be supported by establishing some contract, express or implied, binding the plaintiffs to pay *pro rata* freight. Express contract there is none; and the only grounds relied upon for implying a contract are that the plaintiffs' goods were sold at Copenhagen with their consent given expressly or impliedly to Hansen, who acted for the best for all parties. But, assuming this to be so, the goods were in fact sold because they were so damaged as not to be worth forwarding; and a sale under such circumstances, whether approved by the plaintiffs beforehand or ratified afterwards by claiming the proceeds of sale, is not enough by English law to render distance freight payable—see *Hopper v. Burness* (5), and the cases there cited. To have that effect, the circumstances must be such as to give the cargo owner an option of having his goods sent on to their destination, or of accepting them at their intermediate port. If, having that option, he accepts the goods at an intermediate port, he is bound to pay *pro rata* freight—see *McLachlan on Shipping*, 2nd ed. p. 446. But here the plaintiffs have no such option; there was nothing equivalent to a voluntary acceptance by them of the goods at Copenhagen.

Upon both points, therefore, my judgment is for the plaintiffs, with costs—the amount to be referred to an English average adjuster.

*Judgment accordingly.*

Solicitors—Hollams, Son & Coward, for plaintiffs;  
Lowless & Co., for defendants.

[IN THE DIVISIONAL COURT FOR THE  
Q.B., C.P., AND EXCH. DIVISIONS.]

1879. }  
Aug. 5. }

FOSTER v. EDWARDS.

*Costs—Power of Master or District Registrar—Judicature Act, 1873, sec. 49—Order LIV. rule 2.*

*The enactment in section 49 of the Judicature Act, 1873, that no order by the High Court or any Judge thereof as to costs only which by law are left to the discretion of the Court shall be subject to any appeal, does not apply to the order of a Master or district registrar, and therefore a Judge of such Court has power to vary as to costs an order of a district registrar dismissing the action without costs.*

In this case after the pleadings had been closed the district registrar of Halifax made an order dismissing the action for want of prosecution, without costs. The defendant appealed to Field, J., at chambers, who varied such order as to costs by awarding the costs of the action to the defendant.

*English Harrison*, for the plaintiff, now moved to set aside this order of the learned Judge, on the ground that the order of the district registrar as to costs could not be the subject of appeal. The 49th section of the Judicature Act, 1873 (36 & 37 Vict. c. 66), enacts that "no order made by the High Court of Justice or any Judge thereof, by the consent of the parties, or as to costs only which by law are left to the discretion of the Court, shall be subject to any appeal except by leave of the Court or Judge making such order." That applies equally to a Master or district registrar as to a Judge of the High Court. By Order XXXV. rule 4 a district registrar may exercise all such authority in an action as may be exercised by a Judge at chambers except such as by the rules a Master is precluded from exercising. No doubt Order LIV. rule 2 excepts "awarding of costs other than the costs of any proceeding before such Master," but it is clear that the district registrar had jurisdiction to make the order dismissing the action.

(5) 45 Law J. Rep. C.P. 377; s. c. Law Rep. 1 C.P.D. 137.

*Foster v. Edwards, Q.B.*

[DENMAN, J.—He had not however jurisdiction to award costs simply.]

The learned Judge at chambers was no doubt of that opinion, and therefore considered he had power to vary the order in that respect.

*Mears* appeared for the defendant, but was not called upon.

DENMAN, J.—This is, in fact, an appeal from an order of my brother Field as to costs only, which therefore cannot be had. It has been contended, however, that that learned Judge had no power to vary the order of the district registrar as to costs, because it has been argued that the words "Court" or Judge" in the 49th section of the Judicature Act, 1873, include "Master" and "district registrar." I do not however think so. Those words have always been applied only to the High Court or to a Judge thereof, and I think that the intention of the Legislature was to give the discretion as to costs to such Court or Judge only.

POLLOCK, B., concurred.

*Rule refused.*

Solicitors—Williamson, Hill & Co., for plaintiff;  
Leary, Leary & Peace, for defendants.

#### [IN THE HOUSE OF LORDS.]

1879. { THE OVERSEERS OF THE TOWN-  
June 27, 30, { SHIP OF THE FOREIGN OF  
July 21. { WALSALL v. THE LONDON  
AND NORTH WESTERN RAIL-  
WAY COMPANY.

*Rate—Sanitary Purposes in a Borough—District or Borough Rate—Exemption conferred by Local Act—Vested Interests—Public Health Act, 1872, 35 & 36 Vict. c. 79. ss. 3, 4, 7, 16—Sanitary Law Amendment Act, 1874 (37 & 38 Vict. c. 89), s. 3—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 10, 207, 211.*

[For the report of the above case, see 48 Law J. Rep. M.C. 166.]

#### [IN THE COURT OF APPEAL.]

(*Appeal from the Queen's Bench Division.*)

1879.

June 17, 19, 23. } THE QUEEN v. FRENCH.

*Highway—Turnpike Act—Roads authorised to be made by Trustees under Private Act—Tolls—Completion of Part of Roads—Insufficiency of Tolls to keep completed Part in Repair—Statute 4 & 5 Vict. c. 59—Application for Contribution towards Maintenance out of Highway Rate—Jurisdiction of Justices.*

[For the report of the above case, see 48 Law J. Rep. M.C. 175.]

#### [IN THE EXCHEQUER DIVISION.]

1879. { THE LONDON, BRIGHTON AND  
June 20, { SOUTH COAST RAILWAY COMPANY  
24, 30. { (*appellants*) v. THE VESTRY OF  
ST. GILES, CAMBERWELL (*respondents*).

*Metropolitan Management Acts—18 & 19 Vict. c. 120. s. 105—25 & 26 Vict. c. 102. s. 77—Paving—Owner of Land bounding or abutting on a Street—"Street."*

[For the report of the above case, see 48 Law J. Rep. M.C. 184.]

#### [IN THE QUEEN'S BENCH DIVISION.]

1879. { THE QUEEN (*on the prosecution*  
May 23. { of GEORGE TUCK) v. THE JUSTICES OF BERKSHIRE.

*Appeal—Quarter Sessions—Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 52, sub-sec. 3—Conviction—Time for entering into Recognisance—"Immediately"—Question of Fact.*

[For the report of the above case, see 48 Law J. Rep. M.C. 137.]

THE  
**LAW JOURNAL REPORTS**

FOR  
THE YEAR 1879.

CASES RELATING TO  
THE POOR LAW, THE CRIMINAL LAW,  
AND OTHER SUBJECTS

CHIEFLY CONNECTED WITH

**The Duties and Office of Magistrates,**  
PRINCIPALLY DECIDED IN THE  
QUEEN'S BENCH, COMMON PLEAS, AND EXCHEQUER DIVISIONS,  
AND IN THE  
COURT FOR CROWN CASES RESERVED,  
MICHAELMAS SITTINGS, 1878, TO TRINITY SITTINGS, 1879,  
BOTH INCLUSIVE.

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REPORTED

*In the Court for Crown Cases Reserved,*  
By **WALTER HENRY MACNAMARA, Esq.,**  
BARRISTER-AT-LAW.

*In the Queen's Bench Division,*  
By **J. H. ETHERINGTON SMITH, Esq.,** AND **RICHARD HOLMDEN**  
**AMPHLETT, Esq.,**  
BARRISTERS-AT-LAW.

*In the Common Pleas Division,*  
By **WILLIAM PATERSON, Esq.,** AND **GILBERT GEORGE KENNEDY, Esq.,**  
BARRISTERS-AT-LAW.

*In the Exchequer Division,*  
By **W. DECIMUS I. FOULKES, Esq.,** AND **FRANCIS PARKER, Esq.,**  
BARRISTERS-AT-LAW.

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**MAGISTRATES' CASES.**  
**VOLUME XLVIII.**

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# SUPREME COURT OF JUDICATURE.

## CASES RELATING TO THE POOR LAW, THE CRIMINAL LAW, AND OTHER SUBJECTS

CHIEFLY CONNECTED WITH

### The Duties and Office of Magistrates.

LAW JOURNAL REPORTS, VOL. XLVIII.

MICHAELMAS, 1878, to MICHAELMAS, 1879.

42 Victoria.

*Hereford Union v. The Guardians of the Woodstock Union* 42 Vict. 42  
*See also* *Shannon v. The Guardians of the Woodstock Union* 42 Vict. 42  
[IN THE QUEEN'S BENCH DIVISION.]

1878. { THE GUARDIANS OF THE WOODSTOCK  
Nov. 9. { UNION (appellants) v. THE  
CHURCHWARDENS, &c., OF THE  
PARISH OF ST. PANCRAE (respondents).

*Poor Law—Divided Parishes, &c., Act*  
(39 & 40 Vict. c. 61), s. 35—*Derivative*  
*Settlement of Pauper—Order of Removal.*

*The pauper was born in the respondent parish, and had not acquired a settlement in her own right. Her father was born in D., in the appellant union, and had acquired through his father, the pauper's grandfather, a derivative settlement in M.:—Held, that the case came within the last part of the 39 & 40 Vict. c. 61, s. 35, and that, as the pauper's settlement could not be ascertained without inquiring into her parent's derivative settlement, she must be deemed to be settled in the respondent parish, the place of her birth.*

This was an appeal against an order of removal dated the 12th of June, 1877, adjudging the last legal settlement of Emily Taylor, a pauper aged eighteen years, to be in the parish of Deddington, in the appellant union.

The Court of Quarter Sessions quashed  
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the order of removal, but stated the following Special Case for the opinion of this Court. 73

Emily Taylor, the pauper, became chargeable to the parish of St. Pancras, and was on the 12th day of June, 1877, by an order of removal adjudged to be legally settled in Deddington, in the Woodstock Poor Law Union.

The pauper was born in St. Pancras parish on the 16th of April, 1859, and has not acquired any settlement in her own right.

The pauper is the lawful daughter of George Taylor and Temperance his wife.

The pauper's father, George Taylor, was born in Deddington on the 1st of January, 1815, and acquired no settlement in his own right.

The pauper's father, the said George Taylor, was the lawful son of William and Martha Taylor, both deceased.

In 1829 the said William Taylor, the pauper's grandfather, acquired a settlement by serving the office of parish constable in Milton, a parish comprised in the Banbury Poor Law Union, the said George Taylor being then under the age of sixteen and unemancipated.

The Sessions were of opinion that the pauper's settlement was in St. Pancras

B

*Woodstock Union v. St. Pancras Parish, Q.B.*

parish, and they accordingly quashed the said order of removal.

The question for the opinion of the Court was whether the settlement of the pauper was in Deddington.

*Besley*, for the appellants.—Up to the time of the passing of 39 & 40 Vict. c. 61, the birth settlement of a pauper was only a presumptive one, and liable to be defeated by shewing a subsequent settlement elsewhere. Here the pauper's father had no settlement in his own right, but acquired a derivative one through his father in Milton. This case, therefore, comes within the last part of 39 & 40 Vict. c. 61. s. 35 (1), and inasmuch as the pauper's settlement cannot be ascertained without inquiring into her parents' derivative settlement, she must therefore be deemed to be settled in the respondent parish, the place of her birth.

*Poland and Lumley*, for the respondents.—The object of the Legislature was to prevent an inquiry extending beyond one generation. In any case this pauper must have a different settlement to that of her father; for her settlement is clearly either at Deddington or St. Pancras, whereas it is conceded that her father's settlement would, if he became chargeable, be in Milton. It is contended here that the pauper derived a settlement from her father, and that, as he was born in Deddington, that was her settlement, which can therefore be shewn without inquiring into the derivative settlement of the pauper's father.

*MELLOB, J.*—I confess that in spite of the contention brought forward on behalf

(1) By 39 & 40 Vict. c. 61. s. 35, "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

... If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

of the respondents I fail to see how it can be said that this pauper's settlement was in Deddington. The pauper herself was born in St. Pancras; and the father, it appears, had once a birth settlement in Deddington, but he had acquired a new settlement in Milton. The only question which we have to decide is whether, on the facts before us, the pauper's settlement was at Deddington. I think it clearly was not, but that the pauper's settlement was in the parish of St. Pancras. The object of the Legislature doubtless was to do as little violence as possible to a pauper's feelings arising from natural relationship by separating father from child; but though that may be so, I think there can be no doubt that the pauper's settlement was at the place of her birth.

*FIELD, J.*—I think that the judgment of the Quarter Sessions was right, and must be affirmed. The intention of the Legislature manifestly was to get rid of derivative settlements altogether, and to order that everybody should be settled where they had acquired a settlement or where they had been born. But there are exceptions to this—one the case of a wife, the other the case of a child under the age of sixteen, the latter of whom is to take the settlement of the parent up to that age, and is to retain the settlement so taken until another is acquired. Now this is the case of a child who would, in the natural order of things, have taken the settlement of her father. What, then, was the settlement of the pauper's father? The father, George Taylor, was born at Deddington, and never acquired any settlement in his own right. It was contended on behalf of the appellants that the birth settlement of the pauper's father was only a *prima facie* settlement, and it was suggested that though such settlement was *prima facie* at Deddington, it was really and truly in Milton. Would that have to be ascertained? Yes, clearly; and this is the very thing which the Legislature has said shall not be done; for when it cannot be shewn what settlement a child derived from the parent without inquiring into the derivative settlement of such parent, such child "shall be deemed to be settled in

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the parish in which he or she was born." I confess I feel that we are only acting in accordance with the general policy of the Legislature in holding that this pauper was settled in the respondent parish. Accordingly our judgment must be for the appellants, and the order of removal must be quashed.

*Order quashed.*

Solicitors—White & Son, agents for Hawkins, Woodstock, for appellants; Rexworthy, for respondents.

[IN THE QUEEN'S BENCH DIVISION.]

1878. } EARL MANVERS AND BROWNE  
Nov. 12. } v. BARTHOLOMEW.

*Highway—5 & 6 Will. 4. c. 50. ss. 53, 54—Repair of Highways—License by Justices to get Materials in enclosed Land—Extent and Duration of License.*

The plaintiffs were respectively the owner and occupier of a farm in the parish of L., and the defendant was in 1877 the surveyor of highways for the parish. In 1866, the justices at special sessions granted their license under 5 & 6 Will. 4. c. 50. s. 54, authorising the then surveyor to get materials, for the repair of the highways within the parish, from a field forming part of the said farm, and the surveyor, in pursuance of the license, got such materials as were necessary. Materials continued to be got during subsequent years, down to 1877, for the same purpose; but in 1877, in consequence of objections raised by the plaintiffs, the defendant, as surveyor, applied to the justices for a new license. The justices having declined to accede to the application, on the ground that the license granted in 1866 was still in force, the defendant entered the land, and got further materials for the repair of the highways:—

Held, that the license granted to the surveyor in 1866 was limited to the necessities of the particular occasion, and was

not in force in 1877, so as to justify the defendant in entering the plaintiffs' land during that year.

This was a Special Case stated pursuant to Order XXXIV. rule 1.

The plaintiff, Browne, is a farmer possessed of and occupying a farm in the parish of Langton-by-Wragby, in the county of Lincoln, as tenant thereof to the plaintiff, Earl Manvers, the owner, and the defendant was during the year 1877 the surveyor of highways for the parish.

In 1866, materials being required for the repair of the highways in the said parish, the then surveyor of highways (not the defendant), pursuant to the provisions of the General Highway Act, 5 & 6 Will. 4. c. 50. ss. 53 (1), gave

(1) By 5 & 6 Will. 4. c. 50. s. 53, "it shall not be lawful for any surveyor . . . to dig, gather, get, take or carry away any materials for making or repairing any highway out of or from any enclosed land or ground until one calendar month's notice in writing, signed by the surveyor, shall have been given to the owner of the premises from which such materials are intended to be taken, or to his known agent, and to the occupier of the premises from which such materials are intended to be taken, or left at the house . . . of such owner or agent, and also of such occupier, to appear before the justices at a Special Sessions for the highways, to shew cause why such materials shall not be had therefrom; and in case such owner, agent or occupier shall attend pursuant to such notice, but shall not shew sufficient cause to the contrary, such justices shall, if they think proper, authorise such surveyor or other person to dig, get, gather, take and carry away such materials at such time or times as to such justices shall seem proper; and if such owner, agent or occupier shall neglect or refuse to appear by himself or his agent, the said justices shall and may (upon proof on oath of the service of such notice) make such order therein as they shall think fit, as fully and effectually to all intents and purposes as if such owner or occupier, or his agent, had attended."

By section 54, "It shall be lawful for every such surveyor for the time aforesaid, by license in writing from the justices at a Special Sessions for the highways, to search for, dig and get materials, if sufficient cannot be had conveniently within such waste lands, common grounds, rivers or brooks, in or through any of the several or enclosed lands or grounds of any person whomsoever . . . within the parish where the same shall be wanted, or within any other parish adjoining or lying near to the highway for which such materials shall be required, if it shall appear to such justices that sufficient materials cannot

*Eari Manvers v. Bartholomew, Q.B.*

notice to the plaintiffs as the owner and occupier of the said farm, requiring them to appear before justices at Special Sessions, to shew cause why materials for the repair of the said highways should not be had from a field forming part of the said farm, and which field was enclosed land within the meaning of the said Act and of 4 & 5 Vict. c. 51.

No opposition being offered to the application made in pursuance of such notice, the justices, in Special Sessions assembled, granted their license under 5 & 6 Will. 4. c. 50. s. 54, to the surveyor authorising him to dig and carry from the said field materials for the purposes aforesaid, making satisfaction for the same and for damage to such field in the manner directed by the said Act. The license was never appealed against pursuant to the power contained in s. 105 of the Act.

The surveyor accordingly dug and carried away from the field the necessary materials, and with them repaired the highways. A sum agreed upon between the parties was paid to the plaintiffs for the materials.

In subsequent years the different surveyors of highways appointed each year for the said parish got materials for the repair of the highways therein from the said plaintiffs, and paid the plaintiffs sums from time to time agreed upon as the price of such materials. This course was

conveniently be had in the parish where such highways lie, or in the waste lands or common grounds, rivers or brooks of such adjacent parish, and that a sufficient quantity of materials will be left for the use of the parish where the same shall be, and to take and carry away so much of the said materials as by the discretion of the said surveyor shall be thought necessary to be employed in the amendment of the said highways; the said surveyor making such satisfaction for the materials which may be got or taken away, and also for the damage done to such lands or grounds by the getting and carrying away the same, as shall be settled and ascertained by order of the justices at a Special Sessions for the highways."

By section 105 an appeal is given to Quarter Sessions against any order, &c., of justices. A form of license is given in the appendix, and is in general terms, "to search for, &c., materials within the enclosed lands or grounds of C. D. within the parish, to be employed in the repair of the highways within the parish."

continued until 1877, when the plaintiffs objected to any more gravel being got or taken from their land. In 1877, in consequence of these objections, the defendant applied to the justices in special sessions to grant him a new license to get materials from the said field, and the plaintiffs subsequently applied to the justices to revoke the license granted in 1866. The justices declined to entertain either application; the former one on the ground that the said license was still in force, and the latter on the ground that, as the plaintiffs had not appealed, the said license was irrevocable.

Notice was thereupon served by the plaintiffs upon the defendant, requiring him not to trespass or dig or carry away materials from the said field, notwithstanding which the defendant, claiming to act under the license hereinbefore referred to, has, during 1877, entered upon the said field, and has dug and carried away stone and other materials for the repair of the said highways.

The question for the opinion of the Court was whether the license granted to the surveyor in 1866 conferred upon the defendant any authority to enter upon the lands in question in 1877.

*Graham*, for the plaintiffs.—The question here is whether a license granted by the justices under the Highway Act (5 & 6 Will. 4. c. 50), s. 54, is perpetual or limited in its operation. It is contended that the license granted in 1866 did not confer upon the defendant any right to enter upon the lands in 1877. [He was here stopped by the Court.]

*E. Lumley*, for the defendant.—On the true construction of the Act the license granted to the surveyor continued in force so long as any materials existed on the land available for the repair of the highway. If any hardship is inflicted on particular individuals by reason of such a construction, then compensation can be claimed under the express provisions of the 54th section.

COOKBURN, L.C.J.—I think that our decision must be in favour of the plaintiffs. The authority given by the Act to get materials for the repair of highways



*Earl Manners v. Bartholomew, Q.B.*

involves important considerations, interfering as it does very considerably with private rights. Stone can in certain cases be obtained by a surveyor, not at the expense of the parish, but of the gentleman on whose property the stones are. That involves as great an interference with private property as can well be conceived, and it behoves us to take care that the statute shall be construed strictly. The section expressly says that the justices may give the surveyor authority to take and carry away materials "at such time or times as to such justices shall seem proper." True it is that when we turn to the form given in the schedule, all mention of time is omitted; still I think that the words in the enacting clause shew that it was not intended that the authority should be given for all time to come, but only for such time or times as to the justices may seem proper. There is abundant reason for saying that this ought to be so. It may be that the taking of stone from one man's land is a burden cast upon him for the good of the parish, but he may rightly say that his neighbours should be common sufferers with himself. Mr. Lumley has pointed out that there are clauses which award compensation for any damage done to the land; still it appears to me that the proper construction of the Act is that when materials are required for the repair of the highways, the surveyor is to go to the justices to authorise him to take such materials from the land as may be necessary for the requisite repairs then in contemplation, which authority must, I think, be coextensive with the particular necessity. This interpretation of the statute, that the license must be *pro re nata*, seems to me to be consistent with the justice of the case as well as the intention of the Legislature.

MELLOR, J.—I am of the same opinion. I think that on the true construction of the statute the license granted to the surveyor by the justices extends only to the necessities of a particular occasion. When the particular repairs that are necessary to be done on the highways have been executed, the license granted by the justices is spent, and the surveyor must apply for a fresh one when occasion

shall require, in which case the justices will consider whether it is reasonable or not that the materials required shall be got at a particular spot.

Accordingly I think that we must answer the question submitted to us by saying that the defendant was not justified under the circumstances in entering the land of the plaintiffs.

*Judgment for the plaintiffs.*

Solicitors—Toynbee, agent for Toynbee, Larken & Toynbee, Lincoln, for plaintiffs; Taylor, Hoare & Taylor, agents for Burton & Scorer, Lincoln, for defendant.

*Norris v. Mann* 4 B.L. 362 311.

[IN THE COURT OF APPEAL.]

1878.  
Jan. 29, 30, 31, { THE QUEEN (defendant  
Feb. 2. { in error) v. BRADLAUGH  
AND BESANT (plaintiffs  
in error).\*

*Indictment—Obscene Label—Omission to set out the Alleged Obscene Matter—Error—Verdict.*

*In an indictment for publishing an obscene book the words alleged to be obscene must be set out in full; and the defect to so set them out will not be cured by a verdict of guilty.*

Error upon the judgment of the Queen's Bench Division, reported 46 Law J. Rep. M.C. 286.

The first count of the indictment as set out in the record was as follows—

"Central Criminal Court to wit:—The jurors for our Lady the Queen, upon their oath, present that Charles Bradlaugh and Annie Besant, unlawfully and wickedly devising, contriving and intending as much as in them lay to vitiate and corrupt the morals as well of youth as of divers other liege subjects of our said Lady the Queen, and to incite and encourage the said liege subjects to indecent, obscene, unnatural and immoral practices, and bring them to a state of wickedness, lewdness and debauchery, heretofore, to wit on the 24th day of

\* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

*The Queen v. Bradlaugh, App.*

March, in the year of our Lord, 1877, in the City of London, and within the jurisdiction of the said Central Criminal Court, unlawfully, wickedly, knowingly, wilfully and designedly, did print, publish, sell and utter a certain indecent, lewd, filthy, bawdy and obscene book called *Fruits of Philosophy*, thereby contaminating, vitiating and corrupting the morals as well of youth as of other liege subjects of our said Lady the Queen, and bringing the said liege subjects to a state of wickedness, lewdness, debauchery and immorality, in contempt of our said Lady the Queen and her laws, to the evil and pernicious example of all others in the like case offending, and against the peace of our said Lady the Queen, her Crown and dignity."

The second count was in the same words, the date being put five days later.

The record also averred that the plaintiffs in error were found guilty.

The grounds of error were—That the said indictment shews no offence known to the law and does not warrant the said conviction and sentence; that the libel in question was professedly a work on medical science and political economy, and that in the indictment in which the said work is alleged to be "an indecent, lewd, filthy and obscene libel," such portions of the work as were libellous as aforesaid ought to have been set out; that the indictment does not shew any specific offence, and that the particular words supposed to be criminal ought to have been expressly specified and set forth in the said indictment.

The case was argued on Jan. 29, 30, 31, by—

Bradlaugh and Besant in person.

*The Solicitor-General* and *Mead*, for the Crown.

[It is unnecessary to give the arguments as they, and the cases cited, are fully considered in the judgments.]

*Cur. adv. vult.*

The following judgments were given on Feb. 2:—

BRAMWELL, L.J. — This case comes before us upon a question of substantial

importance, but nevertheless of a purely technical nature, and the decision which we have to pronounce is quite apart from the merits, and quite apart from the consideration whether any wrong has or has not been done to the plaintiffs in error.

The question has arisen under the following circumstances:—An indictment was preferred against the plaintiffs in error charging them with publishing an obscene libel, to wit, a certain indecent, lewd, filthy, bawdy and obscene book called *Fruits of Philosophy*; upon this indictment they were found guilty. They afterwards moved the Queen's Bench Division, in arrest of judgment, and the rule which they obtained was discharged; and the question before us is whether the Judges of that Court were right in discharging that rule, or whether they ought to have made it absolute. The objection taken was that the indictment stated, but did not shew, that an offence had been committed; or, as it may be put in somewhat different language, the objection was that the indictment simply averred that an offence had been committed, and did not shew how it had been committed. For the Crown, it was almost admitted by the Solicitor-General that if the objection had been taken by demurrer, it would have been good; but it was said that it was cured by the verdict, on the ground that the jury could not have found the plaintiffs in error guilty, unless the obscene libel had been proved at the trial to have been published by them.

Now it is undoubtedly a rule that an indictment for any offence must shew that the offence has been committed, and must shew how it has been committed; and if these particulars are omitted judgment will be arrested. No doubt that is the general rule; and I do not intend to allude to alterations made by statute as to criminal pleading, because no statute is applicable to this case; therefore in the observations which I shall make as to the form of indictments, I shall speak as if the common law were unaltered. Now it is not enough to indict a person for that he committed murder, or murdered A. B.; at common law it must be shewn what he did; so that if the acts charged are proved to have been perpetrated, it

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would be shewn that he committed murder; in other words, it is not enough to allege that he committed the crime, it must be shewn how he committed it. Similarly in an indictment for burglary, it is not enough to allege that the accused committed a burglary, or to allege that he committed a burglary at the house of A.; it must be charged that he burglariously entered between certain hours, with other circumstances shewing how the crime had been committed, and those facts must be stated which constitute the crime said to have been committed. For this rule three reasons were assigned, two of which I do not think very important, at all events, at the present time; but the third is of a more substantial character. One of these reasons was, that the person indicted for the commission of a crime might know what charge he had to meet; if he were charged with murder or burglary generally, he would not know what particular act was alleged against him, and what he had to meet. Another reason was that, if convicted or acquitted on an indictment of that kind, the accused could not plead or prove, with the same facility as otherwise he might, a plea of *autrefois* convict or *autrefois* acquit. At the present day, I think those two reasons may be disregarded, because an accused person is very rarely ignorant of the charge which he is called upon to meet, and no real difficulty exists as to pleading or proving a former conviction or acquittal. But even as to these reasons I must admit that a very plausible observation was made by the female plaintiff in error, namely, that the book, as a whole, was charged as an offence against her, and she could not possibly tell what passages would be selected as those on which the charge was to be supported. The third reason, in my opinion, is to this day substantial, and cannot be disregarded. It was that a defendant is entitled to take the opinion of the Court, before which he is indicted, by demurrer, or by motion in arrest of judgment; or the opinion of a Court of Error, by writ of error, on the sufficiency of the statements in the indictment. It is true that a defendant

at the trial as to the validity of the indictment, yet it is not unreasonable that he should be at liberty in some way to question the decision of that Judge. But whether these three reasons were good or bad, they clearly existed with reference to the form of indictment, which accordingly, as I have already intimated, must shew not only that the accused committed the offence, but must also state the facts which constituted it.

In some instances, words are the subject-matter of an indictment; and it follows from the principle, which I have mentioned, that wherever the offence consists of words written or spoken, those words must be stated in the indictment; if they are not it will be defective upon demurrer, in arrest of judgment or upon writ of error. For instance, upon an indictment for perjury, it was necessary that the facts constituting the perjury should be set forth, and that necessity existed until 23 Geo. 2. c. 11. The authorities will be found in 2 *Chitty's Crim. Law*, ch. 9, p. 307, 2nd edit. That statute recited the extreme difficulty of getting convictions for perjury by reason of difficulties attending the prosecutions for them, and effected an alteration whereby the offence was allowed to be stated in a more general way. In like manner, upon an indictment for forgery, it was necessary to set out the words of the forged instrument, as appears from 3 *Chitty's Crim. Law*, ch. 15, p. 1040, 2nd edit. In like manner, there can be no doubt that in an indictment for defamatory libel, it was necessary to set out the words complained of, so that the Court might judge whether they were or could amount to a libel. Now, in support of this doctrine, I will refer to *Oook v. Oox* (1). That action was for slander, and after a general verdict for the plaintiff a motion was made in arrest of judgment, on an objection to the last count, which did not set out the words complained of. Lord Ellenborough, C.J., in delivering the judgment of the Court, said (2): "The objection is, that in a count for slander by words the words themselves should be set out, in order that the defendant may

(1) 3 M. &amp; S. 110.

(2) At page 113.

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know the certainty of the charge, and may be able to shape his defence, either on the general issue, or by plea of justification accordingly, and that this defect is not cured by verdict." Now, that is what his Lordship states to be the objection. Then he says (3)—"The allegation then amounts to this; that the defendant by words, or by words coupled with acts, slandered the plaintiff in his trade; and therefore it is bad, and not cured by verdict, as a charge in the alternative. But supposing it to be taken as a charge of oral slander only, the weight of authorities is against the setting out words by their effect only. This count is equivalent to an allegation that the defendant used certain words to the effect of imputing insolvency to the plaintiff." Lord Ellenborough then goes on to cite the authorities, beginning with *Newton v. Stubbs* (4), which he says, "is an express authority that a count for using words to the effect following, &c., is bad after verdict," and he cites a variety of other cases, amongst them, *Dr. Sacheverell's Case* (5), and he says (6)—"There seems to be no reason for any difference in this respect between civil and criminal cases; the action arises *ex delicto*." And, most certainly, if there was a difference, it would be that less strictness is required in civil than in criminal cases. Then he proceeds, after mentioning another case: "Unless the very words are set out, by which the charge is conveyed, it is almost, if not entirely, impossible to plead a recovery in one action in bar of a subsequent action for the same cause. Identity may be predicated with certainty of words, but not of the effect of them as produced upon the mind of a hearer. It has been said that this is not like the case of a defective title, but is more analogous to that of a title defectively set out. If, however, the authorities cited are law, and they are supported by more ancient ones, it is of the substance of a charge for slander by words that the words themselves should be set out with

sufficient innuendoes, and a sufficient explanation, if required, to make them intelligible; it is of the substance of a charge of slander of any sort that it should not be laid in the alternative. Upon the whole, we think that this count is so defective in substance, that no intendment can be made, to supply its defects, from what can be presumed to have passed at the trial; and consequently that the judgment must be arrested." Now, that was the opinion of the Court of King's Bench, in an action for slander. I may mention that that case is referred to and recognised in *Solomon v. Lawson* (7), in which it was held that where a declaration for a libel set out a publication which referred to a previous publication, but, unless by reference to the language of the previous publication, contained no libel, such previous publication must be considered as incorporated in the publication complained of, and must appear in the declaration, to be set out verbatim, and not merely in substance. It is true that these two cases relate to actions at law, and the first is an action for slander. But, as was said by Mr. Justice Blackburn, in *Heymann v. The Queen* (8)—"At common law there is no difference between civil and criminal pleading except that, as I have before intimated, according to the spirit in which our law is administered, if there were a difference, more strictness would be required in criminal than in civil pleading. On these authorities it is manifest that where words constitute the offence, they must be stated in the indictment; and the authorities distinctly shew that where a defamatory libel is complained of, as was almost admitted by the Solicitor-General, it must be stated in the indictment. It seems to me that whatever reason there is for setting out the words of a defamatory libel, is equally applicable to other writings that are called libels; though possibly, as Mr. Mead argued, they are called libels in a different sense from that in which defamatory writing is called a libel. Lord Justice Brett has collected authorities

(3) At page 114.

(4) 2 Shower, 435.

(5) 5 Har. St. Tr. 828; s. c. 15 How. St. Tr. 466, 467.

(6) Page 116.

(7) 8 Q.B. Rep. 823; s. c. 15 Law J. Rep. Q.B. 253.

(8) Law Rep. 8 Q.B. 102.

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upon the matter. I do not know that there is any case in which judgment has been arrested on an indictment or information for a seditious, a blasphemous, or an obscene libel for want of setting out the words. But no precedent can be found in which they have not been set out, except in certain American cases, to which I shall presently refer; and except in two precedents in 2 *Chitty's Crim. Law*, pp. 43, 45, with which also I will deal, when I come to the American cases; and then there has been no judgment in an English Court of justice that they need not be set out, and no decision that the indictment will not be bad in arrest of judgment; and I repeat that whatever reason can be given for setting out the very words in defamatory libels, is equally true in blasphemous, obscene or seditious libels. First, I will cite *The King v. Ourll* (9), where it was held that an obscene book is punishable as a libel in the temporal courts, and I will mention *The King v. Sparkling* (10), in which it was held that a conviction for cursing and swearing was bad, because it did not set out the words which had been used.

That being the general principle, we must deal with the argument that obscene libels need not be, and indeed ought not to be, set forth on the record; the reason given being that the records of the Court should not be defiled by any indecency of that kind. Speaking with the greatest respect to those who have thought otherwise, I think the objection fanciful and imaginary. The records of a Court of justice are not read with a view to entertainment or amusement; and if the objection has any weight, why does it not apply to other libels and to other offences? I suppose the majority of mankind would think much worse of a blasphemous libel than even of an obscene libel, and would consider it much more objectionable that the terms of the former should be perpetuated than those of the latter. I suppose excellent reasons could be given why seditious language, speaking disrespectfully pos-

sibly of the Sovereign, should not be perpetuated on the Court rolls. But there is another kind of libels, which, to my mind, if it were possible, ought to be effaced from the rolls, and yet it is admitted that they must be set out on the record—I mean libels defaming the character of a private person. Let us see which is the worst of the two. Suppose a man indicted for a libel charging an infamous crime against another. It must be set out upon the record, for it is a defamatory libel. Then the defendant may never plead, or may not be arrested, or he may die, and thus the charge may never be tried, and yet that statement is to remain on the record for all time, and no answer will be given to it. In some respects it would be well that such an imputation as that should be effaced from the records of the Court—an imputation so grievous to the individual and all connected with him. However, the argument as to this point on the part of the Crown was supported by authority. The only semblance of authority in English law was the precedents which I have mentioned. We are in the habit of looking at precedents as containing the law; but that is when there is a series of them; so that one may be sure that they would not be in existence or perpetuated unless they had received the sanction of the Courts; these instances are in truth but one precedent, and therefore I do not think I need pay much attention to them. But in support of this contention for the Crown some American cases were cited. Decisions in the Courts of the United States are not binding authorities; and although they may be expressly in point, yet, if they are contrary to our law, they must be disregarded. Whatever respect we may be disposed to pay to the Judge who pronounced the decision, the only manner in which an American case can be used as a guide is to consider it as the expression of the opinion of an able person acquainted with the general spirit of our law; and therefore we may look at it in much the same way as we may consider the decisions of the Judges of French, Italian, or other Courts who have pronounced opinions upon mercan-

(9) 2 Str. 789.

(10) 1 Str. 497.

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tile law, which to a certain extent is common to ourselves. But I do not think that the American cases cited before us assist the case for the prosecution. It seems to have been assumed in the Queen's Bench Division that *The Commonwealth v. Holmes* (11) shewed that, generally, an obscene libel need not be set forth in terms; but the plaintiff in error, Bradlaugh, has produced before us *The Commonwealth v. Tarbox* (12), which was not cited in the Court below. In that case the indictment was held to be good without setting forth the obscene words, because there was an allegation that the libel was so obscene that it could not be, with decency and propriety, put upon the record. The rule in the American Courts appears to be that when there is no allegation excusing the statement of the words on the record on the ground of what may be called their infamy, they must be set out. In *The People v. Girardin* (13) a vigorous and forcible judgment was pronounced in favour of the view now put forward on behalf of the Crown; but even in that case some description of the nature of the obscenity complained of was inserted in the indictment. Here the indictment does not allege that the words are too obscene to be inserted; and therefore in any point of view the American cases assist the argument for the plaintiffs in error. It was suggested that the insertion of the words complained of is sufficiently excused because it is averred that the plaintiffs in error published "a certain indecent, lewd, filthy and obscene libel." That was very well met with this argument: Would not those words be the proper prefatory description of every obscene libel? and that in order to bring this indictment within the authority of the American cases, it would have been necessary to aver that the libel was so utterly indecent, filthy, lewd and obscene, that it ought not to appear on the records of the Court. For the prosecution reliance

was placed also on *Dugdale v. The Queen* (14); but the decision in that case does not affect the rule of law laid down in previous authorities.

We are not asked to say that the law is altered, because no power can alter it but the Legislature; and it is not pretended that the Legislature has altered it. What in effect we are called upon to do is, to say that the law has been mistaken and misunderstood, and that it is not necessary to set forth words when they constitute a crime. Reliance has been placed upon certain cases as to the law relating to false pretences, in which it has been held that after verdict judgment could be arrested, although the false pretence had not been stated. Now I do not think it necessary to go critically into those cases. I do not suggest for a moment that they were not rightly decided, but I wish to make this observation about them, namely, that they are cases in which the Courts have held, rightly or wrongly, that the defect was not a failure to state the ingredients of the offence, but they were cases in which those ingredients had been imperfectly stated. This distinction is explained in the judgment of Blackburn, J., in *Heymann v. The Queen* (8), where he says: "The objection to the count therefore is that it does not state that the agreement or confederacy was in contemplation or expectation of an adjudication; and if the question had arisen upon demurrer, I am not quite prepared to say that that might not have been a good objection. But it is a general rule of pleading at common law,—and I think it necessary to say where there is a question of pleading at common law there is no distinction between the pleadings in civil cases and criminal cases,—where an averment, which is necessary for the support of the pleading, is imperfectly stated, and the verdict on an issue involving that averment is found, if it appears to the Court after verdict that the verdict could not have been found on this issue without proof of this averment, there, after verdict, the defective aver-

(11) 17 Massachusetts, 336.

(12) 1 Cush. (Massachusetts), 66.

(13) 1 Mann. (Michigan), 90a.

(14) 1 E. & B. 425; s. c. Deara. 64; s. c. 22 Law J. Rep. M.C. 50.

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ment, which might have been bad on demurrer, is cured by the verdict." That rule was held to apply in *The Queen v. Goldsmith* (15). The prisoner was indicted for receiving goods, knowing them to have been obtained by means of false and fraudulent pretences, which were not set out; she was convicted, and the Court for Crown Cases Reserved held the conviction must be affirmed. I concurred in thinking that the judgment ought not to be arrested, and my reason for so thinking was, that it was impossible that if the false pretence used by the principal offender had been proved at the trial to be a future promise, or a matter of opinion, the Judge would have let the case go to the jury. A false pretence *prima facie* imposes not a promise, but a misrepresentation as to something existing. These are the only observations which I shall make about that case; but whether it was rightly or wrongly decided, it is impossible that the Judges who decided that case could have intended to lay down a different law from that which had been established by previous authorities. It is the duty of Judges to administer the law as they find it, and to leave the Legislature to amend whatever defects there may be. Therefore, even if that case may appear to be difficult to reconcile in principle with previous cases, it does not overrule the current of authorities, which shew that the offence, and the facts constituting the offence, must be stated; that where those facts consist of words, the words must be set forth; and that if they be not, the indictment is bad, either on demurrer, or in arrest of judgment, or upon a writ of error.

Before concluding I ought to consider the reasons given by the Judges of the Queen's Bench Division for the opinion they expressed, and I need scarcely say that I entertain the greatest respect for their decision. I think the Lord Chief Justice gives three reasons. First, he thinks it would be inconvenient to set out in an indictment the whole of a book alleged to be obscene if in its en-

tirety it is made the subject of a prosecution, and he alludes to the inconvenience of setting out *in extenso* the whole of a publication which may consist of two or three volumes (16). With great submission to the Lord Chief Justice, I think it very unlikely that a work contained in many volumes will ever be published the obscenity of which cannot be made apparent without the whole being set out in the indictment. But if the question of convenience were to determine whether the libel is to be set out it would be necessary to adopt some rule, and that rule would probably be that the words of a libel need not be set out when it is very long. But then it would be very difficult to determine what length would render it unnecessary to set out the libel; would two volumes be too many, would one volume, 100 pages, or what other amount? It may be a great inconvenience that a long libel should be put upon the record; but whatever the inconvenience may be, it seems to me that upon an indictment for private defamation, blasphemy, obscenity or sedition, where the objection is to the whole, and not to a part, the whole must be set out.

The next reason assigned by the Lord Chief Justice was, that the objection ought to have been taken by demurrer (17). It might be more convenient for the administration of justice to enact that if a man will not take an objection to an indictment by demurrer, he shall not be at liberty to take it by motion in arrest of judgment, or by error. I think that many reasons can be urged in favour of limiting the power to take advantage of technical defects, but that is a matter to be considered by the Legislature, and the answer which I have to give to the second reason assigned by the Lord Chief Justice is, that the law of the land, as it at present stands, allows technical objections to an indictment to be taken upon arrest of judgment or by writ of error.

Then the Lord Chief Justice proceeds

(16) 46 Law J. Rep. M.C. 287; Law Rep. 2 Q.B. D. 572, 573.

(17) 46 Law J. Rep. M.C. 288; Law Rep. 2 Q.B. D. 573, 574.

(15) 42 Law J. Rep. M.C. 94 s. c. Law Rep. 2 C.C. 74.

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to mention the third objection, namely (18), that, "although the subject-matter of this indictment falls within the law of libel, it to a certain extent arises out of the general law as being *commune nocumentum* a matter of complaint as to which arises from its being subversive of public morals, and therefore a public nuisance." It may be admitted that an offence of the kind alleged in the indictment before us is *ad commune nocumentum*, and that it may still be so described; but the answer to the third reason assigned by the Lord Chief Justice is, that whether the offence is *ad commune nocumentum* or not, the plaintiffs in error are charged with having committed it, and therefore the law requires that it should be fully stated in the indictment. I find no exception to the general rule that where the offence is alleged to be *ad commune nocumentum*, the ingredients of it, the facts which constitute it, need not be stated in the indictment. I cannot feel the force of the difficulties propounded by the Lord Chief Justice.

Then my brother Mellor bases his decision upon the ground that an objection of this kind could be taken by demurrer to the indictment, and says that the point may still be taken upon error (19).

The Lord Chief Justice also says, "We shall, however, shelter ourselves under the decisions of the American Courts, leaving the ultimate decision of this matter—an important one, no doubt—to the Court of error." I am glad to find those two statements of opinion, because when one has the misfortune to differ from the views of learned Judges, it is a very great comfort to know that those views were not entertained strongly. I cannot help thinking that the opinions expressed by the Lord Chief Justice and my brother Mellor, shew that they thought that this was a matter which was fairly open to argument, and which might be reviewed in the Court of error. It results, therefore, to my mind, that the authorities to which I have referred are

unimpeached and are binding upon us, and no sufficient reason has been given why we should not act upon them.

Now this indictment is not merely doubtful, but wholly defective; not only are the words not set forth, but no description of any kind is given. The offence alleged is, that the plaintiffs in error "did print, publish, sell and utter a certain indecent, lewd, filthy and obscene libel, to wit, a certain indecent, lewd, bawdy and obscene book called the *Fruits of Philosophy*. The words following "to wit" serve only as a mere identification of the alleged libel, and therefore the indictment may be read as though it had merely charged that the plaintiffs in error had uttered a certain indecent, lewd, filthy, bawdy and obscene libel. Under these circumstances, certainly I am of opinion that the judgment ought to have been arrested, and we ought now to pronounce judgment to that effect, and reverse the judgment of the Queen's Bench Division. I repeat that I wish it to be understood that we express no opinion whether this is a filthy and obscene, or an innocent book. We have not the materials before us for coming to a decision upon that point. We are deciding a dry point of law, which has nothing to do with the actual merits of the case.

BRETT, L.J.—It seems to me that we are not called upon to differ from any strongly formed opinion of the Lord Chief Justice and Mr. Justice Mellor; I think that their judgments shew that they did not form a strong opinion as to the point which we shall have to determine in this case. Some of the authorities which we have had to consider were not brought before the Queen's Bench Division; and with regard to the argument for the Crown there it must be observed that, except *The Queen v. Dugdale* (14), the only decisions cited as to indictments were American cases, and I think it will appear that *The Queen v. Dugdale* (14) is not in point for the present proceedings. It is evident from the terms of his judgment that Mr. Justice Mellor came to the conclusion that the words complained of ought to be set out, and that their omis-

(18) 46 Law J. Rep. M.C. 288; Law Rep. 2 Q.B. D. 574.

(19) 46 Law J. Rep. 288; Law Rep. 2 Q.B. D. 574.



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sion would have made this indictment bad on demurrer, and one ground of the judgment of the Lord Chief Justice was likewise that the objection ought to have been taken by demurrer. The only real point, therefore, upon which we differ from the learned Judges is, that the omission in this case was a defect that was not cured by the verdict.

It seems to me that the questions raised in this case are, first, what is it necessary to set out in such an indictment as this; secondly, what kind of omissions can or cannot be cured by verdict; and thirdly, whether in this indictment the omission was such a defect that it could not be cured by the verdict.

The first question really comes to this, whether in an indictment of this kind it is necessary to set out the words relied upon as constituting the offence. I cannot express what I believe to be the rule with regard to indictments more accurately, in my view, than was done in *The Queen v. Aspinall* (20). In that case almost every sentence of the judgment delivered by me on behalf of Lord Justice Mellish and myself was, I may venture to say, the result of many cases; as to each sentence a laborious examination of cases was made, and it was intended to express what we considered to be the result of those cases, and I cannot find better words now in which to express the result. With regard to indictments, it is there said (21), that "every pleading, civil or criminal, must contain allegations of the existence of all the facts necessary to support the charge or defence set up by such pleading. An indictment must, therefore, contain allegations of every fact necessary to constitute the criminal charge preferred by it. As in order to make acts criminal, they must always be done with a criminal mind, the existence of that criminality of mind must always be alleged. If, in order to support the charge, it is necessary to shew that certain acts have been committed, it is necessary to allege that those acts were in fact committed. If it is necessary to

shew that those acts, when they were committed, were done with a particular intent, it is necessary to aver that intention. If it is necessary, in order to support the charge, that the existence of a certain fact should be negatived, that negative must be alleged." Where the crime alleged in an indictment consists of words written or spoken, it seems to me that the words are the facts which constitute the crime, and that for this reason the words must be set out.

Now the word "libel," as popularly used, seems to mean only defamatory words; but words written, if obscene, blasphemous or seditious, are technically called libels, and the publication of them is by the law of England an indictable offence. The publication of obscene words comes also under another class of offences, namely, the class of offences against morality. I am aware that in a valuable book lately published, *Stephen's Digest of the Criminal Law*, cxviii. art. 172, p. 104, obscene words written are not put under the class of libels, but they are put under the class of offences against morality. But they have long been treated as falling within the legal meaning of the term "libel." Therefore libels may be divided into seditious, blasphemous, obscene and defamatory. There are other offences which consist in words, either written or spoken, such as perjury, false pretences, forgery, letters demanding money with threats, and the administration of unlawful oaths, and I think it will be found that indictments for committing any of these offences are all within the principle which I have stated, namely, that inasmuch as the crime exists in the words, the words must be stated; and I think I shall shew that in every one of those cases there is authority for saying that the words must be set out, unless the necessity for setting out the words is excused by statute; and it seems to me that each of the statutes which have been passed to excuse the necessity of setting out the words, is an authority that, without the statute, by the common law the words must have been set out, and of course wherever it has been decided that the omission to set out the words is a fatal objection, even after verdict, the

(20) 46 Law J. Rep. M.C. 145; s. c. Law Rep. 2 Q.B. D. 48.

(21) 46 Law J. Rep. M.C. 149.

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decision shews still more strongly than the statutes which I have mentioned, the necessity for setting out the words, and that the objection must be fatal on demurrer. As we have to deal with a decision of such high authority as that of the Queen's Bench Division I have thought it right to look carefully into the authorities, and those authorities I feel bound to cite, in order to justify the conclusion at which I have arrived.

One of the earliest cases relates to the offence of cursing and swearing, and uttering of profane oaths, which of course consists in words: it is *The King v. Sparling* (10). This conviction was for profane cursing and swearing, under 6 & 7 Will. 3. c. 11, and it set forth that the defendant did "profanely swear fifty-four oaths, and did profanely curse 160 curses," but none of them were set out. There having been a conviction there must have been a trial, and a decision of the Court of Petty Sessions, but it was held that the conviction was nought, because the oaths and curses were not set forth. The Court of King's Bench, including Lord Holt, gave as a reason, "For what is a profane oath or curse is a matter of law, and ought not to be left to the judgment of the witness; he may think false evidence is so; suppose it was for seditious or blasphemous words, must not the words themselves be set out, be they ever so bad, that the Court may judge whether they are seditious or blasphemous." *The King v. Popplewell* (22) and *The King v. Chaveney* (23) are cases of a similar kind, and relate to the same subject-matter. They are all after conviction, and they seem to me to be authorities for saying that whenever words are complained of they must be set out, and that the omission of the words is fatal after verdict or decision.

I will now refer to the law as to letters demanding money. In *Lloyd's Case* (24), an indictment, following the words of the Black Act, 9 Geo. 1. c. 22, charged the prisoner with feloniously sending a letter,

without any name subscribed and signed thereto, demanding money. After conviction it was moved in arrest of judgment that the indictment was bad on two grounds, one of which was that neither the letter nor even the substance of it was set forth in the indictment. It was held bad in arrest of judgment, and the reason given was that in every indictment a complete offence must be shewn, and the report states that the precedents, which had been looked through, generally set forth the letter.

With regard to false pretences, it is only necessary to refer to *The King v. Mason* (25). That case is always quoted. I know it was said by Mr. Justice Mellor, in *Heymann v. The Queen* (8), that it had been virtually overruled, and in *The Queen v. Goldsmith* (15), Lord Justice Bramwell expressed his concurrence with the remark of Mr. Justice Mellor. But I have failed to find any case before *Heymann v. The Queen* (8) which treats *The King v. Mason* (25) as overruled; on the contrary, it has been again and again approved of and cited as a binding authority. The indictment was that the defendant had obtained from "one Robert Scofield divers sums of money, that is to say, the sum of two guineas, of the value of two pounds and two shillings of lawful money of Great Britain, of the proper moneys of the said Robert Scofield, by false pretences, with an intent then and there to cheat and defraud the said Robert Scofield of the same." The defendant pleaded not guilty, and on his trial at the quarter sessions at Worcester he was convicted and sentenced to transportation; but the judgment was reversed by the Court of King's Bench upon a writ of error. The first objection was that the offence imputed was not specified with sufficient particularity. "Several objections," said Mr. Justice Buller (at p. 586), "have been made on the part of the defendant, but the material one on which I found my judgment is, that the indictment does not state what the false pretences were. . . . I am of opinion the first objection is fatal, and that the judgment must be reversed;" and Mr. Justice Grose says he

(22) 2 Str. 686.

(23) 2 Ld. Raym. 1368.

(24) 2 East's Pleas of the Crown, c. 23, par. 5, p. 1122.

(25) 2 Term Rep. 581.

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is of opinion "that the objection that the pretences are not specified is decisive, and for the reasons mentioned by the defendant's counsel; that the defendant may know what he is to defend, and the Court may see what punishment they are to inflict." I think that those are reasons why the words should be set out, but to my mind the fundamental reason is that the words are the ground of complaint. *The King v. Perrott* (26) is to the same effect. It was an indictment for obtaining money by false pretences, and the judgment was arrested for the reason that, although the false pretences were set out, there was not an averment stating that they were false; but Lord Ellenborough says (p. 385): "Every indictment ought to be so framed as to convey to the party charged a certain knowledge of the crime imputed to him. The Legislature have so held, and have recorded their opinion to that effect in the cases of perjury." And then he mentions the statute as to perjury, 23 Geo. 2. c. 11, which allows the substance of the charge to be set forth. He also cites *The King v. Mason* (25), and approves of it.

The cases with regard to perjury I do not propose to cite, because 23 Geo. 2. c. 11 (27) is a strong authority pronounced by the Legislature itself, that by the common law, upon an indictment for perjury, the words must be set out.

As to the law of forgery I will mention *Hunter's Case* (28). The prisoner was charged with the forgery of a navy bill, and the objection taken was that, although the indictment alleged the forgery of a receipt for money, there was not a sufficient averment to shew how the fabricated words amounted to a receipt. I quote the case for the opinion of the Judges, delivered by Grose, J. (29): "The material objection to this indictment was, that it did not contain any averment amounting to a capital offence, for although it avers that the prisoner forged a certain receipt for money, yet there is nothing stated in

any of the counts to shew that the instrument set out, which does not on the face of it import to be a receipt, is in fact a receipt." *The King v. Mason* (25) is then cited, and the learned Judge afterwards adds: "In indictments for forging a bill, bond, note, will or other instrument, an exact copy of the instrument respectively charged to have been forged must be stated" (30).

Now the next head which I will mention is the administering unlawful oaths. This offence clearly consists in using the forbidden words. There are two statutes with regard to it—the 37 Geo. 3. c. 123, which in s. 4 excuses the setting out of the words, and provides that it shall be sufficient to set out only the substance and effect; and the 52 Geo. 3. c. 104, which in s. 5 contains a similar provision. The Legislature excuses the setting out of the words, and therefore, as it seems to me, admits that the words must have been set out if it had not been for the provisions in these statutes.

The next case which I shall cite is a decision with regard to a seditious libel, and it is *The King v. Horne* (31). There the words relied upon were set out, and the information was held good. It was in many respects a remarkable case.

I will now go to cases as to defamatory words, and the first which I will cite is *Newton v. Stubbs* (4). It was an action for words spoken of the plaintiff, and it was alleged that on one occasion the defendant spoke the words "ad effectum sequentem." It was objected that this was uncertain, and the Court held that this mode of pleading was wrong.

I will next refer to *Zenobio v. Axtell* (32), which was cited in the course of the argument. It was an action for publishing a defamatory libel in the French language, in a newspaper called the *Courier de Londres*. The declaration alleged that the libel was "according to the purport and effect following in the English language," and then it set out the translation. It stated that what had been said

(26) 2 M. & S. 385.

(27) Repealed by 30 & 31 Vict. c. 59, having been practically superseded by 14 & 15 Vict. c. 100. s. 20.

(28) 2 Leach C.C. 711.

(29) Page 719.

(30) See as to the now existing law, 14 & 15 Vict. c. 100. ss. 5, 6, 7, and 24 & 25 Vict. c. 98. ss. 42, 43.

(31) 2 Cowp. 672.

(32) 6 Term Rep. 162.

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was in the French language, and then assumed to state its purport and effect in English, and it did not say, "which being translated into English has the following meaning." Upon that ground Lord Kenyon, C.J., said: "That this objection must prevail, is evident from the uniform current of precedents, in all of which the original is set forth. The plaintiff should have set out the original words, and then have translated them."

Now in *Wright v. Clements* (33) the declaration stated that the defendants published a certain libel, "containing, amongst other things, certain false, scandalous, malicious, defamatory and libellous matters, of and concerning the plaintiff, in substance as follows, that is to say," and then it set out the words with innuendoes. The words were introduced by the allegation "in substance as follows." There was a motion in arrest of judgment, and it was argued that although the words were not set out according to their tenor, yet, inasmuch as they were alleged to be set out according to their substance, it was sufficient after verdict. Lord Tenterden said, p. 506: "Judgment must be arrested. In actions for libel, the law requires the very words of the libel to be set out in the declaration, in order that the Court may judge whether they constituted a ground of action; and unless a plaintiff professes so to set them out he does not comply with the rules of pleading. The ordinary mode of doing this is to state that the defendant published of and concerning the plaintiff the libellous matters to the tenor and effect following."

Then Holroyd, J., says, p. 508: "Now where a charge either civil or criminal is brought against a defendant arising out of the publication of a written instrument, as is the case in forgery or libel, the invariable rule is, that the instrument itself must be set out in the declaration or indictment, and the reason of that is that the defendant may have an opportunity, if he pleases, of admitting all the facts charged, and of having the judgment of the Court, whether the facts stated

amounted to a cause of action, or a crime."

Lord Justice Bramwell has cited the case of *Cook v. Cox* (34), and that case lays down the same principle.

Now, these decisions were pronounced in 1814 and 1820, after Fox's Act, 32 Geo. 3. c. 60, passed in 1792. Therefore, any argument based upon Fox's Act cannot prevail. It is true that before that statute the Judges held that upon the trial of an indictment or information for libel, all that the jury had to find was, whether the defendant had published the writing, and whether the innuendoes were true, and that it was for the Court to say whether the writing was a libel or not. Fox's Act declared that view of the law to be wrong. Whether the Legislature were right in principle, or whether the Judges were right, is not for us to discuss; and we must accept the declaration of the Legislature as an authoritative statement of the law. But it seems to me that Fox's Act leaves untouched the validity of an objection to the omission of words from an indictment or information when they form the substance of the offence charged. In principle the only difference made by that statute is, that if the written instrument can be a libel, then it is for the jury to say whether it is a libel (35); but there remains a preliminary question which it is for the Court or Judge to decide, namely, whether the writing can be a libel, whether in truth there is any evidence upon which a jury can say it is a libel, and that question is still open, and is a question for the Court (36); and therefore the reason which is given by Holroyd, J., in *Wright v. Clements* (33) still prevails, that the words ought to be set out, in order that the defendants may demur and may raise the objection that the words cannot by any reasonable construction amount to a libel. Moreover, by the 4th section of Fox's Act, 32 Geo. 3. c. 60, the power to move in arrest of judgment is expressly preserved for the benefit of a defendant who is found guilty; and I

(34) 3 M. & S. 110.

(35) See *Fray v. Fray*, 34 Law J. Rep. C.P. 45.

(36) See *Mulligan v. Cole*, 44 Law J. Rep. Q.B. 153; s. c. Law Rep. 10 Q.B. 549.

(33) 2 B. & Ald. 503.

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think that the Legislature intended to allow a defendant, either before verdict, by demurrer, or after verdict, by motion in arrest of judgment, to object that the words complained of either do not amount to a libel or are wholly omitted from the information or indictment, as the circumstances of the case may allow.

Now I come to what seems to me to be a remarkable case. It is not a decision of a Court upon the present question, but it seems to me to be a great authority; I mean *The King v. Wilkes* (37). In that case an information was exhibited in the Court of King's Bench for the publication of an obscene and impious libel. That obscene and impious libel was in the book styled an *Essay on Woman*. The facts now material are (see p. 2528) that Mr. Wilkes having pleaded not guilty, and the records having been made up and sealed, "the counsel for the Crown thought it expedient to amend them by striking out the word 'purport' and in its place inserting the word 'tenor.' The proposed amendments were in all those parts of the information where the charge was that the libel printed and published by Mr. Wilkes contained matters 'to the purport and effect following, to wit:' which the counsel for the Crown thought it advisable to alter into words importing that such libel contained matters 'to the tenor and effect following, to wit.'" It is clear that the words were set out; yet, because they were introduced by the words "to the purport and effect following" instead of "to the tenor and effect following," the Attorney-General, Sir Fletcher Norton, considered it unsafe to go on even after plea pleaded and issue joined, and thought it advisable to amend the record. That seems to me a very important authority.

The second question which I have proposed is what kind of omissions can or cannot be cured by verdict, and all the cases which I have cited seem to me to form a strong current of authorities to shew that in every kind of crime which consists in words, if the words complained of are not set out in the indictment or information, the objection is fatal in arrest of judgment.

Now we come to the cases which are said to be to the contrary, and I will deal very shortly with them. The first is a case upon which the Crown has relied—*Dugdale v. The Queen* (14). The only counts of the indictment in that case material to be now mentioned are the first and second; the first count charged the defendant with obtaining and procuring obscene prints, with intent to publish them, and the second count charged him with preserving and keeping them with the like intent. The second was held not to disclose an offence for another reason, that is, that the mere having them in his possession was not indictable. The first count was held to be good, because it alleged a step towards committing a misdemeanour. In my opinion, if a man, knowing prints to be obscene, procures them for the purpose of publishing them, his offence is complete, although he has never looked at them, and therefore the actual nature of the prints was not a part of the charge, and it was unnecessary to describe them. But further, I would strike out of the category of the cases which we are considering all cases with regard to obscene prints and obscene pictures. The publication of obscene prints and obscene pictures may be in one sense libellous, but they are not words, and therefore they do not seem to me to fall within the rules as to criminal pleadings which we are considering here to-day; the publication of them is an offence like that committed by Sir Charles Sedley (38), who was convicted, not of libel, but of indecent exposure.

Now I come to *The Queen v. Goldsmith* (15). I see but little difficulty in dealing with that case, if it were not for the expressions used by some of the Judges. The prisoner was indicted, not for obtaining money by false pretences, but for unlawfully receiving goods knowing them to have been obtained by false pretences. The objection was that the false pretences were not set out. It seems to me that the crime charged in that case is complete, although the prisoner does not know what the false pretences were, and in this view the words actually used in making

(37) 4 Burr. 2527.

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(38) 17 How. St. Tr. 155.

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the false pretences formed no material part of the charge. If a man receives goods, being told and believing that they have been obtained by false pretences, he is just as guilty of the crime, as if he knew what the false pretences were; upon a similar principle if a man receives goods, knowing them to be stolen, he may not know from whom they were stolen, where they were stolen, or when they were stolen; but all that is wanted, in order to constitute the offence, is that he should know the fact that they had been stolen. In *The Queen v. Goldsmith* (15) it was held sufficient to allege and to prove that the prisoner knew that the goods had been obtained by false pretences. It seems, therefore, to me that it was not necessary for the decision of that case to rely upon Serjeant Williams' note to *Stennel v. Hogg* (39), where it is laid down that a defect, imperfection or omission in pleading is cured by the verdict by the common law.

Now comes the case of *Heymann v. The Queen* (8). That was a case of conspiracy to defraud, and in order to constitute that crime, it is only necessary to shew that persons have agreed together to defraud; and as was pointed out in *Heymann v. The Queen* (8), and also *The Queen v. Aspinall* (20), the crime of conspiracy is complete so soon as the agreement to commit the unlawful act is come to; and the conspiracy may be complete, although the guilty parties have not yet agreed upon what means they should use; as in a case like *The Queen v. Aspinall* (20), where the agreement was to defraud such persons, as might buy shares, by false pretences with regard to those shares, the conspiracy is complete the moment the parties thereto have agreed to deceive such purchasers, although they have not as yet agreed on the false pretences. The crime of conspiracy does not consist in words, but in the agreement; and it follows that the crime is complete, although the false pretences never were used, and although the false pretences might never have been agreed upon. In the case of *The Queen v. Aspinall* (20), amongst the objections put forward it was urged that

the false pretences were not set out; this objection was overruled upon the authority of the decided cases (40), but there were other matters which were not perfectly stated, and the imperfection in the statement of the indictment was much relied on, and it was necessary for the Court to consider whether the defect was capable of being cured by verdict. The rule as to what can be cured is pointed out in *The Queen v. Aspinall* (20): "It (the rule) is thus stated in *Heymann v. The Queen* (8): 'Where an averment which is necessary for the support of the pleadings is imperfectly stated, and the verdict on an issue involving that averment is found, if it appears to the Court after verdict that the verdict could not have been found on this issue without proof of this averment, then, after verdict, the defective averment which might have been bad on demurrer is cured by the verdict.' Upon this it should be observed that the averment spoken of is an 'averment imperfectly stated,' i.e. an averment which is stated, but which is imperfectly stated. The rule is not applicable to the case of the total omission of an essential averment. If there be such a total omission, the verdict is no cure. And when it is said that the verdict could not have been found without proof of the averment, the meaning is, that the verdict could not have been found without finding this imperfect averment to have been proved in a sense adverse to the accused." And it seems to me obvious that must be the rule, upon referring to Serjeant Williams' note to *Stennel v. Hogg* (39), where it is said that the defect is cured by the verdict, if the issue joined be such as necessarily required on the trial proof of the facts "defectively stated." What are the issues in a criminal case? The plea of not guilty is general, and denies every averment necessary to constitute the offence, in other words, every averment which is a necessary part of the indictment, and does not deny what is omitted therefrom. That which is totally omitted from the indictment is no part of the dispute when issue is taken upon the plea of not guilty, and the jury must find

(39) 1 Notes to Saund. by Williams, at p. 226.

(40) At p. 228a.

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for the Crown, if everything stated on the face of the indictment is proved to be true. Therefore, it is true to say that every averment contained in an indictment, although inaccurately stated, is involved in the issue, and that the inaccurate statement of it is cured by the verdict, because after a conviction that inaccurate averment must be taken to have been proved adversely to the prisoner; and it is immaterial that the indictment would be bad before verdict by reason of that inaccurate statement. Therefore, I take the rule to be that an inaccurate averment is cured by verdict, but that an averment which is totally absent cannot be supplied even after verdict.

Now the third and remaining question is whether there is such a total absence in the present case of material words that the defect has not been cured by the verdict. The introductory part of each count alleges that the book complained of falls under the category of an obscene libel; but that introductory part does not justify the total omission of the words which are relied upon as constituting the crime. Now, what is charged as to those words? It is said the defendants did "print, publish, sell and utter a certain indecent, lewd, filthy and obscene libel, to wit, a certain indecent, lewd, filthy, bawdy and obscene book called *The Fruits of Philosophy*." It is obvious that the title of the book, *Fruits of Philosophy*, was not enough to be relied on. Words cannot be more innocent—they never were or could be relied upon as the obscene libel charged. That which was to be relied upon was something written in the book which was so called, and there is no description of anything contained in that book. What is contained in that book is not even attempted to be described according to its tenor and effect. There is a total omission of the contents, and yet it was the contents, or some part of the contents, which was to be relied on by the Crown. The words complained of are necessary to the averment in the indictment, and the total omission of them cannot be cured by the verdict.

With regard to the American cases, I must say that, to my mind, they are

either contrary to the law of England or in favour of the plaintiffs in error. A rule of practice seems to exist in the United States of America, that when an indictment contains an averment that the words are so obscene that if set out they would pollute the records of the Court, it is unnecessary to set them forth; but that where there is not this averment, the words must be set, and if there is an omission both of the words and of the averment, the indictment is bad in arrest of judgment. Therefore, the American cases, if they are to be regarded as authorities, are against the prosecution, and in favour of the plaintiffs in error in this case; because, besides the omission of the words, there is also the omission of that averment which is a necessary substitute for them. I confess, however, that I know of no authority saying that any similar rule exists in English law. I have read Lord Holt's view, as expressed in *The King v. Sparling* (10), that the words of a blasphemous libel must be set out, however shocking they may be, and it seems to me, at any rate, a more robust rule to set out the obscene words upon the face of the indictment than to attempt to preserve the purity of the records, inasmuch as the ears of everyone in Court must be polluted by the words being read out in evidence before the Judge and jury. I cannot follow the reasoning as to the advisability of the records of the Court being kept pure. It seems to me that it is a reason which does not bear examination, at all events, the principle that obscene words may be omitted if they are so obscene that they would pollute the records of the Court is not the law of England, and if it were it does not apply to this case, as the indictment does not contain an averment that the words are too obscene to be inserted. Therefore, to my mind, this indictment is bad, and the plaintiffs in error are entitled to judgment. They are entitled to judgment, as all persons charged with crime in England are, for want of sufficient accuracy in the instrument by which they are charged.

This decision leaves the verdict really untouched. I confess I have felt humiliation in having to discuss such a question

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as this in the presence of one of the plaintiffs in error. We know not the particular ground on which the verdict passed; but it does seem to me sad that such a charge should have been brought against a woman. Although on a point of law the judgment in this case must be reversed, yet if the book complained of is published again, and the plaintiffs in error are convicted upon a properly framed indictment, the reiteration of the offence must be met by greater punishment.

COTTON, L.J.—The question which we have to consider is, whether, on the indictment as framed, there is sufficient to support the judgment against the plaintiffs in error. Although it is a mere question of criminal pleading, it is nevertheless of considerable importance, because, especially in criminal matters, no departure should be allowed from those rules which have been laid down for the purpose of guiding the Courts in the administration of justice. In the present case the offence charged is that of publishing an obscene libel. That offence consists of publishing obscene written words. Has any rule been laid down for framing an indictment for it? I cannot do better than take the rule quoted with approval by Lord Ellenborough in *Cook v. Cox* (34). That rule, which was stated by ten Judges, is as follows:—"By the law of England, and constant practice, in all prosecutions by indictment or information for crimes or misdemeanours by writing or speaking, the particular words supposed to be criminal ought to be expressly specified in the indictment or information." (41)

This rule, established so long ago as the reign of Queen Anne, has been ever since recognised, and to shew how uniform the practice has been, it is only necessary to refer to the numerous authorities and cases alluded to by Lord Justice Brett, amongst which I may especially mention *Wright v. Clements* (33). Is there any authority to countervail this rule on behalf of the prosecution? Practically no decision has been quoted which

enables it to be argued that this rule does not now prevail. The only English case which was referred to as not following that rule was *Dugdale v. The Queen* (14); but I wish to remark that in that case there was no decision that the actual words need not be set out; the point was not raised, and that case cannot in any way be looked upon as a decision meeting the long current of authority establishing and following the rule. When a rule is so well established as this, it is almost unnecessary to consider what the reason of it is; but here certainly one reason is apparent, namely, that when words constitute the alleged crime, if the words complained of are not set out, the defendant is precluded from raising, either by demurrer or by proceedings in the Court of Error, the question whether or not the circumstances charged are in fact, according to the law of England, criminal; and it is of the utmost importance in dealing with cases of this kind, that it should not be considered whether or not in this particular case any injustice has been done to the accused persons, or whether or not they have suffered any substantial disadvantage. In my opinion we ought to adhere strictly to the principles, and the rules which have been laid out, without nicely speculating as to whether any advantage or disadvantage exists in the particular case.

On what ground is it contended that this indictment is sufficient? I will first take the point which was principally relied upon in the Queen's Bench Division. I do not understand that either of the learned Judges who decided the case in the Court below thought that, according to the English decisions, there was an exception to the general rule in this kind of libel. It is true the Lord Chief Justice does refer to the inconvenience of setting out libels of this sort, or books of this sort in the indictment; but he does refer to, and expressly says, that he relies upon the decisions of the American Courts, and I must therefore consider whether or not those decisions do justify the judgment in the Queen's Bench Division upon this indictment. We are in no way bound by the American decisions; their effect is simply that they may enable



*The Queen v. Bradlaugh, App.*

us to see how principles recognised by the law of England ought to be applied, by shewing us how learned Judges in other countries have acted on those principles; but if in fact the judgments of the American Courts are founded upon principles which we do not recognise, then of course those decisions are perfectly useless, and can be neither guides nor authorities. In the American cases referred to, the Judges certainly recognised the rule to which I have referred, and which I have quoted from *Cook v. Cox* (34), they recognised it as a general rule; but as against that general rule they rely upon another, namely, that it is necessary to keep the records of the Court pure; but it was only upon an allegation that the book or libel in question was so gross that no records ought to be defiled by it, that they held the indictment to be sufficient without setting out the actual words relied upon. It might be sufficient to say that these cases have no bearing on the present, because there is no such allegation in the present case, and if the present indictment is held to be sufficient, every indictment for any offence in the nature of an obscene libel must also be sufficient, although it does not follow that general rule to which I have referred. But the matter does not rest here. Does the law of England recognise, so as to make it available for the prosecution, that rule upon which the Judges in American Courts rely? It is perfectly true that the English Courts do require their records to be kept pure in this sense, that they will not allow their records to be the means of propagating defamation or obscenity under the pretence of its being part of a judicial proceeding. They will require anything impure or scandalous to be removed from their records when it is irrelevant to the matter to be tried, but if the matters on the records of the Court, or in an affidavit, are really relevant to the matter to be tried, they are not scandalous, and no principle recognised by the English Courts requires any statement to be removed from their records, if relevant to the issue to be tried, simply because it is impure. Does the principle that the records must be kept pure justify the

absence of what would otherwise be a necessary averment in the indictment, on the ground that it is gross and impure? In my opinion it does not, and for this reason the duty of the Court is to administer justice, either as between party and party, or as between the Crown and those who are accused; and for the purpose of doing so it ought not to consider its records as defiled by the introduction upon them of any matter, which is necessary in order to enable the Court to do justice according to the rules laid down for its guidance; a defendant has a right to claim that he shall have fair notice, in order that he may not be prejudiced in defending himself against proceedings, whether civil or criminal, and therefore, in my opinion, the principle upon which those American cases are decided does not avail in this case. Those cases can be no guide or assistance to us. If it is desirable that in cases of this sort there should be an exception to the rule as to the statement of words, it is not the duty of the Court to make an exception; it must be for Parliament to interfere, as it has done in other cases mentioned by Lord Justice Brett.

I think that disposes of the ground principally relied on in the Queen's Bench Division, but there is another ground to which I must refer, that is, that the defect has been cured by the verdict. The rule is very simple, and it applies equally to civil and criminal cases; it is, that the verdict only cures defective statements. In the present case the objection is not that there is a defective statement, but an absolute and total omission of that which constitutes the criminal act, namely, the words complained of, and the judgment of Lord Ellenborough in *Cook v. Cox* (34) shews that the omission of words, when they form the substance of the offence, cannot be cured by verdict, when he says, "It is of the substance of a charge for slander by words that the words themselves should be set out." Here we have not the substance set out, we have not a mere defective averment; we have an absolute omission to aver that which was relied upon as lewd and indecent. My opinion is that the defect is not a matter cured by the verdict, and it

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is perfectly open to the plaintiffs in error to rely on this as a fatal defect in the indictment, even after verdict.

In my view, therefore, this indictment is not framed in accordance with settled rules, and neither on authority or principle can omission of the words complained of be excused, and this judgment cannot stand.

*Judgment reversed.*

Solicitor—T. J. Nelson, for the prosecution.

## [IN THE QUEEN'S BENCH DIVISION.]

1878. { THE QUEEN on the prosecution  
Nov. 11. { of the METROPOLITAN BOARD  
OF WORKS v. LEE.

*Metropolitan Building Act (18 & 19 Vict. c. 122), sections 3 and 69 to 74—Dangerous Structures—"Owner" of Building—Liability for Repair of District Church—Church Building Act (58 Geo. 3. c. 45), section 70.*

*The incumbent of a district church in the metropolis, built under the Church Building Act, which provides that the repairs shall be made by the district, is not the owner of the church within the meaning of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), so as to be liable to pay the expenses incurred by the Metropolitan Board of Works, in respect of their dealing with it as a dangerous structure under sections 69 to 74 of that Act.*

In this case a rule nisi had been obtained on the part of the Metropolitan Board of Works for a mandamus to one of the metropolitan police magistrates, commanding him to issue a distress warrant against the Rev. F. G. Lee, D.D., for the recovery of certain expenses incurred by the board in repairing the tower of All Saints' Church, Lambeth, of which Dr. Lee was the incumbent.

It appeared that the church in question was a district church, built in 1847, under the provisions of the Church Building Act, 58 Geo. 3. c. 45, by which Act the

costs of the repairs of such district churches were charged upon the districts to which they respectively belong (1). Subsequently, namely in 1855, was passed the Metropolitan Building Act, 18 & 19 Vict. c. 122 (2), by which public buildings, including churches, are brought under the jurisdiction of the Metropolitan Board of Works, who are empowered to take certain proceedings in the event of any building being certified to be a dangerous structure, and which Act declares that all expenses incurred by the board shall be paid by the owner of such structure (3).

(1) 58 Geo. 3. c. 45. s. 70, "And be it further enacted, that the repairs of all such district churches or chapels shall be made by the districts to which they respectively belong, by rates to be raised within the district, in like manner as in case of repairs of churches by parishes; and every such district shall be deemed in law a separate and distinct parish for that purpose, and the repairs of all chapels not made district churches shall be made by the parish in or for which the chapels shall be built."

Section 71. . . . "and each district shall for ever thereafter (i. e. after twenty years from the consecration of the district church), make, raise, levy, collect and apply separate and distinct rates for the repairs of the church or churches or chapels of the district as if a separate parish."

(2) The Metropolitan Building Act, 1855, 18 & 19 Vict. c. 122. s. 3 (Interpretation section).

"Public building shall mean every building used as a church, chapel or other place of public worship."

"Owner shall apply to every person in possession or receipt either of the whole or any part of the rent or profits of any land or tenement, or in the occupation of such land or tenement, other than as a tenant from year to year, or for any less term, or a tenant at will."

Section 30. . . . "Every public building shall, throughout this Act, be deemed to be included in the term building, and be subject to all the provisions of this Act, in the same manner as if it were a building erected for a purpose other than a public purpose."

(3) Section 69. "Whenever it is made known to the commissioners hereinafter named, that any structure (including in such expression any building, wall or other structure, and anything fixed to or projecting from any building, wall or other structure) is in a dangerous state, such commissioners shall require a survey of such structure to be made by the district surveyor, or by some other competent surveyor, and it shall also be the duty of the district surveyor to make known to the said commissioners any information he may receive with respect to any structure being in such state as aforesaid."

*The Queen v. Lee, Q.B.*

In 1877, the surveyor of the board certified that the tower of All Saints was dangerous, and the board called upon Dr. Lee to repair it; he, however, declined, on the ground that he had no fund or endowment for the purpose, and was not personally liable for repair of the fabric of the church. The board, therefore, executed the necessary work them-

Section 71. "Upon the completion of his survey, the surveyor employed shall certify to the said commissioners his opinion as to the state of any such structure as aforesaid."

Section 72. "If such certificate is to the effect that such structure is not in a dangerous state, no further proceedings shall be had in respect thereof, but if it is to the effect that the same is in a dangerous state, the commissioners shall cause the same to be shored up, or otherwise secured, and a proper hoard or fence to be put up for the protection of passengers, and shall cause notice in writing to be given to the owner or occupier of such structure, requiring him forthwith to take down, secure or repair the same, as the case requires."

Section 73. "If the owner or occupier, to whom notice is given as last aforesaid, fails to comply, as speedily as the nature of the case permits, with the requisition of such notice, the said commissioners may make complaint thereof before a justice of the peace; and it shall be lawful for such justice to order the owner, or on his default, the occupier, of any such structure to take down, repair or otherwise secure, to the satisfaction of the surveyor who made such survey as aforesaid, or of such other surveyor as the said commissioners may appoint, such structure or such part thereof as appears to him to be in a dangerous state, within a time to be fixed by such justice; and in case the same is not taken down, repaired or otherwise secured within the time so limited, the said commissioners may, with all convenient speed, cause all, or so much of such structure as is in a dangerous condition, to be taken down, repaired or otherwise secured, in such manner as may be requisite; and all expenses incurred by the said commissioners in respect of any dangerous structure, by virtue of the second part of this Act, shall be paid by the owner of such structure, but without prejudice to his right to recover the same from any lessee or other person liable to the expenses of repairs."

Section 74. "If such owner cannot be found, or if, on demand, he refuses or neglects to pay the aforesaid expenses, the said commissioners, after giving three months' notice of their intention to do so, by posting a printed or written notice in a conspicuous place on the structure in respect of which or of part of which, they have incurred expenses, or on the land whereon it stands, may sell such structure, and they shall, after deducting from the proceeds of such sale the amount of all expenses incurred by them, restore the surplus (if any) to the owner."

selves, and sought to recover the expense from him as "owner," under section 73 of the above Act, and applied to a magistrate to make an order for the payment, and enforce it by the issue of a distress warrant. On the refusal of the magistrate, this rule for a mandamus was obtained, against which

The Rev. F. G. Lee, D.D., shewed cause in person.—It was never intended that the clergyman should be liable for these repairs; indeed they are expressly thrown on the inhabitants of the district. Since the abolition of church-rates, the vicar has no means of levying a rate, but that does not make him the owner of the church for the purpose of the Metropolitan Building Act, or transfer the liability of the parishioners to him, there being no words sufficient to create such a new and onerous liability. When the Metropolitan Building Act was passed, the parishioners were owners, if anyone was, and payment could have been enforced against them. One test of ownership would be that alluded to in section 73, namely, who would be entitled to the surplus, if the building were pulled down and sold, and the board repaid themselves out of the proceeds? That the board had not ventured to sell was a strong point against their contention. Then it was clear that the vicar could not sell, yet the Act contemplated an owner doing this.

*F. M. White* (Biron with him), in support of the rule.—The terms of the Act are quite explicit, and churches are expressly included under buildings which the Board of Works are, in the interest of the public, to see do not cause danger. It can never have been intended to throw the cost of repairs of churches on the general rates of the metropolis; yet this will be the effect of holding that the incumbent is not liable primarily. It will be for him to recover against his parishioners. Absolute beneficial ownership is not necessary to the existence of this liability—*Bowditch v. The Wakefield Local Board* (4).

[*MELLOR, J.*—A school is different. A church could not be let at a rack rent.]

(4) 40 Law J. Rep. M.C. 214; s. c. Law Rep. 6 Q.B. 567.

*The Queen v. Lee, Q.B.*

In *Angell v. The Paddington Vestry* (5) it will be seen that the commissioners are not owners, and it would appear from that case that though church could not be assessed as either "house" or land," yet where specifically mentioned in the Act, as it is here, the vicar would be liable in respect of it as owner. By 8 & 9 Vict. c. 70, the freehold of the church vests in the parson.

[COCKBURN, L.C.J.—But that does not affect the construction of the word owner in this statute. How can the definition of owner or occupier in section 3 apply to the incumbent here?]

Some one must be liable, and the incumbent is *prima facie* owner. The statute must not be construed by the light of the subsequent abolition of church rates.

COCKBURN, L.C.J.—I am of opinion that this rule should be discharged; not on the ground that a church is not a "building" within the Act, because section 3 declares that "public building shall mean every building used as a church, chapel or other place of public worship," but on the ground that there is another question, namely, whether the defendant, Dr. Lee, is the "owner" of a building within the meaning of the term owner in the statute; and I cannot bring my mind to the conclusion that he is. At the time the statute was passed it was generally believed, not only that the parishioners were liable to be rated for the maintenance of the fabric of the church of the parish, but that there was a machinery by which they might assess themselves. But it turned out that the machinery was ineffectual, and consequently church-rates are no longer levied. It cannot be intended that the burden of repairing the fabric of the church, in which the clergyman has only a life interest at most, and in which the parishioners have quite as great an interest as he, should fall upon the incumbent and not on the parishioners. If this were intended by the Legislature it would be said in express terms, but it is not said. The Legislature, no doubt, intended to bring churches under the Metropolitan Board of

Works in this Act, by classing them among public buildings, for the safety of which the board were enabled to take certain measures in the interests of the public, and they thought there would be no difficulty in carrying this out. But when they come to give further explanation of what is meant by the term "owner," then they make it clear that an incumbent is not such a person as is intended by owner, or made as such liable to defray the costs of repair. An owner is the person who gets the rents of the premises. Tried by this test, the defendant is not the owner. Then is he in occupation of the building? Not more so than the parishioners who go to the church. The sections, therefore, of the Act itself, sections 69 to 74 inclusive, clearly shew, in my opinion, that the clergyman cannot be considered as owner or occupier of the church. And then there is this consideration staring one in the face, that to hold this gentleman liable for the repairs of this church would be a flagrant injustice. Such it would be to turn round on the clergyman to fix him with this liability, simply because the old machinery has failed, and the parishioners will not assess themselves; and we ought not to strain the terms of the Act to bring him within them when he is not expressly within them, and when it was never intended that he should be. I do not look at the circumstances of the case dwelt on by the defendant, that it is a poor living, for it might be a rich one, and the question would be just the same; but I decide the case on the ground that it certainly was not in contemplation when the Act was passed, that the clergyman, while it was, that the parishioners, should repair the fabric of the church. I do not find anything in the statute which compels me to hold the defendant liable, and the rule for a mandamus must be discharged.

MELLOR, J.—I am of the same opinion. I also beg to say that I do not base my opinion on the circumstances stated by Dr. Lee as to his resources and means. But they affect me to this extent, that I must see my way very clearly before I concur in a judgment which would compel a distress to be made upon the defendant's

(5) 37 Law J. Rep. M.C. 171; s. c. Law Rep. 3 Q.B. 714.

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goods. Looking, therefore, to see if the words of the Act are express, I find in section 3, "Public building shall mean every building used as a church, chapel or other place of public worship." Now this *prima facie* includes all churches no doubt, but then I am not satisfied that Dr. Lee is the "owner" of the church within the definition of owner given in the interpretation section. In that I read that "owner" is to "apply to every person in possession or receipt of the whole or of any part of the rents or profits of any land or tenement, or in the occupation of such land or tenement other than as a tenant from year to year, or for any less term, or as a tenant at will."

And it appears to me that Dr. Lee does not satisfy any of those words, while looking at the other clauses as to remedies provided in the case of dangerous structures, especially to section 73, I cannot help thinking that it would be a very strong thing to hold that the defendant, who could not obey the directions given in that section 73, is yet liable to be proceeded against by distress, and that the case is so clearly made out against him that I am obliged to make this rule absolute. I quite agree that in former times the parishioners could be compelled to repair the fabric, by means of excommunication and other spiritual censures, which are no longer available. This machinery having failed, and church-rates, except as voluntary offerings, having been abolished, it is, I think, an additional reason why, unless absolutely compelled to say that this is within the Act, I should not hold the clergyman to be liable as owner.

On all these grounds, thinking that the case is not sufficiently brought within the express meaning of the statute, I decline to be a party to making the rule absolute for a mandamus. The rule must be discharged, with costs.

*Rule discharged with costs.*

Solicitors—R. Ward, for the Board of Works ;  
defendant in person.

[IN THE QUEEN'S BENCH DIVISION.]

1878. { THE SPON LANE COLLIERY COM-  
June 22. { PANY, LIMITED (appellants),  
v. BAKER (respondent).

*Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), ss. 46 and 51—Accumulation of Water in adjoining Colliery—Inability of Mine Owner to provide Remedy—Notice by Inspector—Jurisdiction.*

By 35 & 36 Vict. c. 76. s. 46 the inspector of mines has power in certain cases, by notice in writing, to call upon a mine-owner to remedy any matter connected with his mine which, in the opinion of the inspector, is dangerous and defective, so as to threaten or tend to the bodily injury of any person.

The appellants were the owners of certain coal mines, adjoining which was a disused colliery belonging to B. In one of the pit-shafts of the latter, which communicated with the appellants' mines, water had accumulated to a considerable extent, so that there was danger of the flow of water from the pit-shaft flooding a portion of the appellants' mine, and so endangering the lives of the men working therein. The inspector of mines accordingly gave notice, in writing, to the appellants, under 35 & 36 Vict. c. 76. s. 46, requiring them to remedy the matter. The appellants thereupon took the best practicable measures for removing the accumulation of the water, but failed to comply with the notice ; they however continued the men at their work, though requested by the inspector not to do so :—

Held (by COCKBURN, L.C.J., and MEL-  
LOR, J., dissentients LUSH, J.), that the in-  
spector had no power to call upon the ap-  
pellants to remove a danger which was  
not immediately connected with their own  
mines ; also, that the terms of the 46th sec-  
tion conferred no authority on an inspector  
to order the withdrawal of men under any  
circumstances.

This was an appeal to the Staffordshire Quarter Sessions, held on the 15th of October, 1877, against a conviction dated the 21st of August, made under the Coal Mines Regulation Act. On the hearing of the appeal, the Court of Quarter Sessions quashed the conviction, subject to the following SPECIAL CASE :—

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*Spon Lane Colliery Co. v. Baker, Q.B.*

1. The appellants are the owners and occupiers of the lands and coal mines called the Spon Lane Colliery, within the mines inspection district of South Staffordshire and Worcestershire, and the respondent, James Philip Baker, is Her Majesty's inspector of mines for such district.

2. The lands and coal mines of another colliery, called the Bromford Colliery, which, prior to the 12th of June, 1877, and then and thereafter were and still are the property of the Blakeley Hall Colliery Company, adjoin the Spon Lane Colliery.

3. On the appellants' colliery are two perpendicular pit-shafts. They pass from the surface of the earth down to a seam or vein, called the thick coal, lying at a depth of 365 yards, or thereabouts, beneath the surface. One pit-shaft is used for the purpose of drawing water through it from the mines; the other is used for the purpose of working the mines of the Spon Lane Colliery, by raising and lowering men and materials through the pit-shaft. A waterway communicates between the two pit-shafts about 74 yards above the said seam or vein.

4. On the Bromford Colliery is a perpendicular pit-shaft, which passes from the surface of the earth down to the said seam or vein which underlies both collieries, and is about on the same level as the pit-shafts of the appellants' colliery, but the depth varies in other parts of the said collieries on account of the inclination of the seam and the faults or dislocations therein. The said pit-shaft of the Bromford Colliery had been disused for nearly two years prior to the 12th of June, 1877, and water had accumulated in it. Adjoining the Bromford and the appellants' collieries is another colliery, called the Littleton Hall Colliery, which, prior to the 12th of July, and then and thereafter until the 5th of September, 1877, belonged to and was occupied by Mr. Wm. Dawes, but the pit-shafts therein ceased working shortly after the stoppage of the workings at Bromford Colliery.

5. Prior to the dates aforesaid much of the thick coal had been worked and gotten of the said seam and vein at and

in each of the said collieries, and water entering into and accumulating in either of the said collieries, naturally passes from one to the other, through the imperfectly collapsed gap and hollows of the workings in the said seam.

6. Previous to the matters hereinafter mentioned the appellants' pit-shafts had been filled with gob or soil to a height of about seventy and seventy-five yards respectively from the bottom of the pits, this filling extending up to just below the opening of the headway; but water percolated through this stopping, and was drained away in the usual manner.

7. On the 12th of June, 1877, twelve men, employed by the appellants, were working in this headway or inset. The top of the column of water then in the pit-shaft belonging to the Bromford Colliery Company was 120 yards above the level of the entrance to the headway or inset. The respondent considered that there was danger of the flow of water from the pit-shaft of the Bromford Colliery increasing and flooding the headway in the appellants' colliery, and so endangering the lives of the men working therein.

8. The Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), section 46, applies to the mines aforesaid, and the respondent is an inspector duly appointed under the Act. The state of things above described is not provided against by any express provisions of this Act, or by any special rule.

Section 46 enacts that, "If in any respect (which is not provided against by any express provision of this Act, or by any special rule) any inspector find any mine to which this Act applies, or any part thereof, or any matter, thing or practice in or connected with any such mine, to be dangerous or defective, so as in his opinion to threaten or tend to the bodily injury of any person, such inspector may give notice in writing thereof to the owner, agent or manager of the mine, and shall state in such notice the particulars in which he considers such mine, or any part thereof, or any matter, thing or practice to be dangerous or defective, and require the same to

*Spon Lane Colliery Co. v. Baker, Q.B.*

be remedied, and unless the same be forthwith remedied, the inspector shall also report the same to a Secretary of State.

"If the owner, agent or manager of the mine objects to remedy the matter complained of in the notice, he may, within twenty days after the receipt of such notice, send his objection, in writing, stating the grounds thereof, to a Secretary of State, and thereupon the matter shall be determined by arbitration in manner provided by this Act; and the date of the receipt of such objection shall be deemed to be the date of the reference. If the owner, agent or manager fail to comply either with the requisition of the notice, where no objection is sent within the time aforesaid, or with the award made on arbitration, within twenty days after the expiration of the time for objection, or the time of making of the award (as the case may be) he shall be guilty of an offence against this Act, and the notice and award shall respectively be deemed to be written notice of such offence.

"Provided that the Court, if satisfied that the owner, agent or manager has taken active measures for complying with the notice or award, but has not, with reasonable diligence, been able to complete the works, may adjourn any proceedings taken before them for punishing such offence, and if the works are completed within a reasonable time no penalty shall be inflicted.

"No person shall be precluded by any agreement from doing such acts as may be necessary to comply with the provisions of this section, or be liable under any contract to any penalty or forfeiture for doing such acts."

9. On the 12th of June, 1877, the respondent, having ascertained, or believing, that the facts stated in paragraph 7 then existed, gave to the appellants the following notice in writing—

"Coal Mines Regulation Act, 1872,

"35 & 36 Vict. c. 76. s. 46.

"Notice.

"To the Spon Lane Colliery Company (Limited), Owners of the Spon Lane Colliery or Mine.

"Whereas on inspection and information in respect to the condition of the above-mentioned mine, I find the following matter, namely, that a serious and increasing accumulation of water exists near to, or in connection with your mining works at the above-named colliery, and which may rush into your mine or pit-shafts and overwhelm everything and everybody therein, and whereas I am of opinion that the said matter is dangerous, and threatens and tends to the bodily injury of the workmen or any other persons employed therein and thereat. Now I hereby give you notice forthwith to remedy the said matter.

"James P. Baker,

"H.M. Inspector of Mines for the District of South Staffordshire.

"12th day of June, 1877."

10. This notice was sent by post, and received by the respondent on the 13th of June, 1877. The accumulation of water mentioned in the said notice was not immediately reduced, and the respondent reported the same to a Secretary of State. The appellants did not within twenty days of the receipt of the notice, or at any time, send any objection in writing stating the grounds thereof to a Secretary of State.

11. The appellants having, in the opinion of the respondent, failed to comply with the requisition of the notice, he laid an information in writing against them on the 16th day of August, 1877, before a justice of the peace for the said county (1).

(1) The following is a copy of the information which was annexed to and formed part of the case:—"That the Spon Lane Colliery Company (Lim.) in the county of Stafford on the 12th day of June, 1877, then being the owners of a certain colliery called and known by the name of the Spon Lane Colliery Company in the county of Stafford, the same being a coal mine or colliery within the true intent and meaning of the 35 & 36 Vict. c. 76, did then and there neglect to observe the 46th section of the said Act."

*Spon Lane Colliery Co. v. Baker, Q.B.*

12. The appellants were summoned to answer the charge, and appeared before two justices of the peace for the county, on the 21st day of August, 1877, when the case was heard and the appellants convicted as above stated.

13. The appellants gave the necessary notices and recognisance, and appealed against the conviction to the next Court of Quarter Sessions for the county.

14. The appeal was heard on the 17th day of October, 1877. Evidence was given shewing the situation of the respective pit-shafts to be as described, the accumulation of water in the Bromford pit-shaft and the rate of influx into the appellants' pit-shafts; and that, save for a period of a few days during which they were withdrawn, the men continued to work in the headway. It appeared that on the 8th of June, the respondent at an interview with the appellants discussed the possibility of erecting a dam in their pits to exclude the water, and the appellants were quite willing to erect such a dam, but it was ultimately thought by all parties that such an expedient would not be satisfactory and the idea was abandoned. Upon receiving the notice above set forth the appellants entered into negotiations with the owners and managers of the Bromford Colliery, and tried to make arrangements for the raising of the water from the pit-shaft, and so reducing and removing the accumulation of water there. Owing to the pit-shaft and machinery in the Bromford Colliery being out of repair this could not be done without executing considerable works, which would occupy some months.

15. The appellants then entered into negotiations with Mr. Dawes for permission for the appellants to pump the water out of the pit-shafts at Littleton Hall Colliery, but were refused, upon which negotiations for the purchase of the Littleton Hall shafts by the appellants were commenced, and on the 5th of September last they entered into an agreement for the sale to them of the Bromford Colliery.

16. On the 10th of September the appellants first began to draw out the water from the pit-shafts at Littleton Hall

Colliery, and have from that time reduced the accumulation of water complained of.

17. It was proved or admitted that the appellant, in acting as above stated, had taken and were prosecuting practicable measures for removing the accumulation of water.

18. It was contended on behalf of the appellants that the conviction must on any view of the facts be erroneous, as no offence under the Act could have been committed till long after the 12th of June. The Court of Quarter Sessions, however, heard the appeal on the merits and quashed the conviction.

19. The Court found as follows:—

"That there was no danger to workmen from a serious and increasing accumulation of water.

"That the appellants had used reasonable diligence to comply with the inspector's notice, so far as taking means to reduce the water, but nothing was done down to the 10th of September, towards reducing the water.

"That up to that time 723 tons of water in each twenty-four hours came into the pit, and notwithstanding the request of the inspector the men were continued at their work."

The question for the opinion of the Court was whether the order of the Court of Quarter Sessions quashing the said conviction was right.

If the Court should be of opinion in the affirmative the said order was to be affirmed.

If the Court should be of opinion in the negative the order was to be quashed and the original order was to stand.

*Bosanquet* (*Darling* with him) for the appellants.—The 46th section can only apply to a danger immediately connected with a mine over which the owner can exercise a control, whereas the offence of which the appellant is accused is that he did not remedy something connected with a mine which did not belong to him, and the 46th section, therefore, has no application. Moreover, the last-named section applies only to cases not otherwise expressly provided for; whereas the



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state of things which prevailed here is expressly provided for in section 51, sub-sections 6 and 9 (2). The inspector here gave a notice which he had no power to give; for the appellants, if guilty of any offence, ought to have been proceeded against under the 51st section for non-withdrawal of the men.

*Gorst and Charles Bowen*, for the respondent.—The 51st section, sub-section 6, only makes it the duty of a person in charge of a mine to withdraw the men in case he discover that danger to life exists, and throws no obligation on the owner of the mine. But the inspector has only such powers as are conferred on

(2) By 35 & 36 Vict. c. 76. s. 51. sub-sec. 6, 'If at any time it is found by the person for the time being in charge of the mine, or any part thereof, that by reason of noxious gases prevailing in such mine or such part thereof, or of any cause whatever, the mine or the said part is dangerous, every workman shall be withdrawn from the mine or such part thereof as is so found dangerous, and a competent person, who shall be appointed for the purpose, shall inspect the mine or such part thereof as is so found dangerous, and if the danger arises from inflammable gases, shall inspect the same with a locked safety lamp, and in every case shall make a true report of the condition of such mine or part thereof, and a workman shall not, except in so far as is necessary for inquiring into the cause of danger or for removal thereof, or for exploration, be readmitted into the mine or such part thereof as was so found dangerous until the same is stated by such report not to be dangerous. Every such report shall be recorded in a book which shall be kept at the mine for the purpose, and shall be signed by the person making the same.'

By sub-section 9, "Where a place is likely to contain a dangerous accumulation of water, the working approaching such place shall not exceed eight feet in width, and there shall be constantly kept at a sufficient distance, not being less than five yards in advance, at least one bore-hole near the centre of the working, and sufficient flank bore-holes on each side."

him by the 46th section, and the conviction for disobedience to his notice was rightly made under the provisions of that section.

COCKBURN, L.C.J.—I much wish that I could take the same view of the 46th section as my brother Lush, but I cannot. I think we cannot supply an obvious deficiency in legislation. As I read it, the 46th section contemplated a case of danger which it is in the power of a mine owner to remedy physically, irrespective of the withdrawal of the men from the dangers to which they are exposed. The section does not go on to enact that until the danger is remedied the men shall be withdrawn from the mine. Nor does it say that if no remedy can be found the non-withdrawal of the men should be an offence. The section, in my judgment, presupposes a state of things which is in the power of the mine owner to remedy. Assuming that the circumstances of this case come within the provision of the 46th section, I quite agree that the mine owner is bound to provide a remedy, but the remedy that he is bound to provide must relate to something to be done on his own mine. I cannot think that he can be held liable for neglecting to do something on his neighbour's property, having no power given to him either by common law or statute to go on a neighbour's land to remedy a defect. He has neither morally nor legally a power to go into a neighbour's mine to remedy a danger, and the facts before us do not therefore fall within the terms of the 46th section, which has reference only to the condition of the mine itself and dangers existing in it, and the remedy for getting rid of such dangers by altering the condition of the mine itself. The 6th rule of section 51 is the only provision in the Act for the withdrawal of the men, and that can only be when the person in charge of the mine finds it dangerous. I wish the 46th section had given the inspector authority to order the withdrawal of the men, but I cannot add to the legislation. Accordingly I think that this conviction is bad and must be quashed.

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MELLOR, J.—I am of the same opinion. I think that the 46th section applies only to matters in the mine affecting the mine itself. The substantial object of the Act was to prevent danger to human life, and when the 46th section is read in connection with section 51, I regret that one is forced to the conclusion that the 46th section, under which this notice was given, is confined to matters capable of being remedied by the mine owner. If the owner of the mine objects to remedy the matter complained of by the inspector, the grounds of his objections are to be stated to the Secretary of State, and thereupon the matter is to be determined by arbitration. And should the mine owner omit to remedy the matter complained of, and not take the necessary steps to bring about an arbitration, he thereupon becomes liable. Now the fact of an arbitration being enjoined is one point which tends to shew that the operation of the section is limited in the way I have already pointed out. The justices considered that the appellants had endeavoured to obey the notice, but if I am right in saying that the terms of the notice relate to something which it is not in their power to remedy the notice itself fails. There is no provision in the section for the compulsory withdrawal of the men, but as regards this the Legislature have made such provision as they thought fit, in section 51, sub-section 6. For these reasons I am of opinion that the conviction was wrong, and that the Quarter Sessions acted rightly in quashing it.

LUSH, J.—I am sorry to be unable to agree as to the meaning of the 46th section. Two objections have been raised to this conviction by Mr. Bosanquet; first, it is said that the operation of the 46th section is excluded by reason of section 51, sub-section 6, of the general rule, which expressly provides for the state of things which has occurred here. [His Lordship read the section referred to.] That makes it the duty of the mine owner to withdraw his men in certain events, and there can be no doubt that there would be danger to life from

accumulated water in the mine. The 46th section also supposes danger to the lives of the workmen from some cause or other, and gives jurisdiction to the inspector to give notice to the mine owner. It seems to me that these two provisions are quite independent of each other, and there is nothing to prevent the inspector from interfering when the person in charge of the mine is ignorant of any existing danger, or is unwilling to recognise it. The inspector's jurisdiction remains the same, whatever the manager of the mine thinks fit to do. It was contended by Mr. Bosanquet that the withdrawal of the workmen in case of danger could not be required by the inspector. It is admitted that to withdraw the men would be a remedy against the dangerous matter to which the inspector has drawn attention; but it is said that as there are particular circumstances under which this proceeding is sanctioned in sub-sect. 6, sect. 51, the omission of any express authority to the inspector to require it under section 46 is conclusive that no such remedy was contemplated by that section. I cannot, however, think that the jurisdiction of the inspector for the protection of human life was intended to be so limited. He is not restricted as to the remedy he may require; and if, as in this case, it is impossible for the owner to remedy the danger, of which notice has been given, he is, I think, bound to withdraw his men.

There is also the objection that the 46th section has no application where the danger is one which the mine owner cannot control. I agree that the owner may not have the means of withdrawing the water, nor yet of preventing the water from flowing in, but this does not appear to me to shew that the defendant may not be liable. At all events, I think he is not the proper judge of that matter, but the proper course is to give the Secretary of State the opportunity of determining whether or not a remedy can be provided. It seems to me that whether the matter complained of admits of a remedy or not, it is the duty of the mine owner to lay his case before the authorities, and it is then for the Secretary of State to

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determine whether it is or is not capable of being remedied. In my judgment the jurisdiction of the inspector to give the notice is not excluded by section 51, subsection 6, and when the notice has been once given it becomes the owner's duty in all cases to take the steps provided by the statute, and leave the authorities to decide whether or not a remedy can be applied.

*Judgment for the appellants.*

Solicitors—E. Doyle & Sons, agent for Jackson, West Bromwich, for appellants; the Solicitor to the Treasury, for respondent.

[IN THE COMMON PLEAS DIVISION.]

1878. }  
Nov. 22. } REDDISH v. HITCHINOR.

*Justice of the Peace—Fees to Clerk; Liability to pay—Municipal Corporation Act, 5 & 6 Will. 4. c. 76—Conviction under the Vagrant Act.*

*A railway station-master gave a person into the custody of a police constable on the charge of picking pockets at the railway station, and he afterwards appeared and gave evidence before two justices, who convicted the prisoner under the Vagrant Act, 5 Geo. 4. c. 83, of frequenting a place of public resort with intent to commit a felony:—Held, that the station-master was not liable for the fees payable to the clerk of the justices in respect of such conviction.*

The plaintiff, who is clerk to the borough magistrates at Stockport, sued the defendant (the station-master of the London and North-Western Railway Company at Stockport), in the County Court of Cheshire, holden at Stockport, for 22s., the amount of fees to which he claimed to be entitled as magistrates' clerk under the following circumstances:—

On the 18th of January last the defen-

dant, whilst station-master at the said railway station at Stockport, gave two persons into the custody of a police constable on the charge of picking pockets at such station. The defendant followed them to the police office, and afterwards appeared and gave evidence as prosecutor before the borough magistrates, who convicted the prisoners under the Vagrant Act, 5 Geo. 4. c. 83, of the offence of frequenting a place of public resort with the intent to commit a felony. In respect of such conviction the plaintiff claimed, as such magistrates' clerk, to be entitled to the fees the subject of this action. The plaintiff is paid a salary, but he receives all the fees that are payable by virtue of his office as magistrates' clerk, out of which he retains the amount of his salary, and pays the balance to the borough fund (1). The County Court Judge found a verdict for the plaintiff for 15s., being 2s. for oaths, 1s. for hearing, 7s. for two convictions, and 5s. for two commitments, according to the schedule of fees of justices' clerks made by the justices with the approval of the Secretary of State, and he disallowed 7s. claimed for provisions in the lock-ups. A rule *nisi* was afterwards obtained on behalf of the defendant to set aside this verdict, against which—

*F. Clerk, for the plaintiff, now shewed cause.*—The defendant is liable to pay the fees of the magistrates' clerk. The defendant required the matter to be done in respect of which the fees were payable, and the defendant therefore is primarily liable to the plaintiff for such fees. In *Okes' Magisterial Synopsis* (12th edition), page 109, it is said that, "the party liable to the clerks to the justices, however appointed, for the amount of their fees allowed or sanctioned for the particular business, is, except where otherwise directed by statute, the person

(1) The plaintiff, before August, 1877, had been paid a salary, in lieu of fees, by arrangement. After that date payment of justices' clerks by salary in lieu of fees is made compulsory by 40 & 41 Vict. c. 43.

*Reddish v. Hutchinson, C.P.*

who made the application or instituted the proceedings in respect of which the fee is due, and the proper way is not to give any credit, but insist upon payment at the time, and refuse to do the act required until payment." So Coleridge, J., in the course of the argument of counsel in *The Queen v. Coles* (2), says, "Whoever wants the thing in respect of which the fee is made payable, must pay the fee; the prosecutor if he takes out a warrant; the defendant if he enters an appearance." And in *Wray v. Chapman* (3), in which the question was whether justices' clerks are entitled to fees in respect of applications for summonses, &c., by police constables acting under the Commissioners of Police, Coleridge, J., in his judgment, says: "The difficulty I have is to say on what grounds they are not. It must be admitted that ordinarily the clerks have a right to fees for their services, and ordinarily the party applying is bound to pay these fees." It will be argued on behalf of the defendant that the borough fund is liable for these fees, and that the plaintiff should look only to that fund. The question whether the borough fund is liable must depend on 5 & 6 Will. 4. c. 76 (the Municipal Corporation Act, 1835). By section 76 of that Act a watch committee is to be appointed, who are to appoint constables for the borough, and by section 78 any such constable is to apprehend disorderly persons or persons whom he shall have just cause to suspect of intention to commit a felony. Then section 92 makes the borough fund liable for the payment of certain specified salaries and expenses, "and of all other expenses not herein otherwise provided for which shall be necessarily incurred in carrying into effect the provisions of this Act." The fees the subject of this action were not expenses incurred in carrying the Municipal Corporation Act, 1835, into effect, and therefore the case is not within that Act. The provisions of that

statute apply only to arrests by the borough constable for offences at places within the borough which are under the management of the borough council, and not to places like a railway station, which, though deemed a "place of public resort" within the meaning of section 4 of the Vagrant Act, 5 Geo. 4. c. 83 (4), is in fact private, and at all events is not a place where it is the duty of the borough constable to apprehend under section 78 of the Municipal Corporation Act, 1835, so as to make the fees claimed in the present case part of the expenses incurred in carrying into effect the provisions of that Act—*The Queen v. The Mayor of Gloucester* (5).

[LINDLEY, J.—Where is the obligation on the defendant to pay?]

If the fees are not payable out of the borough fund, the defendant is liable on the general principle of common law.

[GROVE, J.—Do you say then that if a person finds that a robbery is being committed in his house and he takes the robber and gives him to a constable, who brings him before a magistrate who commits him, the person who has been so robbed is to be liable to the fees of the magistrates' clerk.]

Yes. The argument on the part of the plaintiff must go to that extent.

[Collins, for defendant, referred to *The Queen v. The Inhabitants of Chelmsford* (6).]

The apprehension was not here made by a constable, and the place being a railway station, and not a public place within the borough, the 78th section of the Municipal Corporation Act, 1835, does not apply.

Collins, in support of the rule.—The conviction was under the Vagrant Act, 5 Geo. 4. c. 83. s. 4, for being "a sus-

(4) A railway platform has been held to be a place of public resort within 5 Geo. 4. c. 83. s. 4—*Ex parte Davis* (26 Law J. Rep. M.C. 178).

(5) 5 Q.B. Rep. 862; s. c. 13 Law J. Rep. Q.B. 233.

(6) 5 Q.B. Rep. 56; s. c. 12 Law J. Rep. M.C. 139.

(2) 8 Q.B. Rep. 82; s. c. 15 Law J. Rep. M.C. 14.

(3) 19 Law J. Rep. M.C. 156.

*Reddish v. Hitchiner, C.P.*

pected person or reputed thief frequenting any place of public resort . . . with intent to commit a felony," and section 6 of that Act makes it "lawful for any person whatsoever to apprehend any person who shall be found offending against this Act, and forthwith" to take him before a justice, "or to deliver him to any constable," &c. The defendant did this. It was the duty of the constable to take the prisoner before the magistrates, and the defendant was afterwards called on to attend and give evidence. [He was then stopped.]

GROVE, J.—I am of opinion that this rule should be made absolute. Whether the case is to be looked at as coming under the Municipal Corporation Act, 1835, or whether the defendant is to be considered only as a witness after having given the prisoners to a constable under the provisions of the Vagrant Act, 5 Geo. 4. c. 83, I do not consider the defendant to be liable for the fees payable to the magistrate's clerk, and which are sought to be recovered in this action. I think that the 78th section of the Municipal Corporation Act, 1835, applies to what was done here. [The learned Judge read that section.] It points to a constable acting under the Vagrant Act, under which the magistrates convicted the prisoners in the present case. I do not see how the defendant can be made liable for these fees. He did not act or take any proceedings for any purpose of his own. He gave the prisoners to the constable, who was the proper person to receive them. The prisoners were then in the hands of the law, and therefore on both points I think that the defendant is not liable, and that this rule must be made absolute.

LINDLEY, J.—I am of the same opinion. I do not see how the defendant can be made liable for these fees. It is said that he is at common law, because he is bound to pay for the services which he required the plaintiff to perform. The cases of *The Queen v. Cole* (2) and *Wray v. Chapman* (3), which have been referred to in support of that, have no application, I

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think, to this case, for the substance of them is that he who wants anything to be done for him by the justices' clerk must pay the proper fees for doing it, but here the defendant did not want the clerk to do anything for him. He merely put the law in force.

*Rule absolute.*

Solicitors—E. Reddish, for plaintiff; R. F. Roberts, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1878. } PAUL AND ANOTHER (*appellants*)  
Nov. 16. } *v. SUMMERHAYES* (*respondent*).

*Trespass—Hunter in pursuit of Fox—Noxious Animal—Assault—Game—Statute, 1 & 2 Will. 4. c. 32. ss. 2, 35.*

*A person who is out hunting with foxhounds for the purpose of sport, cannot justify a trespass in entering the lands of another on the ground that he is in fresh pursuit of a fox.*

*Whether a person could justify a trespass on the ground that his only object and intent was to destroy a noxious animal, which could not otherwise be got rid of—Quære.*

CASE stated by justices under 20 & 21 Vict. c. 43.

The appellants were charged before certain justices for the county of Somerset with assaulting and beating the respondent at Curry Mallett on the 2nd of November, 1877.

The following facts were proved at the hearing:—

The respondent lived with his father and attended to his business for him (he being incapacitated from illness); a portion of the farm occupied by the respondent's father consisted of a field called "The Nineteen Acres," in the parish of Curry Mallett. At noon on the 2nd of November, the respondent was at work in the field when the appellants, who

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were out with the Taunton Vale Foxhounds, were on horseback and riding slowly across an adjoining field towards "The Nineteen Acres." The respondent got on the bank of his father's field at a gap near a covert in which the hounds were, and when the appellants were within ten yards of him said, "Gentlemen, I forbid you to come on this land." Thereupon the appellants endeavoured to ride up the bank, and the respondent was assaulted by them whilst endeavouring to push back their horses from off the field in question occupied by his father. There was no evidence to shew that any fox had been seen that day in "The Nineteen Acres."

It was contended on behalf of the appellants, *inter alia*, first, that they were with others in fresh pursuit of a fox started on other land, and were entitled under 1 & 2 Will. 4. c. 32. s. 35 to ride over the field in question without interruption; secondly, that under the circumstances of the case the respondent was not justified in using force to prevent the appellants entering "The Nineteen Acres."

The justices convicted, but submitted the following questions for the opinion of the Court:—

1. Whether 1 & 2 Will. 4. c. 32. s. 35 prevents an occupier resisting an entry on his land of persons hunting after they have been forbidden by him?
2. Whether the respondent was, under the circumstances, justified in resisting the entry on "The Nineteen Acres," after he had forbidden the entry and it was persisted in (1)?

*Cole*, for the appellants.—The first question arises under the Game Act, 1 & 2 Will. 4. c. 32. s. 35 (2).

(1) There were other questions submitted by the justices which do not call for a report. That portion of the argument and judgment of the Court which relates to them is consequently omitted.

(2) By the Game Act (1 & 2 Will. 4. c. 32), s. 35, the provisions contained in the statute against trespassers in pursuit of game are not to extend, *inter alia*, to any person hunting upon any lands and being in fresh pursuit of any fox started upon

[LORD COLERIDGE, C.J.—That statute in no way applies, inasmuch as the term "Game," as defined by section 2 of the Act, does not include foxes.]

As regards the other question, it is contended that at common law a man may go anywhere provided he is in fresh pursuit of a fox. It was held in *Gundry v. Feltham* (3) that a person may justify a trespass in following a fox with hounds over the grounds of another, provided he do no more than is necessary to kill the fox. He referred also to *Miller v. Fandrye* (4).

*Arthur Charles*, for the respondent.—The only point to be argued is, whether foxhunters hunting for their own amusement have a right to trespass on other people's lands against their will. Such a proposition could scarcely have been seriously argued here were it not for the decision in *Gundry v. Feltham* (3). That case, however, was decided in 1786, on demurrer to a plea which stated that the fox was a "destructive and hurtful vermin," and that the trespass committed by the defendant was "the only way and means" of killing it. The demurrer admitted all that was alleged in the plea, namely, that the fox was a "noxious animal," and that there was no means of killing it other than was adopted by the defendant; and on this ground Buller, J., based his judgment. In *The Earl of Essex v. Capel* (5), tried in 1809, a similar question came before Lord Ellenborough sitting at Nisi Prius, and his Lordship, after remarking that the judgment in *Gundry v. Feltham* (3) was founded on an *obiter dictum* of Justice Brooke in the Year Book, 12 Hen. 8. c. 10, directed the jury that if they thought from the evidence that the defendant pursued the fox for his own pleasure and amusement, and that the good of the public was not his sole and

any other land. By section 2 "game" are defined to be "hares, pheasants, partridges, grouse, heath or moor game, black game and bustards."

(3) 1 Term Rep. 334.

(4) 1 Popham 162.

(5) *Locke on the Game Laws*, 5th ed. 45.

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governing motive, they ought to find for the plaintiff, which the jury accordingly did. It is clear from the statements in this case that if Lord Ellenborough's test is correct in point of law, the appellants have altogether failed to justify the trespass which resulted in the assault for which they were convicted. He also referred to *Baker v. Berkely* (6).

*Cole* replied.

LORD COLERIDGE, C.J. (7).—This is an appeal on the part of the defendants from a conviction for assaulting and beating the respondent, and the circumstances are shortly these. The respondent's father was a farmer, and on the day when this assault was committed the respondent was managing his father's business in a field, known as "The Nineteen Acres." On that day there was in the neighbourhood a pack of foxhounds running in pursuit of a fox close by "The Nineteen Acres," and several gentlemen who were out hunting, and amongst them the appellants, prepared to ride across the field known by the name I have mentioned. Thereupon the respondent confronted them at the hedge and expressly forbade them to enter this field. A struggle ensued, one of the appellants insisting on going forward, and the respondent denying his right to do so. The other appellants then came up, and the respondent in his endeavour to prevent them from entering on his father's land, caught hold of the bridle of one of the appellants' horses, whereupon one of them struck at him twice with a riding whip, and another struck at him with his whip. Under those circumstances the appellants were convicted for an assault by certain justices, and the question we are called upon to decide is whether the conviction was correct in point of law. Now, the two main questions presented for our consideration are these: first, whether 1 & 2 Will. 4. c. 32. s. 35, prevents an occupier resisting an entry on his land of persons

out hunting after they have been forbidden by him; and, secondly, whether the respondent was, under the circumstances, justified in resisting the entry on "The Nineteen Acres," after he had forbidden the entry and it was persisted in.

Now, as regards the first point, I confess I don't altogether understand the question submitted for our judgment, but it is not very material, inasmuch as 1 & 2 Will. 4. c. 32, has no application to the present case. That statute merely provides that certain enactments which apply to game shall not apply to fox-hunting; but as foxes are not included in the term "game," as defined by the Act, the statute in question has nothing whatever to do with this matter. The other and really important question is whether, under the circumstances, the respondent was justified in resisting the appellants' entry on the field; and I am of opinion that he was. It has been argued that authority is to be found for the proposition that fox hunting in the ordinary and popular sense of the term may be exercised over the land of another without his consent and against his will. In support of this argument the case of *Gundry v. Feltham* (3) has been cited, but in my judgment no such right can exist. Fox hunting is doubtless a valuable sport and well entitled to the enthusiasm it excites among those whose privilege it is to enjoy it; but it must nevertheless be carried on, like other sports, in subordination to the general rights of mankind as well as the ordinary laws of property, one of which is that no man is entitled to enter the land of another without his leave and against his will. These questions do not in practice often arise, because this sort of thing is not often done without compensation being awarded to the persons over whose land a trespass has been committed; but when they do arise they must be governed by the ordinary rules of law, and it appears to me that there is nothing to justify fox hunters riding over gardens and trampling on shrubs, or entering the lands of another against the express will of the person whose property is invaded. This appeal is really brought before us on the autho-

(6) 3 Car. & P. 33.

(7) His Lordship presided in this Division in the absence from illness of the Lord Chief Justice.

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city of *Gundry v. Feltham* (3). Now even if the decision in that case can be supported it is quite distinguishable, as pointed out by Lord Ellenborough in *The Earl of Essex v. Capel* (5) on the ground that *Gundry v. Feltham* (3) was decided upon demurrer when, consequently, the plaintiff was taken to admit that the sole object of the hunter was to kill the fox, and that it could not be destroyed in any other way; indeed Buller, J., puts his judgment on that very ground. It was admitted that the trespasses which occurred were the only means of getting rid of the fox, and the decision may, therefore, be sustained on that ground. Afterwards came the case of *The Earl of Essex v. Capel* (5), decided by Lord Ellenborough, sitting at Nisi Prius it is true, but decided after careful consideration by him of the law applicable to the subject. In that case Lord Ellenborough expressly laid it down that in order to justify a trespass the jury must be satisfied that no other object existed in the mind of the trespasser, except the destruction of the fox. The evidence adduced at the trial went to shew that what was done was mainly done for the enjoyment of the hunt and the interest of following the hounds, and the jury accordingly found for the plaintiff. Now these dicta of Lord Ellenborough's, as I endeavoured to explain to Mr. Cole during the argument, clearly shew that when once any other motive exists in the mind, except the destruction of the fox, there can be no justification for the trespass. Lord Ellenborough, in the course of the case, takes occasion to remark that when the cases come to be looked at there is considerable doubt whether, if the object of the party was the destruction of the animal, that would afford any justification for a trespass, and that the idea probably originated in an obiter dictum of Brooke, J., in 12 Hen. 8. c. 10, to the effect that a man might justify entering into the lands of another to kill a fox because it was a beast injurious to the commonwealth, which dictum got repeated in book after book until it was supposed definitely to decide a point which was not the principal question before the

Court when it was uttered. However, we need not discuss that point further, as it is sufficient to say that the supposed authority of *Gundry's Case* (3) does not conflict with the later decision. For the reasons I have given I am of opinion that the respondent had a right to stop the appellants from entering his father's land, and that they were properly convicted for the assault which was committed.

MELLOR, J.—I entirely agree with what has fallen from Lord Coleridge. It cannot be disputed that the real object was the enjoyment of the sport and not the destruction of the fox, and I think the dictum of Lord Ellenborough is not only good law but is consistent with common sense. The result therefore is that the conviction must stand.

*Judgment for the respondent.*

Solicitors—Coode, Kingdon & Cotton, agents for Jolliffe, Crewkerne, for appellants; Reed & Lovell, agents for Reed & Cook, Bridgwater, for respondent.

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1878.	} THE QUEEN v. THE OVERSEERS OF WALSALL.
Feb. 5.	
May 18.	

*Court of Appeal — Jurisdiction — Case stated by Quarter Sessions for the Opinion of the Queen's Bench Division—Poor Rate—Judicature Act, 1873, ss. 19, 45.*

*The Court of Appeal has no appellate jurisdiction to review a decision of the Queen's Bench Division in the matter of a poor-rate, which is a mere opinion binding on no one.—So held per COCKBURN, L.C.J., and BRETT, L.J.; dissentientibus BRAMWELL, L.J., and COTTON, L.J.*

[For the report of the above case, see 47 Law J. Rep. Q.B., C.P. & Exch. 711.]



[IN THE QUEEN'S BENCH DIVISION.]

1877. }  
 Nov. 2. } THE QUEEN v. WILSON.

*Extradition Act, 1870 (33 & 34 Vict. c. 52), ss. 2, 6—Limitation of Act by Treaty—Exemption of British Subject from Surrender—Writ of Habeas Corpus.*

By the *Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 2, Her Majesty is empowered, in cases where an arrangement has been made with any foreign state for the surrender to such state of any fugitive criminals, to direct, by Order in Council, that the Act shall apply in the case of such foreign state, and may limit the operation of the order, and render the operation thereof subject to such conditions and exceptions as may be deemed expedient. By section 6, where the Act applies in the case of any foreign state, any fugitive criminal of that state who is in any part of Her Majesty's dominions is liable to be apprehended and surrendered in manner provided by the Act.*

In 1874 a treaty was made, in pursuance of the above statute, between the British Government and the Swiss Government, by which, however, it was expressly provided, *inter alia*, that no subject of the United Kingdom shall be delivered up by the Government of the United Kingdom, and an Order in Council was subsequently issued which recited the treaty and declared that the Act should be in force as regards Switzerland.

W., a British subject, was in custody on a charge of theft, alleged to have been committed in Switzerland, for the purpose of being handed over to the Swiss Government:—Held, that the prisoner was entitled to be discharged, inasmuch as the treaty contained an express exception in favour of British subjects, and the provisions contained in the *Extradition Act* could only apply so far as they were consistent with the terms of the treaty.

This was a rule of *habeas corpus* to discharge from custody one Alfred Thomas Wilson, who had been apprehended on a charge of larceny, alleged to have been committed in Switzerland. The return to the writ shewed that the prisoner had

been committed to the Middlesex House of Detention by the chief magistrate sitting at Bow Street under a charge of larceny, alleged to have been committed in Switzerland; that the prisoner was a British subject, and that it was proposed to surrender him to the Swiss Government under the *Extradition Act, 1870*.

By the *Extradition Act, 1870 (33 & 34 Vict. c. 52, s. 2)*, "Where an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals, Her Majesty may, by order in Council, direct that this Act shall apply in the case of such foreign state.

"Her Majesty may by the same or any subsequent order limit the operation of the order, and restrict the same to fugitive criminals who are in, or suspected of being in, the part of Her Majesty's dominions specified in the order, and render the operation thereof subject to such conditions, exceptions and qualifications as may be deemed expedient.

"Every such order shall recite or embody the terms of the arrangement, and shall not remain in force for any longer period than the arrangement."

By section 6, "Where the Act applies in the case of any foreign state, every fugitive criminal of that state who is in, or suspected of being in, any part of Her Majesty's dominions, or that part which is specified in the order applying this Act (as the case may be), shall be liable to be apprehended and surrendered in manner provided by this Act, whether the crime in respect of which the surrender is sought was committed before or after the date of the order, and whether there is or is not any concurrent jurisdiction in any Court of Her Majesty's dominions over that crime."

In March, 1874, a treaty was entered into, in pursuance of the above Act, between the British Government and the Government of the Swiss Confederation, by which the contracting parties engaged to deliver up to each other those persons who, being accused or convicted of a crime committed in the territory of the one party, shall be found within the territory of the other party under the cir-

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circumstances and conditions stated in the treaty. By Article 3, "No Swiss shall be delivered up by Switzerland to the Government of the United Kingdom, and no subject of the United Government shall be delivered up by the Government of the United Kingdom."

In February, 1875, an Order in Council was made, which recited the treaty and declared that the Act should be in force as regards Switzerland.

*E. Clarke* now moved that the prisoner be discharged. [He was stopped by the Court.]

*Charles Bowen* (*H. D. Greene* with him), for the prosecution, contended that the language of the treaty was not imperative, and that at any rate it could not be allowed to prevail for the purpose of introducing an exception which the statute did not authorise. They cited *Ex parte Counthay* (1).

COCKBURN, L.C.J.—I am not sorry that this argument has taken place, for I happen to be chairman of the Royal Commission which is now sitting on the subject of extradition, and I will endeavour, if possible, to get this blot removed, so as to prevent a British subject who commits an offence abroad from escaping from the consequences. I cannot, however, entertain the shadow of a doubt that, in accordance with the special provision in the Extradition Act, 1870, by which Her Majesty may make the treaty, and the application of the Act subject to such conditions and exceptions as she may deem expedient, that the order in Council must be limited by the terms of the treaty. Were this not so, this strange result would follow, namely, that the express arrangement entered into by the contracting parties—one of which is a foreign power—might be varied in terms by our legislature. Now this treaty with Switzerland contains an exception in favour of British subjects, of whom, it is admitted, the prisoner is one. As therefore the Act can only have application so far as it is consistent with the treaty, the

extradition cannot take place, and the prisoner must be discharged.

MELLOR, J., and FIELD, J., concurred.

*Prisoner discharged.*

Solicitors—Freshfields & Williams, for prosecution; Wontner & Sons, for prisoner.

[IN THE QUEEN'S BENCH DIVISION.]

1878. { THE QUEEN *on the prosecution*  
March 5. { of THE LICENSING JUSTICES OF  
Nov. 30. { THE COUNTY OF HEREFORD  
(respondents) v. SMITH (appellant).

*Licensing Acts*—9 Geo. 4. c. 61. s. 1; 32 & 33 Vict. c. 27. ss. 8 and 19; 35 & 36 Vict. c. 94. s. 42—*Renewal of Public-house License*—*General Discretion of Justices.*

A man who had had a public-house license granted him by the magistrates for many years previous to 1869, and continuously down to 1877, was refused the renewal of it at the general annual licensing meeting in the last-mentioned year, on the ground that the neighbourhood was sufficiently supplied by other existing public-houses, he not having for eight years taken out an excise license or used his house as an inn:—Held, that the application refused was for a renewal license, and not a new license; and that the justices had a general discretion as to granting or refusing the application under 9 Geo. 4. c. 61. s. 1, and were not fettered by the limitations in sections 8 and 19 of 32 & 33 Vict. c. 27, which are confined to applications for licenses for the sale of beer, cider and wine.

This was a rule for a *certiorari* to bring up and quash an order of Quarter Sessions, affirming on appeal, subject to a Case, a refusal by licensing justices to renew a license.

At the general annual licensing meeting for the Harewood End Division of the county of Hereford, held in September, 1877, the justices refused the application

(1) 42 Law J. Rep. Q.B. 217; s. c. Law Rep. 8 Q.B. 410.

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of John Smith for a license to sell exciseable liquors by retail, to be consumed on the premises, at an inn called the "Rising Sun."

The applicant had resided at the inn for a long time, and had had a magistrate's license for the sale of spirits, to be consumed on the premises, for many years previous to and including the year 1877. He had not, however, for eight years taken out an excise license or sold exciseable liquors, or used the place as an inn, until shortly before the licensing meeting in 1877, when he did take out an excise license for the remaining portion of the year covered by his then existing magistrates' license.

His application at the licensing meeting was opposed by the superintendent of police, on the grounds, amongst others, that the character of the applicant was unsatisfactory and that the neighbourhood was supplied with a sufficient number of public-houses; and it was refused.

Smith appealed to the Quarter Sessions, and objected that the respondent justices had no jurisdiction to refuse the license on any ground other than one of the four mentioned in section 8 of the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), as applied by section 19 of the same Act.

The respondents gave evidence in support of their refusal on the last mentioned ground, and the Quarter Sessions dismissed the appeal, granting a case to the appellant, which included the above facts.

*T. S. Pritchard*, for the respondents.—It is wholly immaterial whether the application was for a new license or for a renewal, because the discretion of the justices under 9 Geo. 4. c. 61 was unlimited, and with regard to the renewal of spirit licenses their discretion remains untouched by the Act of 1869, as appears not only from the words of limitation used in sections 8 and 19 of that Act, but also from section 42 of the Act of 1872 (35 & 36 Vict. c. 94).

The conditions imposed on the justices by sections 8 and 19 of the Act of 1869, apply only to applications for certificates to sell beer, cider or wine. He cited—

*The Queen v. The Justices of Lancashire* (1) and *The Queen v. Curzon* (2).

*A. T. Lawrence*, for the appellant.—The licensing justices had no general discretion. This house had a license before the passing of the Act of 1869, and therefore comes within section 19, so that the appellant had a vested right. He was a licensed person within the definition in section 74 of the Act of 1872, and his application was for a renewal; the discretion of the justices was therefore limited.

[COCKBURN, L.C.J.—Section 42 says the discretion shall be exercised as heretofore; it was heretofore exercised under 9 Geo. 4. c. 61. Then section 19 of the Act of 1869 does not apply, because that refers to a particular class of licenses.]

With regard to all renewals the conditions precedent to objections being entertained under section 42 must be fulfilled, and that section is to be construed so as to import the limitation as to the four grounds in all cases of applications for renewals.

[COCKBURN, L.C.J. — The applicant has not limited his application to a license for beer, cider or wine, and so has not brought himself within section 19.]

COCKBURN, L.C.J.—We can only say that the justices below had a discretion to exercise as to the granting of the license applied for by the appellant. The 8th and 19th sections of 32 & 33 Vict. c. 27 have no application to the case which was before them. Even treating this as a renewal, they have exactly the same discretion as to renewals of such licenses as the one asked for here, as they had before the Act of 1869 was passed. We have to see, therefore, how their discretion was previously exercised.

Now the Act of 1869 relates to two distinct classes of licenses, one for selling exciseable liquors under 9 Geo. 4. c. 61, and the other for selling beer, cider and wine; and section 19, which protects existing interests in respect of the second class must be read in connection with section 8, which enacts that the provi-

(1) 40 Law J. Rep. M.C. 17; s. c. Law Rep. 6 Q.B. 97.

(2) 42 Law J. Rep. M.C. 155; s. c. Law Rep. 8 Q.B. 400.

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sions as to granting licenses under the Act of Geo. 4 are not to be affected by that Act, except as therein stated.

If this application had been merely for a license for the sale of beer, cider or wine, the argument of Mr. Lawrence would have been well founded, that the appellant comes within the operation of the 19th section, but the present is a much larger application, being for a spirit license. Consequently, the Act of 1869 cannot apply so as to afford to the appellant that protection in respect of such general license, which is limited to an application for a partial license.

It follows that this case remains under the Act of Geo. 4, whereby there was the same discretion given to the justices, whether the license asked for was a new one or by way of renewal. And the distinction between new licenses and renewals having been introduced by 32 & 33 Vict. c. 27, the subsequent Act of 35 & 36 Vict. c. 94. s. 42 dealing with renewals imposes certain conditions on the justices in respect of applications for renewals, and enacts that, "subject, as aforesaid, licenses shall be renewed and the powers and discretion of justices relative to such renewal shall be exercised as heretofore."

The discretion as to granting a license to sell exciseable liquors, under 9 Geo. 4. c. 61. s. 1, is thus expressly preserved to the justices, and they had a right to exercise it in reference to this application; and the order of Sessions must be affirmed.

MELLOR, J., concurred.

[*Lawrence*.—Will the Court give an opinion for the guidance of the Quarter Sessions upon the point whether this was an application for a renewal or for a new license? COCKBURN, L.C.J.—The Justices' license has been taken out from year to year and we think it was an application for a renewal of that license.]

*Order of Sessions affirmed.*

NOTE.—The case reserved by the Sessions, after stating the facts as above mentioned, concluded by asking the question of this Court whether

under the circumstances the application was for a new license or for the renewal of a license, and made the affirmance or quashing of the order of Sessions dismissing the appeal, depend upon the answer to that question; and on the above argument the objection was taken by Lawrence for the appellant, that the Court could entertain no other question, but, on behalf of the respondents, Pritchard contended that the Court were not bound by the question in the case if it could see on the facts stated that it was not the real question before the Sessions or before the Court, and what the real question was, but would in that case consider and decide the real question. He admitted that it was an application for a renewal of a license, and not for a new license. And the argument proceeded on that footing, and upon the objection being further taken for the appellant that the case did not state that the Sessions had decided the material fact that the justices were right in refusing the license, the Court having heard all the arguments on the real question as to whether or no the justices had an absolute discretion, proceeded to deliver judgment thereupon, but sent the case down to be re-stated on the point said to be ambiguous. Accordingly the Crown Office sent down the case to the Sessions, retaining the order of Sessions which had been brought up by the *certiorari*; and upon the case being returned by the Clerk of the Peace, with the statement that, upon rehearing, the Sessions had found that the justices had rightly exercised their discretion, the Court on the 30th of November, upon motion by Pritchard for the respondents, gave judgment affirming the order of Sessions dismissing the appeal, without permitting further argument.

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Solicitors—White & Son, agents for Garrold, Hereford, for appellant; Fortune, agent for Minett, Son & Piddocke, Ross, for respondents.

[IN THE QUEEN'S BENCH DIVISION.]

1878. { THE LEICESTER WATERWORKS COM-  
Dec. 3. { PANY v. THE ASSESSMENT COM-  
MITTEE OF THE BARROW UNION,  
AND NUTTALL, AND SHEFFIELD.

*Assessment Committee—Appeal to Sessions against Rate—Reference to Arbitration—Costs in Discretion of Umpire—Absence of Order under Baines's Act, authorising Reference—Action for Costs against Assessment Committee—Liability of Poor Law Guardians—Statutes 12 & 13 Vict. c. 45. ss. 12, 13; 22 & 23 Vict. c. 49. s. 2; 25 & 26 Vict. c. 103. ss. 1, 28; 27 & 28 Vict. c. 39. s. 2.*

*An assessment committee, being unincorporated and merely a select body of guardians, cannot be sued in an action as a committee, neither are the various members thereof personally liable for acts done by them as members of the committee.*

*The plaintiffs' company complained, in 1872, of being over assessed with reference to certain works which belonged to them, and which passed through some parishes in the Barrow Union; they accordingly brought appeals, which the assessment committee defended in the name of the guardians, in pursuance of 27 & 28 Vict. c. 39. s. 2. In 1872 the committee in question consisted of twelve, the defendant N. being chairman and S. vice-chairman of the committee. On the 8th of June, 1872, a meeting was held, at which the waterworks company were represented by the chairman, and the guardians of the B. Union by the assessment committee; and it was unanimously agreed that the question as to the rateable value of the plaintiffs' works should be settled by arbitration; and that, pending the negotiations, the appeals should be respite. An agreement was, on the 29th of June, accordingly drawn up and signed by the plaintiffs, and by the defendant N. "as chairman for, and on behalf of the assessment committee of the Barrow Union," by which the disputes between the parties were referred to arbitration, and the costs of the proceedings left in the discretion of the arbitrator or umpire. There was no Judge's order, or order of Sessions, ordering or authorising the reference. The reference was held, and the award, published early*

*in 1874, was in favour of the plaintiffs, the costs of the reference being also given to them. Accordingly the plaintiffs now brought this action to recover the expenses connected with the reference, which they had been compelled to pay on taking up the award, but which the defendants declined to refund. It was admitted that the assessment committee in all their proceedings were acting with the approval and consent of the guardians of the union:—*

*Held, that the defendants were not liable, and that the action, if maintainable at all, should have been brought against the guardians of the Barrow Union.*

*Whether, in the absence of a Judge's order, or order of Sessions, under Baines's Act (12 & 13 Vict. c. 45. ss. 12, 13), the guardians of the union would have been liable, under the circumstances above mentioned, if sued within the period limited by 22 & 23 Vict. c. 49. s. 2—Quære.*

SPECIAL CASE stated without pleadings for the opinion of the Court.

1. The plaintiffs are a company having powers to supply water to Leicester and other places.

2. In the year 1872 the guardians of the Barrow-on-Soar Union, under and in pursuance of the statute 25 & 26 Vict. c. 103. s. 2, duly appointed an assessment committee for that union. This committee consisted of twelve members. The defendant, William Nuttall, was a member of the assessment committee so appointed in 1872, and was the chairman of such committee; and the defendant, John Sheffield, was also a member of that committee in the year 1872.

3. In 1871 and 1872 certain appeals had been brought by the plaintiffs, and were all pending against rates made upon the assessment of the plaintiffs' works in and passing through several parishes in the Barrow-on-Soar Union. The guardians of the Union duly gave their consent to the assessment committee to appear and defend such appeals, and thereupon the said assessment committee for the year 1872, in pursuance of 27 & 28 Vict. c. 39. s. 2, appeared in the name of the said guardians as respondents to such appeals.

4. While such appeals were pending,

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the following memorandum was made and signed; namely,—

“Leicester Waterworks Company’s Office,  
“8th June, 1872.

“At a meeting of the Committee of Directors of the Leicester Waterworks Company and the Assessment Committee of the Barrow-upon-Soar Union, comprising Messrs. Ellis (chairman), Harris (vice-chairman) and Hodges on behalf of the Directors of the Waterworks Company, and Messrs. William Nuttall (chairman), Sheffield (vice-chairman), Thomas Nuttall, Camm, Matts, Wright, Cuffling, Cocks, on the part of the guardians of such union—

“It was unanimously agreed that all questions in relation to the rating of the above-named company’s works and mains, comprised in and passing through the several parishes of the said union, be submitted to Mr. Thomas Hawksley, on the part of the Waterworks Company, and to Mr. Corbett, on behalf of the said guardians, with a view to their adjusting the same, and, in case of their failing so to do, with power to appoint an umpire whose decision shall be final. This arrangement is subject to confirmation by the board of directors of the said waterworks company. That, pending these negotiations, the appeals entered by the waterworks company against the said rating, if necessary, be further respited, and, in case it should be ultimately necessary to proceed with such appeals, no further notices thereof shall be required, nor any objection taken for want of form or otherwise, it being understood that the notices of appeal shall be taken as applying to the present assessment.

“E. S. Ellis,

“On behalf of the Directors of the  
“Waterworks Company.

“Wm. Nuttall,

“On behalf of the Assessment  
“Committee.”

5. On this arrangement being confirmed an agreement of submission was drawn up, and was, with the consent of the guardians of the Barrow-upon-Soar Union, signed for and on behalf of the assessment committee of the said union

by the defendant, Wm. Nuttall, as chairman for and on behalf of the assessment committee for 1872.

Under the agreement in question (which was dated the 29th of June, and formed part of the case) the disputes between the parties were left to the decision of two arbitrators, or, in case of their disagreement, of an umpire to be appointed by them, the parties binding themselves to abide by the award of the arbitrators, or umpire, in whose discretion the costs of the proceedings were left. The agreement was signed by “E. S. Ellis” and Richard Harris for the company, and by “Wm. Nuttall, 29th June, 1872, chairman for and on behalf of the assessment committee of the Barrow-upon-Soar Union.”

No Judge’s order, or order of sessions, was applied for or obtained by either party ordering or authorising such reference.

The umpire duly made and published his award on the 31st of January, 1874, in favour of the plaintiffs, by which certain repayments were ordered to be made in respect of over-assessments and the costs of the agreement of reference, and of the reference and award ordered to be paid “by the other party to the agreement of reference.”

8. While negotiations were pending, and while the appeals were pending, poor-rates were continuously being made by the several parishes, and the plaintiffs’ property assessed in respect of the same. But for the agreement in the 4th paragraph mentioned, the plaintiffs would have had to appeal against each rate both to the assessment committee and to the quarter sessions. Each appeal to the quarter sessions would have had to be respited from time to time until a decision was finally arrived at, and very large expenses would have been thereby incurred both by the plaintiffs and the defendants.

9 & 10. The umpire duly advised the solicitors to both parties on the 2nd day of February, 1874, that the award was ready, and accordingly the plaintiffs on the 4th of February, 1874, paid the sum of 37*l.* 1*s.* 9*d.* for the umpire’s charges. The award was not then formally completed, but was returned for completion

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and completed on the 7th day of February, 1874.

11. A copy of the award was on the 12th of February, 1874, sent by the plaintiffs' solicitor to the solicitor to the Barrow-on-Soar Union and to the Assessment Committee, with a letter, of which the following is a copy—

"Leicester Waterworks Company and the Assessment Committee of the Barrow-upon-Soar Union.

"Dear Sir,—I beg herewith to send you in your official capacity of clerk to the assessment committee an examined copy of the award of Mr. Hunt. I have paid the sum of 372*l.* 18*s.* 9*d.* on taking up this award, which amount I find is ordered to be paid by your clients, the respondents, and of which I have to require repayment from them at once. As soon as the next Quarter Sessions are over, and the order of Sessions made upon the several appeals, in accordance with the decision set out in the award, I will send you my bill of costs, which has also to be discharged by your clients. In the meantime I shall be glad to hear from you with cheques for the amounts ordered by the award to be repaid by the several parishes to the appellants in respect of the amounts for rates paid by them to such parishes under protest pending the decision in this case, and which amounts are set out in the award.

"I am, dear Sir, yours truly,  
"(Signed) Jos. B. Haxby."

12. The plaintiffs' costs in the matter of the references were taxed at 26*l.* 9*s.* 6*d.*, and a letter was sent on the 19th day of June, 1875, to Mr. Goode informing him thereof and requesting payment.

13. The award has been acted upon by both parties, and the terms of it carried out so far as relates to the altering of the several valuations, and to the refunding of the various rates overpaid under the protest made by the plaintiffs. The award was by consent taken as the basis of settlement of the rateable value by the Court of Quarter Sessions on the hearing of the appeals.

14. The Barrow-on-Soar Union duly and in pursuance of the statute in that

behalf, appointed an assessment committee in and for each of the years 1873, 1874 and 1876. In each of these years the assessment committee was differently constituted. The defendant, William Nuttall, was a member of such committee in each of the above years. He is no longer a member of the said committee or of the said board of guardians. The defendant Sheffield was a member of such committee in the year 1872.

15. The assessment committee in all their proceedings with reference to the rates appeal and arbitration were acting by and with the consent and approval of the guardians of the said union.

16. In an interview between the solicitors to the plaintiffs and defendants on the 6th of May, 1875, it was arranged that the defendants' solicitors should take the opinion of the Local Government Board, as to the defendants repaying the amount paid by the plaintiffs for the umpire's costs. Application was made for repayment by the defendants on the 10th of June, 1875. On the 16th of November, 1875, letters were sent to the defendants' solicitors, and also to the defendant Nuttall (who was then chairman of the board of guardians and also a member of the assessment committee) demanding immediate payment. The defendant Nuttall replied, stating that the guardians had written to the Local Government Board for their advice, and asking that pending their answer no proceedings might be taken. In consequence of this request the plaintiffs did not then enforce payment of the sums for which this action was brought. The defendants, however, did not apply to the Poor Law Board for any extension of time for payment, and in consequence thereof no extension of time was made. These repeated applications not having been complied with, and repayment being still withheld, the writ in this action was issued on the 17th of February, 1876. No order has been made by the Local Government Board extending the time for payment of the plaintiffs' claim.

17. No notice of action was given previously to the commencement of this action.

18. The plaintiffs have been put to

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other costs in consequence of the award not having been fully carried out with regard to the repayment of rates, and in respect of other proceedings consequent thereon.

The questions for the opinion of the Court are—

1. Whether, under the above circumstances, the defendants on the record of this action, some or one of them, are liable to repay to the plaintiffs the amount paid on taking up the award?

2. Whether the defendants on the record, some or one of them, are liable to pay the plaintiffs the amount of their taxed costs in connection with the reference?

3. Whether the plaintiffs can recover from the defendants on the record, some or one of them, any damages under the circumstances hereinbefore stated? Such damages, if recoverable, to be settled by arbitration.

*Merewether and Sills*, for the plaintiffs.  
—The present action can, under the circumstances which have occurred, be maintained against either the assessment committee or, failing them, the other defendants. The other side will doubtless contend that as they were merely acting on behalf of the guardians, the latter were responsible, and also that the claim is now altogether barred, even as against the guardians, by virtue of the provisions contained in 22 & 23 Vict. c. 49 (1). Now, even if the time mentioned in that Act has elapsed before this action was

(1) By 22 & 23 Vict. c. 49. s. 1, "all debts, claims or demands which may, after the passing of this Act, be lawfully incurred by or become due from any guardians of any union or parish . . . shall be paid within the half year in which the same shall have been incurred or become due, or within three months after the expiration of such half year, but not afterwards . . . Provided that the Poor Law Board by their order may, if they see fit, extend the time within which such payment shall be made for a period not exceeding twelve months after the date of such debt, claim or demand." By section 4, in cases where claims, &c., have been commenced in proper time, and prosecuted with due diligence to judgment or other final settlement, such judgment, &c., shall be satisfied by the guardians, notwithstanding the provisions contained in section 1.

brought, the defendants have waived all right to take advantage of the provisions of the statute by having carried out so much of the award as was in their favour; having so acted, they are bound to carry out so much of it as was against them. Moreover, it was the duty of the defendants to have applied to the Poor Law Board for an extension of time to pay the sums now sued for, and they have impliedly contracted to do so; an action will therefore lie against them for breach of that duty, and also for breach of that contract. As regards the question whether an assessment committee can be sued as such, it is contended that they can, and that they are in the same position as overseers, who may be really liable but have their remedy over—*Kirby v. Banister* (2). Their appointment is from among the body of the guardians, under 25 & 26 Vict. c. 103. s. 2, and they are in the position of persons who are, by virtue of the provisions contained in the last-mentioned statute, charged with certain duties involving expense; they must therefore necessarily have some fund out of which to meet such expenses. For instance, under the express provisions of the 20th section, a committee may in certain cases, with the consent of the guardians, "appoint or employ a person to survey and value the rateable hereditaments comprised in any valuation list;" the 37th section moreover, which empowers an assessment committee to allow compensation for "any act, matter or thing made or done in pursuance of their order, and all expenses connected therewith, as to the committee in each case seems just," was passed to include cases like the present, where a committee have approved by their proceedings of everything that has been done. Lastly, even if the assessment committee cannot be sued, *Nuttall and Sheffield* have rendered themselves personally liable to the defendants. Even if they did not, in fact, intend to bind themselves personally, there was an implied warranty on their part that they had authority to act as they have done, and

(2) 5 B. & Ad. 1069; s. c. 3 Law J. Rep. M.O. 69.



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they are liable for the misrepresentation—*Cherry v. The Colonial Bank of Australasia* (3). Again, their signature to the agreement to arbitration is sufficient to bind them—*Bottomley v. Fisher* (4).

*Marshall Griffith*, for the assessment committee; *Pitt Lewis*, for Nuttall, and *Glen*, for Sheffield.—First. An assessment committee are not a corporate body, and therefore cannot be sued as a committee, nor made a defendant; they are not even a *quasi* corporation, but a select body chosen from the guardians, and charged with the performance of certain duties for and on behalf of the guardians. There would clearly be great inconvenience in holding that such an action as this could be maintained against an assessment committee, for the latter are a fluctuating body, changing from year to year. Besides, an assessment committee possess no funds out of which to meet any charges said to have been incurred by them, and recourse ought in all cases to be had to the guardians of the union, who alone are responsible for any expenditure incurred on their behalf by the assessment committee. The action, if maintainable at all, should have been brought against the board of guardians for the Barrow Union, who are a corporation by statute. Unfortunately, however, no demand has been made for these moneys within the time limited by 22 & 23 Vict. c. 49, so that the guardians have no power to discharge the claim. The plaintiffs, therefore, are now endeavouring to get over the difficulty in which they find themselves placed by fixing a liability on the assessment committee, who merely acted on behalf of the guardians, and with their approval in everything which was done. Whether, even if the guardians had been made defendants in proper time they would have been justified in making the payment now demanded by the plaintiffs, and whether any payment made would not have been disallowed by the auditor is by no means clear, because

it would seem that the reference in respect of which the alleged liability arose ought to have been sanctioned by a Judge's order or by an order of Sessions, and was not so sanctioned—see 12 & 13 Vict. c. 45. ss. 12 and 13 (5). At all events, any such proceeding on the part of an assessment committee was *ultra vires*.

Secondly, as regards any personal liability on the part of Nuttall and Sheffield, neither of them could incur any personal liability whilst acting merely as guardians and members of the Poor Law Union. The various members of a committee are not liable personally for acts done by them as members of such committee, and Sheffield was not a member of the board of guardians at the time when the alleged liability arose. No personal liability arises from mere signature—*Alexander v. Sizer* (6). The contention that they were acting *ultra vires* so as to render themselves personally liable to the defendant is disposed of by the express findings in the Special Case.—See paragraph 15. But, even assuming that they were acting *ultra vires*, their powers are defined by law, and the plaintiffs must be taken to be as well acquainted with the law as these two defendants; for misrepresentation by an agent does not extend to misrepresentation of law—*Rashdall v. Ford* (7). In *Cherry's Case* (3) there was a misrepresentation of fact, and it was on that ground that the defendants were held liable.

(5) By Baines's Act (12 & 13 Vict. c. 45), section 12, the parties to an appeal may, at any time after notice of appeal, by order of a Judge, submit, with certain exceptions, the matter of such appeal to the award or umpirage of any person, and agree that such submission should be made a rule of Court, and every award and umpirage under the Act shall be as binding and effectual as if the same had been a regular judgment of the Sessions, and may, on the application of either party, be enrolled among the records of the Court. By section 13 the Sessions have a like power with consent of the parties in the case of appeals brought before them.

(6) 38 Law J. Rep. Exch. 59; s. c. Law Rep. 4 Exch. 102.

(7) 35 Law J. Rep. Chanc. 769; s. c. Law Rep. 2 Eq. 750.

(3) 38 Law J. Rep. P.C. 49; s. c. Law Rep. 3 P.C. 24.

(4) 1 Hurl. & O. 211; s. c. 31 Law J. Rep. Exch. 417.

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They also cited *Beattie v. Ebury* (8), *Thorpe v. Cole* (9) and *Lindus v. Melrose* (10).

*Merewether* replied.

MELLOR, J.—I am of opinion that our judgment should in this case be given in favour of the defendants. The question we have to determine arises in this way. The plaintiffs are a waterworks company having works in and passing through several parishes in the Barrow-on-Soar Union, and in 1871 and the following year disputes arose between the company on the one side and the persons representing the union on the other with reference to the rateable value at which the company are to be assessed for the pipes and works belonging to them which passed through these parishes. Certain appeals were accordingly brought by the plaintiffs against the rates that were made upon them for the works in question, and by consent of the guardians the assessment committee appeared in the name of the guardians as respondents to the appeals. Whilst the appeals were pending the parties wisely, as it appears to me, had a conference, and determined that, instead of having these appeals tried time after time, the rateable value should be settled out of Court, thinking, no doubt, that such a course was calculated to save great expense. At the meeting in question the waterworks company were represented by the chairman and one or two other gentlemen, and the guardians of the union by the assessment committee, and it was unanimously agreed that pending the negotiations the appeals entered by the waterworks company against the rating should be resped. This arrangement was duly confirmed, and on the 29th of June, 1872, a preliminary agreement was entered into between the Leicester Waterworks Company of the one part, and the assessment committee of the Barrow-upon-Soar Union, for and

on behalf of the board of guardians of such union of the other part, such agreement being signed by the chairman of the company, and by the defendant William Nuttall as chairman for and on behalf of the assessment committee. The memorandum of agreement after reciting the differences that had arisen, and the resolution that had been passed to refer all questions in relation to the rating of the works of the waterworks company to arbitration, witnessed that it was agreed that the disputes in question should be referred to the award and final determination of two arbitrators, and in case of disagreement by them, to an umpire, by whose decision the parties were to be bound, and that the costs incidental to the reference should be in the discretion of the arbitrators or the umpire, that is to say, of the person who made the award. The reference was held, and the award duly made and published, and certain expenses that were incurred became apparently payable by the assessment committee or the guardians of the Barrow Union. In that state of things the award having been in favour of the plaintiffs, and the expenses of the reference ordered to be paid to the plaintiffs having been ascertained, an action is brought against the assessment committee, and also against Nuttall and Sheffield, who were respectively chairman and vice-chairman of the committee, and the question therefore which we are now called upon to decide is, whether an action will lie against either of these parties to recover those sums of money alleged to be due from them, or some one or more of them, to the plaintiffs. I have come to the conclusion that this action cannot be maintained against any one of the defendants.

Let us first see what sort of a position an assessment committee occupy; the way in which they are formed, and the duties that are cast upon them. The Act 25 & 26 Vict. c. 103. s. 2 prescribes that the committee are to be chosen year by year from out of the body of the guardians for the investigation and supervision of valuations to be made within the union, and for the performance of certain other acts and duties prescribed in other

(8) 44 Law J. Rep. Chanc. (H.L.) 20; s. c. Law Rep. 7 H.L. 102.

(9) 2 Cr. M. & R. 367; s. c. 5 Law J. Rep. Exch. 24; on appeal 1 Mee. & W. 531; s. c. 5 Law J. Rep. Exch. 281.

(10) 3 Hurl. & N. 177; s. c. 27 Law J. Rep. Exch. 326.

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parts of the statute. The committee, therefore, are part of the guardians, selected out of the whole body to provide against the inconvenience that would be caused by the attendance of the whole body whenever matters relating to the valuation list, such as objections, and so forth, had to be heard and determined. Mr. Merewether has placed some stress on the words of the 20th section, which enables a committee "with the consent of the guardians to appoint or employ a person to survey and value the rateable hereditaments comprised in a valuation list;" but this power seems to me only to be given as a guide for the future in cases where objections are raised to the correctness of a valuation list, and was never I think intended to empower an assessment committee, or probably the guardians, to refer the valuation of any particular case to the arbitration of a person, though mutually agreed upon. I think that if an effective arbitration was desired, recourse should have been had to Baines's Act, under which authority for such a proceeding would have been given by a Judge or initiated by him. But no such steps were taken here, and I think, therefore, that the assessment committee had no power under 25 & 26 Vict. c. 103 to incur the expenses of this arbitration. I cannot see how an assessment committee can be held liable for an act done as an assessment committee, and on behalf of the guardians of a particular union. Then, have this assessment committee contracted in such a way as to make themselves personally liable? I think not; they are no corporation, but are merely a select body of guardians charged with the performance of certain statutory duties; they have, moreover, no funds, but are compelled to have recourse to the funds of the union to meet any expenses legally incurred. Whether the guardians would have been held under the circumstances liable if sued in time is a question we are not called upon now to determine; but I fail to see how the assessment committee or any individual member of the same can be held responsible. Unfortunately—for there is no doubt that these expenses were wisely incurred—it happens that the committee are not *sui juris*, but act by virtue

of certain statutory provisions, so that their liabilities must be determined by those statutes. Any costs incurred by them must for reasons already given come out of the union whose funds are administered by the whole body of guardians. Unfortunately, however, here, by a pure accident, the time allowed for such a claim as the present to be made against the funds of a union is limited by 22 & 23 Vict. c. 40. s. 2, and the statutory period has more than elapsed. The reason of this limitation was probably due to the fact that the guardians were a fluctuating body, which rendered it advisable that there should be a limit beyond which such a claim as the present should not be allowed. The 4th section allows, it is true, a settlement in certain cases to be made by the guardians, notwithstanding that the period has expired, during which the claims ought, as a rule, to have been satisfied, but this section was inserted to obviate the obvious injustice which might otherwise be inflicted on a claimant who had duly taken proceedings, but where the time has been exceeded owing to the course of litigation or other circumstances beyond his control. I confess I feel very sorry (the money being clearly due, and everything having been done perfectly *bona fide* on all sides) that I am compelled to say that the defendants cannot be held liable, it being now too late to order the moneys from the common fund of the union. I am satisfied, however, that no personal liability was ever intended to be, or in fact was entered into by the defendants; I therefore answer the questions submitted to me in the negative, and say that this action cannot be maintained.

MANISTY, J.—I also think that our judgment should be for the defendants. I won't travel over the same ground already so carefully traversed by my brother Mellor, but I make this observation, that this is not an action by a person employed by the assessment committee. This is not an action by employed against employer, but an action between parties to a contract as to how the costs of a certain arbitration should be paid; in other words, it is sought to

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recover back the sum of 372*l.* 18*s.* 9*d.*, being the amount paid for arbitration expenses, that is to say, the charges of arbitrator and umpire, and costs incurred by the waterworks company. The only question is, who are the parties to this agreement? The chairman of the waterworks company is no party to it in his personal character, just as the defendant Nuttall acted for the assessment committee of the board of guardians, and I think that the real parties are the waterworks company on the one side, and the guardians of the union on the other. This almost disposes of the whole matter. It has been contended that all we have to do is simply to look at the signature. I confess I was rather startled at hearing such a proposition, and no authority whatever has been cited in support of it. The object and intention of the agreement must, I think, be looked at, in order to see on whose behalf it was really made. The agreement itself is very clearly expressed and purports to be entered into "between the Leicester Waterworks Company of the one part, and the assessment committee of the Barrow-upon-Soar Union in the county of Leicester, for and on behalf of the board of guardians of such union, of the other part." In the agreement the costs of the reference are left in the discretion of the umpire; how does the umpire say they are to be paid? Why, he says they are to be paid "by the other party." Who are they? The guardians of the union, as it seems to me; therefore it follows that none of these defendants are liable. An assessment committee cannot be sued, they are not a corporation, and I don't quite understand on what principle they could be made liable. If the question had been, whether, under the special circumstances, the moneys might have been recovered from the guardians, I might, perhaps, have liked for further time to consider the matter, but that does not arise. I think the 20th section amplifies the powers given to an assessment committee on questions relating to valuation, but confers no power on them to refer a matter to arbitration. In my judgment that could only have been done under Baines's Act, although Mr. Merewether

has urged that that statute has nothing to do with this matter. As the question about the statute of limitations has no bearing, so far as these particular defendants are concerned, I forbear discussing it.

*Judgment for defendants with costs.*

Solicitors—Paterson, Snow & Bloxam, agents for J. B. Haxby, Leicester, for plaintiffs; C. J. P. Maunder, agent for W. W. Goode, Leicester, for defendants.

1878. }  
Dec. 7. }

MIGOTTI v. COLVILLE.

*Action—False Imprisonment—Computation of Time—One Calendar Month—Expiration of Time of Imprisonment.*

The plaintiff, who was sentenced by a magistrate to be imprisoned, first, for "one calendar month;" and secondly, "for fourteen days, to commence at the expiration of the imprisonment previously adjudged," was taken into the custody of the defendant (the Governor of Coldbath Fields Prison) during the afternoon of the 31st of October, 1877, and finally released at 9 a.m. on the 14th of December. The plaintiff complained that he had been imprisoned for a longer period than he was liable to be detained, and accordingly brought this action for false imprisonment:—

Held, per DENMAN, J., that the plaintiff was not strictly entitled to his discharge until midnight on the 14th of December, and that therefore he had not been detained illegally.

This was an action for false imprisonment against the Governor of Coldbath Fields Prison.

The plaintiff was convicted on the 31st of October, 1877, by Mr. Paget, the police magistrate at Hammersmith, of two separate assaults, and for the first assault he was sentenced to be imprisoned "for one calendar month," and for the second assault he was sentenced to be imprisoned "for fourteen days, to commence at the expiration of the imprisonment previously

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adjudged." The plaintiff was accordingly taken into the custody of the defendant during the afternoon of the said 31st of October, and he remained in prison until 9 A.M. of the 14th of December following, when he was released. The plaintiff asked to be released on the 13th of December when he claimed to be entitled to his discharge, but this was refused by the defendant. For this detention this action was brought, which was tried before Denman, J., at the Middlesex sittings on the 21st of last November, when the jury having assessed the plaintiff's damages at 20s., the point of law whether the detention beyond the 13th of December was illegal was reserved for argument on further consideration.

This was accordingly afterwards argued by—

*Kydd and Barnard*, for the plaintiff, and

*A. L. Smith*, for the defendant.

*Cur. adv. vult.*

The following judgment was delivered by—

DENMAN, J.—This was an action for false imprisonment by detaining the plaintiff in custody for a longer period than, as he contended, he was liable to be detained. The facts were not in dispute. I took the opinion of the jury as to the damages, which were assessed at 20s., and after hearing counsel I took time to consider whether the judgment ought to be for the plaintiff or for the defendant.

The plaintiff had been convicted by a metropolitan police magistrate of two different assaults, and sentenced to imprisonment upon each conviction.

The convictions took place at 11 A.M. on the 31st of October, and the commitments were drawn up in accordance with the sentences passed. For the first assault the plaintiff was sentenced to be imprisoned "for one calendar month;" and for the second assault "for fourteen days, to commence at the expiration of the imprisonment previously adjudged." He was taken into the custody of the defendant, being the Governor of Coldbath Fields Prison, during the afternoon of the

31st of October, and finally released at 9 A.M. on the 14th of December, having claimed to be released on the previous day.

It was contended for the plaintiff that the calendar month (the term of the first sentence) commenced at midnight on the 30th of October. So far I am of opinion that the plaintiff's contention was well founded. I can find no express authority on the point, but arguing from analogous cases I think I ought so to hold. It has been held in many cases that as a general rule, except where it is necessary in order to settle which of two acts done on the same day is to prevail, the law takes no notice of parts of a day, and that the first day to be counted is the day, *any part* of which is occupied in the particular business which is to endure for a certain number of days in order to fulfil any requirement of the law. This principle is recognised in the often cited case of *Combe v. Pitt* (1), in *Field v. Jones* (2) and in *Glassington v. Rawlins* (3), where it was held that, under the statute which enacted that a trader lying in prison two months after an arrest for debt should be adjudged a bankrupt, the day of arrest was to be included in the computation of the two months. Also in *Wright v. Mills* (4) and other cases; and this is stated to be the rule applicable "to all judicial acts" in the judgment of the Exchequer Chamber in *Edwards v. The Queen* (5). There are no doubt several cases in which, where the date is to run from an act done, it has been held that the day in which the act is done is to be excluded from the computation. See *Lester v. Garland* (6).

There are also cases in which where a payment is to be made or something to be done "within so many days or months, or at the expiration of" so many days or

(1) 3 Burr. 1586.

(2) 9 East, 151.

(3) 3 East, 407.

(4) 4 Hurl. & N. 488; s. c. 28 Law J. Rep. Exch. 223.

(5) 9 Exch. Rep. 628; s. c. 23 Law J. Rep. Exch. 165.

(6) 15 Ves. jun. 254.

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months, the day of the event within, or at the expiration of so many days from which the payment is to be made or the act done, is not included in the reckoning. The case of a bill of exchange is a familiar instance. But I can find no authority for saying that the general rule ought not to apply to the case of a sentence of imprisonment. Nor can I see any ground for doubting that it applies to the case, where the sentence is for a calendar month, or a given number of calendar months, just as much as to a sentence for so many days. Holding, then, that the first sentence in the present case must be computed from midnight on the 30th of October, when did the calendar month expire?

The plaintiff contends that it expired at midnight on the 29th of November at the latest, and he does so on the ground that, if not, the plaintiff under a sentence of one calendar month's imprisonment would have to undergo something more than a calendar month's imprisonment, inasmuch as he would be imprisoned for the whole of one day in October (*i.e.* from midnight on the 30th to midnight on the 31st of October), *plus* twenty-nine days and something more, nay even a whole calendar month more in November, making in the whole more than thirty days, whereas November, which is a calendar month, only consists of thirty days. Therefore it is argued it follows of necessity that he will have suffered more than a calendar month's imprisonment, and in this particular case he will have actually been imprisoned during the whole calendar month of November, *plus* one day in October.

It appears to me that this argument, however plausible, is not sound. The question appears to me to depend entirely upon what was the meaning of "one calendar month" at the time the sentence was passed, and I am of opinion that at that time, namely, on the 31st of October, those words meant a month ending on the day in a succeeding month corresponding to the day of the sentence, according to the ordinary understanding of the words "this day calendar month." The whole difficulty of the case here arises from the fact of October having

thirty-one days and November only thirty, but I think that a few considerations will shew how that difficulty ought to be solved.

Suppose, instead of the 31st of October this sentence had been passed on the 26th. Then, applying the rule mentioned above as the commencement of the term, the prisoner would be entitled to count the whole of the 26th as a day of imprisonment, *i.e.* the sentence would have begun to run from midnight on the 25th. I apprehend that no one would contend that it would have expired before midnight on the 25th of November. Why? Because that would be the expiration of the calendar month. Yet in that case, as in this, the calendar month spent in prison would have been one of thirty-one days and not of thirty days. This seems to shew that the meaning of "one calendar month" cannot be construed with reference only to the duration of the latter of the two months over which it may extend. If it did, then a sentence of one calendar month passed on the 29th of January would expire not on the 28th of February, but at midnight on the 25th, because February being a calendar month of twenty-eight days, the prisoner would have in that sense spent a calendar month in prison.

In the case of bills of exchange, in which the word month is held to mean "calendar month," it is laid down by all the text writers that bills at one month drawn on the 28th, 29th, 30th or 31st of January, will fall due (excluding the days of grace) all on the same day, namely, the 28th of February, or in leap-year on the 29th. (See *Byles on Bills*, 12th ed. p. 206, *Chitty on Bills*, 11th ed., by J. A. Russell, and the older books there cited in the note p. 264, and *Story on Bills*, 1st ed. sec. 335, n. 1.)

Yet those drawn on the 28th and 29th would, according to the mode of reckoning here contended for by the plaintiff, have been running one or two days more than the whole of February, and therefore more than a calendar month. It is no doubt true that the law applicable to bills of exchange depends on the usage of merchants, and is not necessarily applicable to other cases, but where the

*Migotti v. Colville.*

question is what is the true meaning of so familiar an expression as "one calendar month," it is useful to consider how such an expression is regarded in any case in which it is constantly used in familiar legal instruments.

On the whole, I am of opinion that a sentence of imprisonment for one calendar month passed on any given day of any given month is to be held to begin to run from the first moment of that day, and to expire upon arriving at the first moment of the corresponding day in the succeeding month. If there be no such corresponding day, by reason of the succeeding month not having so many days as the preceding month, then by analogy to the law established in the case of bills of exchange, I think the calendar month should be held to have expired at the last moment of its last day; but as long as there is a day in the calendar numerically corresponding with the day from which the sentence begins to run, so that it is unnecessary to trench upon a succeeding month, I see no ground for anticipating the expiration of the sentence. This being so, it follows that the plaintiff was not strictly entitled to his discharge until midnight on the 14th of December, being one calendar month and fourteen days from the time from which his first sentence began to run, and fourteen days from its expiration.

I am of opinion, for these reasons, that the plaintiff who was discharged at nine o'clock on the morning of the 14th of December was not detained illegally, and I accordingly give judgment for the defendant with costs.

*Judgment for the defendant.*

Solicitors—Gold & Son, for plaintiff; Nicholson & Herbert, for defendant.

[IN THE QUEEN'S BENCH DIVISION.]

1878. { THE GUARDIANS OF THE POOR OF  
Dec. 11. { THE BARTON REGIS POOR LAW  
UNION (*appellants*), v. THE  
CLERK OF THE PEACE FOR THE  
COUNTY OF BERKS (*respondent*).

*Poor Law—Criminal Lunatic—Order for Maintenance on Parish of Settlement—Settlement of Married Woman being a criminal Lunatic—Date at which Settlement to be computed—9 Geo. 4. c. 40. s. 54, and 3 & 4 Vict. c. 54. s. 7.*

*The last legal settlement of a criminal lunatic into which the justices are directed to enquire by section 7 of 3 & 4 Vict. c. 54, upon an application for an order of maintenance, is the settlement at the date of such enquiry, and not at the date of the order for removal to the asylum.*

This was a case stated by consent of the parties and by the order of a Judge, under 12 & 13 Vict. c. 45. s. 11.

The following paragraphs set out the facts material to the questions argued before the Court :—

1. On the 19th of July, 1867, Mary Coleman, being then charged with the offence of having attempted to murder her child, was removed from the parish of Westbury-upon-Trym, in the appellants' union, where she was then residing, to the county gaol at Gloucester. On the 12th of August following she was indicted for the said offence at the Gloucester Assizes, and upon the trial, being acquitted by the jury on the ground of her insanity, she was ordered to be kept in prison in the county of Gloucester till her Majesty's pleasure should be known.

2. By a warrant dated the 30th of September, 1867, under the hand of one of Her Majesty's principal Secretaries of State, the said Mary Coleman was ordered to be removed to the Broadmoor County Lunatic Asylum, and she was thereupon duly removed under such warrant.

5. By an order dated the 4th of December, 1877, two justices of the peace for the county of Berks adjudged the said Mary Coleman to be legally settled in the said parish of Westbury-upon-Trym, in the appellants' union, and di-

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rected the appellants to pay thenceforth from the date thereof to the superintendent for the time being of the Criminal Lunatic Asylum at Broadmoor weekly the sum of 14s., for the maintenance of the said Mary Coleman during her confinement therein.

Against this order of the 4th of December, 1877, notice of appeal was duly given to the respondent, and it is upon the validity of such order that the opinion of this honourable Court is sought.

6. Samuel Coleman, the husband of the said Mary Coleman, had continuously resided within the said parish of Westbury-upon-Trym, without any break of residence, from the year 1862 up to the present time, and during such residence had always supported himself by his labour, and had never received any parochial relief, unless the maintenance of his wife in the Broadmoor Lunatic Asylum as aforesaid can be considered in law as parochial relief received by him. From the year 1862, until her arrest on the 9th of July, 1867, the said Mary Coleman resided with her husband, who maintained her in such parish as part of his family, and although he was unable to pay 14s. a week for her maintenance in a lunatic asylum, he could have maintained her in his own house as a sane person.

7. It is contended on behalf of the respondent that the said Mary Coleman was at the date of the order now appealed against legally settled in right of her husband in the said parish of Westbury-upon-Trym, by reason of her husband, the said Samuel Coleman (to whom she was married in the year 1860) having resided in the said parish for the term of three years and upwards next before the application for the said order, in such manner and under such circumstances in each of such years, as, in accordance with the several statutes on that behalf, render him irremovable within the meaning of 39 & 40 Vict. c. 61. s. 34.

10. If the said Mary Coleman had not, by reason of the circumstances hereinbefore set out, acquired at the date of such application as aforesaid, a settlement in the said parish of Westbury-on-Trym under 39 & 40 Vict. c. 61. s. 34, it is

admitted that she was at the date of such application and still is legally settled in the parish of Almondsbury in the Thornbury Union. It is also admitted that she was settled there in September, 1867, when the Secretary of State's order was made for her removal to the asylum.

11. The appellants further contend that the settlement of the insane person into which the justices of the peace are directed to enquire under 3 & 4 Vict. c. 54. s. 7, is the settlement of such insane person at the date of the order for his or her removal to the lunatic asylum, and not the settlement which he or she may have at the date of the application for the order of maintenance.

The question for the opinion of this honourable Court is, whether the order of the 4th of December, 1877, adjudging the settlement of the said Mary Coleman to be in the said parish of Westbury-upon-Trym, is upon the facts stated properly made.

*A. Charles (J. F. Clerk with him).—*The case of *The Queen v. The Brampton Union* (1) disposes of all other questions in this case, except the one as to the date at which the settlement is to be computed.

It is admitted in the case that in September, 1867, the husband was settled in another union. The question arises on 9 Geo. 4. c. 40. s. 54, and 3 & 4 Vict. c. 54. s. 7 (2). The first of these

(1) 47 Law J. Rep. M.C. 114.

(2) By 9 Geo. 4. c. 40. s. 54:—"In all cases where any person shall be kept in custody as an insane person by order of any Court, or by his Majesty's order subsequent thereunto, it shall and may be lawful for any two justices of the peace of the county where such person shall be so kept in custody, to enquire into and to ascertain by the best legal evidence that can be procured under the circumstances of the personal legal disability of such insane person, the place of the last legal settlement, and the circumstances of such person; and if it shall not appear that he or she is possessed of sufficient property which can be applied to his or her maintenance, it shall and may be lawful for such two justices to make order under their



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sections, though the Act itself has been repealed, has been held to be still in

hands and seals upon such parish where they adjudge him or her to be legally settled to pay such weekly sum for his or her maintenance in such place of custody, as one of his Majesty's principal Secretaries of State shall, by writing under his hand, from time to time direct; and where such place of settlement cannot be ascertained, such order shall be made upon the treasurer of the county where such person shall have been apprehended; but if it shall appear that such person is possessed of sufficient property as aforesaid, then such justices shall order and direct the same to be applied to pay and satisfy the expense of the maintenance of such person, in the manner hereinbefore directed: provided always that the churchwardens and overseers of the parish in which the justices, or the major part of them, shall adjudge any insane person to be settled, may appeal against such order to the general quarter sessions of the peace to be holden for the county where such order shall be made, in like manner and under like restrictions and regulations as against any order of removal, giving reasonable notice thereof to the clerk of the peace in such county who shall be respondent in such appeal, which appeal the justices of the peace assembled at the said general quarter sessions are hereby authorised and empowered to hear and determine in the same manner as appeals against orders of removals are now heard and determined."

3 & 4 Vict. c. 54. s. 7: "And whereas, by the said last-mentioned Act (9 Geo. 4. c. 40. s. 54), it was among other things enacted that it should be lawful for two justices of the peace of the county where any person should be kept in custody as an insane person by order of any Court, or by Her Majesty's order subsequent thereunto, to inquire into and ascertain the circumstances and settlement of such insane person, and to make order for the payment of such weekly sum for his or her maintenance as one of Her Majesty's principal Secretaries of State should, by writing under his hand, from time to time direct: and whereas it is expedient that so much of the said Act as re-

force for this purpose—*The Queen v. The Guardians of Stepney Union* (3). The justices may, it is true, enter into this enquiry at any time, but the date must, it is contended, be when the personal legal disability arises. Comparing the provisions as to convicts becoming insane after conviction, and those as to persons acquitted on the ground of insanity, in the former case the date of conviction is the test time, and by analogy, in the latter it must be that of the order of the Secretary of State. The Legislature meant to deal with criminals as a class, and no distinction is made between male and female, and it is clear that had this woman been convicted and afterwards become insane, the appellants' contention would be right. It cannot be intended that in the case of a married woman it should be necessary to watch the movements of the husband, and apply for fresh orders when he changes his settlement. And there is no provision in the Act for making any such fresh orders, which would certainly be necessary were the liability to be shifted about according as the husband moved from place to place.

*McKellar* (O. S. O. *Bowen* with him), for the respondent.—The justices may enter upon this enquiry at any time after the removal, and whenever the enquiry is

lates to such direction to be given by such Secretary of State should be repealed, and other provisions made in place thereof: Be it therefore enacted, that so much of the said Act as relates to such directions to be given by such Secretary of State shall be, and the same is hereby repealed, and that it shall be lawful for such two justices, by order under their hands, to direct the overseers of the parish in which they shall adjudge such insane person as last aforesaid to be legally settled, or in case such parish shall be comprised in a union declared by the Poor Law Commissioners, then the guardians of such union or parish, as the case may be, to pay such weekly sum for the maintenance of such person as they or any such two justices shall by writing under their hand direct."

(3) 43 Law J. Rep. M.C. 145; s.c. Law Rep. 9 Q.B. 383.

*Barton Regis Union v. Clerk of Peace of Berks, Q.B.*

held, it is to find out whose is the liability at that time, the time, that is, when the occasion to enforce it first arises.

[MELLOR, J.—You read the statute as if it were from time to time.]

It is not necessary that such words should be in the section. The enquiry held adjudges a settlement which continues until displaced. It may be for the parish so adjudged liable, to apply for another order, if and when they may subsequently think that they can shift the liability upon another parish in which the husband may have acquired a settlement.

*Charles*, in reply.

MELLOR, J.—I confess to having felt very considerable doubt in the course of the argument, mainly arising from the change of language in the Acts of Parliament under which the justices are empowered to act.

But an argument has been addressed to us on a comparison of the language in the statute of Geo. 4 with that in the 3 & 4 Vict. c. 54, in which it is said that the two provisions being nearly in the same words, it was intended by the Legislature that in the former case, just as under section 2 of the later Act, the enquiry by the magistrates should be made on the party in custody being brought before them: and that in both cases "last legal settlement" must mean at the date of conviction, or that of the order of the Secretary of State, no distinction being made between male and female felons.

These may, however, be reconciled by supposing that the Legislature meant that when a person becomes a prisoner under specific circumstances for a specified term, and an inquiry into the settlement is made, then if she be a married woman the law disregards any change which may afterwards occur in her husband's settlement.

But if a woman is kept in confinement during Her Majesty's pleasure, and not for a specific term, and is therefore a person who may be set at liberty at any time, she may go when so set at liberty to her husband's then settlement at once. Now the argument of the appellants goes to this, that although upon liberation she would go to her husband's then settle-

ment, yet the expenses meanwhile incurred, that is, from her confinement to the date of her liberation, would be properly charged on the parish which was his place of settlement when the order for her confinement was made.

But I think, although it is difficult to reconcile the sections, the governing principle must be looked at, viz., that in the first instance the husband is liable to maintain the wife; and secondly, if he cannot, then the parish of his settlement must do so; and there would, in my opinion, be a greater hardship and inconsistency in holding that the parish should be made liable once and for ever, than that at the time the inquiry takes place it should be ascertained what parish is then liable to maintain the person whose inability to maintain himself has rendered the inquiry necessary. I think that the latter is the more reasonable construction, and I answer the question of the justices in the affirmative, that the order was properly made.

MANISTY, J.—I also am of opinion that our judgment must be for the respondent. To say that the case is free from doubt would be going a long way, having regard to the legislation on the subject and the changes in the Acts of Parliament dealing with it; but I agree with my brother Mellor that if we can construe the Acts so as to be in accordance with the general principle, that the parish which would ordinarily have to bear the expense of maintaining the woman is still to bear it notwithstanding her insanity, we ought to do so.

As to the Acts themselves, the judgment in *The Queen v. The Guardians of Stepney Union* (3) shews that section 54 of 9 Geo. 4. c. 40 is still in force for this purpose, inasmuch as it is recited in section 7 of 3 & 4 Vict. c. 54, and the enactment itself in that last-mentioned section would be imperfect and unintelligible without reference to the former section. We have therefore, as appears from the judgment of Cockburn, L.C.J., in that case, to construe section 7 of 3 & 4 Vict. c. 54, reading into it so much of section 54 of 9 Geo. 4. c. 40 as is necessary to give effect to the enactment.

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Now that section does not speak of the settlement which existed at the time when the insane person was committed to custody, but after inquiring into the circumstances and settlement of the insane person the justices are to make an order on the parish "in which they shall adjudge such person to be legally settled." This seems to imply the settlement at the time of holding the inquiry.

Why is a parish which would not be chargeable with the maintenance of the person if she were sane to be charged with it because she is insane by no fault of hers?

*Judgment for the respondent.*

Solicitors—Gregory, Rowcliffes & Co., agents for Benson & Carpenter, Bristol, for appellants; Solicitors to the Treasury, for respondent.

[IN THE QUEEN'S BENCH DIVISION.]

1878. { *In re* THE UNITED PATRIOTS'  
Dec. 9. { NATIONAL BENEFIT SOCIETY  
AND HOLT.

*Friendly Societies Act, 1875, 38 & 39 Vict. c. 60. s. 30—Disputes between Society and Members—Reference to Arbitration—Jurisdiction of Magistrate over Disputed Claim.*

*The provisions of section 30 of the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), apply to friendly societies in general, and are not restricted, as with regard to industrial assurance companies they are, to such as receive contributions by means of collectors at a greater distance than ten miles from the registered office of the society.*

*Where, therefore, by the rules of a friendly society all disputes between members, or persons claiming through members, and the society, were to be referred to arbitration, it was held that, nevertheless, a Court of summary jurisdiction had jurisdiction, under sub-section 10 of section 30, to decide, upon the application of a person claiming through a member, a dispute between him and the society.*

This was an appeal from an order of Field, J., at chambers, dismissing a summons for a prohibition to the Stipendiary

Magistrate of Birmingham from proceeding with an order, made on the 6th of November, 1878, in the matter of the United Patriots' National Benefit Society, enrolled under the Friendly Societies Act, whereby the payment of 14*l.* and costs, was ordered to be made to Alfred Holt.

The claim of 14*l.* had been made by Alfred Holt, as the representative of a deceased member, for a funeral allowance. The 34th rule of the society's rules, made in accordance with the Acts, provided that all disputes arising between the society and members, or persons claiming through members, should be referred to arbitration. The constitution of the society was such that it did not receive contributions through collectors at a greater distance than ten miles from the registered office of the society. Alfred Holt sought to enforce his claim before the magistrate, under sub-section 10 of section 30 of 38 & 39 Vict. c. 60, the Friendly Societies Act, 1875, which provides, "In all disputes between a society and any member or person insured, or any person claiming through a member or person insured, or under the rules, such member or person may, notwithstanding any provisions of the rules of such society to the contrary, apply to the County Court, or to the Court of summary jurisdiction for the place where such member or other person resides, and such Court may settle such dispute in manner herein provided."

The magistrate having made the order, the society attempted to prohibit him.

*A. Charles* (Austin with him), in support of the appeal, contended that the magistrate had no jurisdiction, on the grounds that the provisions of section 30 were, by the introductory words of the section, limited in their application to such friendly societies as received contributions by means of collectors at a greater distance than ten miles from their office. The dispute was, therefore, to be settled by arbitration, as provided by the Act and the society's rules.

*Wood Hill*, *contra*, argued that sub-section 10 applied to all friendly societies, and that the claimant had the option of

*In re United Patriots' Benefit Society, Q.B.*

going to the Court of summary jurisdiction. Sub-sections 1, 8 and 9 are excepted from application by sub-section 13, but otherwise section 30 applies to all industrial societies. It would be unreasonable that the magistrate should have jurisdiction over all industrial societies, but only over friendly societies having collectors outside a ten mile radius.

*Charles*, in reply.—The general policy was to amend the law as to all societies, whether called friendly or industrial; when they receive contributions by collectors beyond ten miles then section 30 applies, when not then section 10.

MELLOR, J.—I have been very much perplexed by the various provisions of this Act, which are apparently inconsistent with one another, but, on the whole, I have come to the conclusion that the construction contended for by Mr. Hill is right. I cannot help thinking that section 30 does intend that all friendly societies should be within sub-section 10, and that certain industrial societies, but not all, should also be within it. That being so, the intention was that persons having questions with such societies should have recourse to the summary jurisdiction provided in sub-section 10 for their settlement. This seems to have been the view of my brother Field at chambers, and I think this application to reverse his order must be dismissed.

MANISTY, J.—I am of the same opinion. I think that the decision of my brother Field should be affirmed. Looking at the interpretation clause in section 4, I think it appears that the legislature had in mind two sets of societies, and it will be observed that part of the definition of an industrial assurance company is, that it is one which receives premiums or contributions by means of collectors, while in section 8, a friendly society is spoken of as supported by voluntary subscriptions. Now, the word subscription there used, is not found in section 30. Then the general provisions which occur throughout the Act, as sections 13 and 22, must be read subject to any limiting enactments having reference to the particular class of society. The general

rule in section 22, is thus, as I think, qualified by the words in section 30. That section 30 was intended to qualify something must be conceded, and the only question really is, to what extent it qualifies section 22. If it be read in the ordinary grammatical sense of the words, friendly societies generally seem to be within the section; had the intention been to convey a different meaning, the draughtsman would, I think, probably have worded it thus, "The provisions of this present section apply only to friendly societies receiving contributions by means of collectors at a greater distance than ten miles from the registered office of the society and, except as after mentioned, to industrial assurance companies receiving contributions in like manner." Tried, therefore, by this test the words of the section as it stands are inapt for the construction sought to be placed upon them by the appellants, and I think that the other construction which accords with the form of the language is not unreasonable and expresses the intention in limitation of the general rule to confer on friendly societies and their members, the option of resorting to a court of summary jurisdiction for the settlement of disputes. The clause "except as after mentioned," may, I think, be satisfied by the words at the end of sub-section 13, but it is not necessary in the present case to decide that point; for I agree in thinking that there was no ground for prohibiting the magistrate here, as having acted without jurisdiction over this friendly society.

*Appeal dismissed.*

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Solicitors—J. King, for appellant; James Neal, agent for John Hemmant, Birmingham, for Holt.

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## [IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1878.  
Dec. 9, 10.

THE OVERSEERS OF THE POOR OF THE TOWNSHIP OF THE FOREIGN OF WALSHALL, AND THE MAYOR AND CORPORATION OF THE BOROUGH OF WALSHALL (appellants) v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY (respondents).\*

*Rate—Sanitary Purposes in a Borough—District or Borough Rate—Exemption conferred by Local Act—Public Health Act, 1872 (35 & 36 Vict. c. 79), ss. 3, 4, 7, 16—Sanitary Law Amendment Act, 1874 (37 & 38 Vict. c. 89), s. 3—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 10, 207, 211.*

By a local Act commissioners were appointed in 1848, with power to levy a district rate for sanitary purposes throughout a district partly within and partly without the borough of W.; by this Act railways were exempted from a part of the rate so levied.

The Public Health Act, 1872, constituted the borough of W. an urban sanitary district, and the town council the sanitary authority; it enacted that in the case of the council of a borough all expenses incurred under the Sanitary Acts should be paid out of a borough rate, "provided that where an urban sanitary authority had, before the passing of this Act, power to levy within its district a rate for sanitary purposes," all expenses incurred by such authority under the Sanitary Acts, should be charged on such rate unless where "at the time of the passing of this Act any such expenses were chargeable upon the borough rate." The definition of Sanitary Acts in section 60 did not include Local Acts.

The Public Health Act, 1875, section 207, enacts that all expenses incurred by an urban authority in the execution of this Act, shall be defrayed out of a district rate, subject to the exception "that if in any district the expenses incurred by an urban authority (being the council of a borough) in the execution of the Sanitary Acts, were, at the

time of the passing of this Act, payable out of the borough rate," then the expenses incurred under the Act shall be paid out of the borough rate. This Act gave railways an exemption with respect to district rates.

By a local Act passed in 1876, the Act of 1848 was, as far as is material, repealed; the borough of W. was extended so as to include the whole of the commissioners' district; the commissioners were abolished; the town council was made the sanitary authority for the whole borough, and succeeded to all the duties and powers of the commissioners.

In November, 1876, the council of the borough levied a borough rate for all purposes, including sanitary expenses, and declined to allow the respondents the exemption claimed by them in respect of their railway:—

Held (affirming the judgment of the Queen's Bench Division), that the respondents were entitled to the exemption claimed; inasmuch as in the borough of W. all sanitary expenses were, at the time of the passing of the Act of 1875, payable out of a district rate, so that the case fell within the general enactment, and not within the first exception contained in section 207 of that Act.

This was an appeal to the Court of Appeal by the overseers of the poor of the foreign of Walsall and the mayor, aldermen and burgesses of the borough of Walsall from a decision of the Queen's Bench Division on a Special Case.

A borough rate was made for all purposes, including sanitary purposes, on the 9th of November, 1876, by which the London and North-Western Railway Company were rated on the full value of the land occupied by them as a railway within part of the borough of Walsall.

The company appealed to the Quarter Sessions, and on this appeal an order was made that the rate should be reduced, and the railway company were held liable to be rated in respect of the land used as a railway, at one-fourth only of the full rateable value thereof in respect of all the sanitary expenses for which the rate was made.

This order was made subject to a Special Case being stated for the opinion

\* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

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of the Queen's Bench Division. That Court being of opinion that the case was governed by the decision in *The Queen v. The London and North Western Railway Company* (1) gave formal judgment in favour of the railway company, from which the overseers and the corporation appealed.

The material portions of the Special Case were, in substance, as follows:—

The borough of Walsall consisted, prior to July, 1876, of the whole of the township of the borough of Walsall, and a part of the township of the foreign of Walsall.

The London and North-Western Railway Company are the owners and occupiers of land within that part of the foreign of Walsall which is within the borough, part of which land is used as a railway constructed under the powers of an Act of Parliament for public conveyance.

In 1848 commissioners were appointed under a local Act, with powers for improvement and sanitary purposes over a district, consisting of the whole of the township of the borough, a part of the township of the foreign lying within the borough, and a part of the adjoining parish of Rushall lying without the ancient borough; but since added thereto. This district did not include the whole of the municipal borough.

The 40th section of the Local Improvement Act enacted that, "for the purpose of defraying the costs and expenses of carrying this Act, and the powers and provisions thereof into execution (except the purposes to which any rates to be made for sewers, drains and private improvements are hereby or by any Act incorporated herewith, directed to be applied) . . . . it shall be lawful for the said commissioners, from time to time, to make, assess and levy such equal rate, to be called the improvement rate, as may be necessary for the purposes aforesaid, not exceeding in any one year three shillings in the pound, of the full net annual value of the property included in such rate, provided always that . . . . the occupier of any land used as a railway

constructed under the powers of any Act of Parliament for public conveyance shall not be assessed to any rate or assessment made by virtue of this Act or any Act incorporated therewith in any greater proportion in respect of the same than in the proportion of one-fourth part only of the net value thereof."

Until the passing of the "Public Health Act, 1872," improvement rates were levied under this local Act, and other local Acts incorporated with it for the purpose of meeting the expenses of their execution, and to all such rates the railway company was, as to the land within the district of the commissioners, rated at one-fourth of the full value of the railway.

By the Public Health Act, 1872, urban sanitary authorities were constituted. Section 4 provided what places should be urban sanitary districts, and who should be urban sanitary authorities, and the borough of Walsall became an urban sanitary district, and the town council an urban sanitary authority.

Section 7 provided that, "subject to the provisions of this Act, the Local Government Acts shall be deemed to be in force within the district of every urban sanitary authority, and from and after the first meeting of an urban sanitary authority in pursuance of this Act, there shall be transferred and attached to an urban sanitary authority to the exclusion of any other authority which may have previously exercised or been subject to the same, all powers, rights, duties, capacities, liabilities and obligations within such district, exercisable or attaching by and to a local board under the Local Government Acts, and by and to the sewer authority under the Sewage Utilization Acts, and by and to the nuisance authority under the Nuisances Removal Acts, and by and to the local authority under the Common Lodging Houses Acts, the Artisans and Labourers Dwellings Act, and the Bakehouse Regulation Act, or by and to any of the said authorities under any of such Acts or any Acts amending such Acts.

Section 16 provided that "All expenses incurred or payable by an urban sanitary authority under the Sanitary

(1) 46 Law J. Rep. M.C. 102.

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Acts shall, if the Local Government Acts or the provisions of those Acts, with respect to rating, were, at or immediately before the passing of this Act, in force throughout the district of such authority, or within a local government district wholly within such district, be defrayed in manner provided by those Acts; and if the Local Government Acts were not so in force at or immediately before the passing of this Act, be defrayed as follows, that is to say—

1. In the case of the council of a borough out of the borough fund or borough rate.

2. In the case of improvement commissioners out of any rate in the nature of a general district rate leviable by them as such commissioners throughout the whole of their district, provided that where an urban sanitary authority had, before the passing of this Act, power to levy within its district a rate or rates for paving, sewerage or other sanitary purposes, all expenses incurred by such authority in the performance of its duties under the sanitary Acts, shall be defrayed out of such rate or rates, except where at the time of the passing of this Act, any such expenses were chargeable upon the borough fund or borough rate, in which case such expenses shall continue so chargeable."

The Sanitary Law Amendment Act, 1874, provided by section 3: "Whereas doubts have arisen as to the extent and meaning of the 7th section of the principal Act, be it therefore declared and enacted that the provisions of the said section shall be deemed to have applied to every authority acting at the time of the passing of the principal Act under the powers conferred upon them by a local Act, with respect to any sanitary purposes, and that all the powers, rights, duties, capacities, liabilities and obligations of any authority having jurisdiction under a local Act in the district of an urban sanitary authority at the time of the passing of the principal Act, so far as they or any of them related to such purposes, were transferred to and became attached to the urban sanitary authority therein referred to."

By the Public Health Act, 1875, sec-

tions 5 and 6, further provision is made for the constitution of urban sanitary districts and urban sanitary authorities to execute the powers of the sanitary Acts within such districts.

Section 10 provides that: "Where any local Act other than an Act for the conservancy of any river, is in force within the district of an urban authority, conferring on any commissioners, trustees or other persons, powers for purposes the same as, or similar to, those of this Act (but not for their own pecuniary benefit), all the powers, rights, duties, capacities, liabilities and obligations of such commissioners, trustees or other persons in relation to such purposes, shall be transferred and attached to the said urban authority."

Section 207 provides that: "All expenses incurred or payable by an urban authority in the execution of this Act, and not otherwise provided for, shall be charged on and defrayed out of the district fund and general district rate leviable by them under this Act, subject to the following exceptions; namely, that if in any district the expenses incurred by an urban authority, being the council of a borough, in the execution of the sanitary Acts, were, at the time of the passing of this Act, payable out of the borough fund or borough rate, then the expenses incurred by that authority in the execution of this Act, shall be charged on and defrayed out of the borough fund or borough rate, and that if in any district the expenses incurred by an urban authority, being improvement commissioners in the execution of the sanitary Acts, were, at the time of the passing of this Act, payable out of any rate in the nature of a general district rate leviable by them, as such commissioners, throughout the whole of their district, then the expenses incurred by that authority in the execution of this Act shall be charged on and defrayed out of such rate. . . ."

Section 211 provides, with respect to the levying of general district rates under this Act: "The occupier of any land used only . . . as a railway, constructed under the powers of any Act of Parliament for public conveyance, shall be assessed in respect of the same in the

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proportion of one-fourth part only of such net annual value thereof."

In July, 1876, an Act of Parliament was passed extending the borough of Walsall by including therein that part of the parish of Rushall which had been up to that date within the improvement commissioners' district. The corporation was made the sanitary authority for the extended borough. The improvement commissioners were abolished, their "rights, powers and interests" were transferred to and vested in the corporation, and their mortgage debts were transferred to and charged on the borough rate. The 40th section and the greater part of the local Act of 1848 were repealed.

In November, 1876, the town council resolved that a borough rate should be laid for all expenses, including those for sanitary purposes, and the mayor issued warrants to the parish officers of the townships of the borough and of the foreign of Walsall and of the parish of Rushall, directing them to pay the sums assessed upon their townships. The overseers of the foreign of Walsall thereupon assessed certain land and buildings of the railway company within their township, including the land used as a railway, at its full rateable value.

The railway company appealed against this rate to the Court of Quarter Sessions, when judgment was given in their favour, subject to a special case, and it was agreed that if the town council ought not to have included sanitary expenses in the borough rate, but should have made a general district rate to defray them, the rate in dispute should not be quashed; but that the borough rate should be amended by reducing the amount payable by the railway company to the amount which they ought to pay to a borough rate proper and to a general district rate if levied.

The Queen's Bench Division affirmed the decision of the sessions, giving the rating authorities leave to appeal, and it having been decided by the House of Lords that there was a right of appeal (2), the rating authorities now appealed.

(2) *Post*, page 66.

*Herschell and Anstie*, for the appellants.

—The question is, whether the railway company can claim an exemption of one-fourth as to rates levied for sanitary purposes, and this raises the question whether the expenses for sanitary purposes are payable out of a borough or a district rate; if out of a borough rate then the respondents cannot claim this exemption. The rating authority contends that the respondents are within the first exception in section 207 of the Act of 1875. In 1848 the improvement commissioners were created, with authority in sanitary matters over the township of Walsall, part of the foreign of Walsall, and Rushall. In 1872 the town council became the Urban Sanitary Authority, with power to raise money to defray their expenses out of a borough rate, so that at the time of the passing of the Act of 1875 the expenses incurred by this urban authority, which was also the council of the borough, were payable out of a borough rate; so that the case is exactly within the terms of the first exception in section 207, and if this is a borough rate the railway company can claim no exemption. The extension Act of 1876 does not affect this point, it only added part of Rushall to the borough. Before the Act of 1875 the town council could levy a borough rate for sanitary purposes in part of the district, and the commissioners could levy a district rate in the remainder. Now the town council have to levy a rate for the whole district, and this is a borough rate inasmuch as a borough rate was levied under the Act of 1872, so that in 1875 some expenses incurred by the council, the sanitary authority, were payable out of a borough rate.

*Bosanquet and R. Neville*, for the respondents.—The railway company contend that they are within the general enactment and not within the exception in section 207 of the Act of 1875. That exception only applies where all rates for all sanitary purposes were at the time of the passing of the Act paid out of a borough rate; it does not apply to a case such as this where there were different rates and different rating authorities, it applies to cases where there may be throughout a whole district a borough



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rate, whereas here the commissioners had before the Act of 1875 power to levy rates for that part of their district which was not taken away, and they could only levy a district rate. The local Act of 1876 alters the area to be rated; but it leaves the principle on which the rate is to be levied unaltered, and the general law as enacted by section 207 still governs this case. The provisions of the local Act of 1848 were still in force in 1875, although they had to be carried out by a different body of persons. Section 16 of the Act of 1872 only applies where all the rates throughout a whole district were paid out of a borough fund, and as that was not so in this district, the railway company are entitled to be assessed at one-fourth only of the net value of their land. Moreover, by section 16 of the Act of 1872 the expenses incurred under sanitary Acts were to be paid out of a borough rate in certain cases, and the definition of sanitary Acts in section 60 of that Act does not include local Acts, so that that provision cannot apply to this case.

BRAMWELL, L.J.—I think that this judgment must be affirmed. Owing to the many statutes which have to be consulted in reference to this matter I find no little difficulty in understanding this question. It seems to me most convenient to consider first section 207 of the Public Health Act of 1875. That section provides that "All expenses incurred or payable by an urban authority in the execution of this Act, and not otherwise provided for, shall be charged on and defrayed out of the district fund and general district rate, leviable by them under this Act, subject to the following exceptions;" and then follows the first exception, which it is said by the appellants includes this case. That exception is as follows: "That if in any district the expenses incurred by an urban authority, being the council of a borough, in the execution of the Sanitary Acts were at the time of the passing of this Act payable out of the borough fund or borough rate, then the expenses incurred by that authority in the execution of this Act shall be charged on and defrayed out

of the borough fund or borough rate." It is therefore necessary that we should see whether at the time of the passing of the Act of 1875 these expenses were payable out of the borough rate. I think they were not, and I think that the joint effect of section 7 and section 16 of the Act of 1872 is, that either the power of the commissioners remained up to 1875, and that the town council had no power to make a rate for sanitary purposes within that district, or else that the town council only succeeded to the powers which the commissioners had before; so that I think there the effect of sections 7 and 16, when read with section 3 of the Sanitary Law Amendment Act of 1874, is either that the power of the commissioners to rate the district consisting of the two townships and of Rushall was renewed so that it lasted up to 1875, or else, if this be not so, then that the town council only got the same power to levy a rate which the commissioners had before. Without doubt difficulties do arise from putting this construction on the statute; but although this be so it may be said in favour of this construction that, if the contention of the rating authority, the appellants, were to prevail, the result would be to heighten the obligation on the respondents by shifting a burden on to them, and so to augment their burden and lighten the burden of the other ratepayers. I see no reason for adopting this construction, and I do not think that the legislature intended that such a result should be produced. I think that where the borough rate had borne the whole of the sanitary expenses, or possibly even part of those expenses, it was intended that it should continue to bear them, but where it had not done so, then, I think, it was not intended to bear them in the future; but it was intended that a district rate should be made. If I am right in so thinking, then the result is that there is no unjust shifting of liability. It is not necessary now to enquire into the reasons for which the exemption was originally granted; it is clear that lands have in consequence of this exemption acquired a certain value which would be diminished in no small degree were the contention of the appellants to prevail.

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I therefore think, after considering all these sections of these various statutes, that this appeal must be dismissed.

BRETT, L.J.—I also think that this judgment must be affirmed. It seems to me that to enable the respondents to succeed, we must find that in the now existing borough all the sanitary expenses can only be defrayed out of a general district rate, and that no part of them is payable out of the borough fund. I am aware that, owing to an arrangement made between the parties at Quarter Sessions, the question comes before us in a different form; but I think that the real principle is contained in what I have stated. I think that in the now existing borough all the expenses of the sanitary authority are payable out of a general district rate and not out of the borough fund. There were in the borough of Walsall, from 1848 to 1872, two different authorities, one being the town council which held sway over the township of Walsall and part of the foreign of Walsall, and the other the improvement commissioners, who had authority over part of those districts and over a part of Rushall in addition.

The town council could create a borough fund by levying a borough rate over the townships I have named under the Municipal Corporations Act; but it had nothing to do with the expenses incurred in the execution of sanitary works. The local Act of 1848 gave the improvement commissioners power to act as a sanitary authority for the township of Walsall, for part of the foreign of Walsall, as well as for their district outside the borough, and these commissioners were the persons whose duty it was to defray the expenses of sanitary works out of a district rate to be levied under the provisions of the local Act of 1848, and some other local Acts which have been passed and incorporated with it. These improvement commissioners levied a rate upon this district, which comprised, as I have said, the township of Walsall, part of the foreign of Walsall and part of Rushall. Now the railway company, the respondents, had a right to have this rate assessed

upon only one-fourth of the net value of their railway. This privilege or exemption was given to them by the 40th section of the local Act by which the improvement commissioners were constituted. That section was in force at the time of the passing of the Act of 1875, which is the time at which we have to determine out of what kind of a rate expenses for sanitary works were to be defrayed. That section was afterwards repealed by the local Act of 1876, while a similar provision is found in the Public Health Act of 1875, creating an exemption in favour of railways as respects general district rates to be levied under that Act.

It is now contended that this exemption is lost, and it is therefore said that at the time of the passing of the Act of 1875, the expenses for sanitary works were payable out of a borough rate.

I now proceed to consider the Act of 1872. I agree with the opinion expressed in the Divisional Court, and I do not think it is necessary to determine whether the improvement commissioners were continued by that Act as the sanitary authority within the township of Walsall and that part of the foreign which was within the borough. If they were not so continued, then by the joint effect of section 3 of the Sanitary Law Amendment Act, 1874, and of section 7 of the Act of 1872, their powers were transferred to the town council.

It that be so, then in the words of section 3 of the later Act, "all the powers, rights, duties, capacities, liabilities and obligations" of the improvement commissioners, who were the "authority having jurisdiction under a local Act in the district of an urban sanitary authority at the time of the passing of the principal Act," that is the Act of 1872, "were transferred to and became attached to the urban sanitary authority."

Now the commissioners had the power to make a district rate throughout the whole of their district in order to defray the expenses of sanitary works, and it would seem that with regard to that part of the district which was within the borough that power would be transferred to the town council. If, however, the

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power to levy a district rate was transferred, still the rate when levied by the council, would be subject to the exemption in favour of the railway. This being so, then the town council were from 1872 to 1875 the authority which had power to raise a borough fund under the Municipal Corporations Act, and they were also the sanitary authority throughout the whole of the borough. With regard to that part of the borough which was originally within the district of the improvement commissioners, the town council had the powers created by the local Act of 1848, transferred to them as I have said, and with regard to that part of the borough which was outside the district of the commissioners, the town council became a sanitary authority under the Act of 1872, and irrespective of the provisions of the local Act of 1848, and would in that part of the borough have fuller powers.

This, then, was the state of affairs. There could be levied in the borough of Walsall both a borough rate and a district rate, a borough rate which could be levied throughout the whole of the borough and be devoted to municipal purposes only, and a district rate which the town council could levy within that part of the borough which had been within the district of the commissioners, and which had been transferred to the council, that is within the township of Walsall and part of the foreign of Walsall, a district which did not include the whole of the municipal borough.

No doubt this overlapping of districts and authorities may lead to some confusion, and there may be practical difficulties which will cause inconvenience in levying the rates; but the solution of these difficulties will be found in section 33 of the Act of 1872 (3), and I agree

with the opinion expressed by the Divisional Court as to the importance of this section. Application might have been made to the Local Government Board, and that board might have exercised its legislative power to alter or repeal the inharmonious provisions of the local Act. No such application has been made, and these complications remain and must be dealt with in the best way possible.

A new Act was passed in 1875; it repealed for the most part former Acts, and it consolidated the law, both altering it and in some cases re-enacting the law without material changes. Section 207 of this Act is the determining section which fixes the time at which we have to enquire how the expenses for sanitary works were defrayed.

It is admitted that the facts of this case bring it within the general law as enacted in section 207, unless they bring it within the first exception. I am of opinion that there were not in 1875 any circumstances which could bring the borough of Walsall within that exception, for I think that all expenses incurred for sanitary purposes were, down to 1875 and at the time of the passing of the Act of 1875, payable out of a district rate and not out of a borough rate.

It results, then, from the consideration of the statutes by which this case is governed, that the town council could levy a borough rate for municipal purposes under the Municipal Corporations Act; but that the council had to levy a district rate out of which to defray all the expenses incurred for sanitary purposes, and it was provided both by the local Act of 1848 and by section 211 of the Act of 1875, that railways shall only be assessed to a district rate at one fourth of their net annual value.

I think, therefore, that in all strictness that rate is altogether bad and ought to be quashed; but as the arrangement is that it should be levied with the limitation created by the local Act, it must be so

(3) 35 & 36 Vict. c. 79. sect. 33. "The Local Government Board may, on the application of the sanitary authority of any district, by provisional order, wholly or partially repeal, alter or amend any local Acts other than Acts for the conservancy of rivers, in force in such district, and not conferring powers or privileges upon corporations,

companies, undertakers or individuals for their own pecuniary benefit, which relate to the same subject-matters as the Sanitary Acts."

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levied. A district rate should be levied for all sanitary purposes within the now existing enlarged borough of Walsall, as enlarged by the local Act of 1876. The Act of 1876 brings what I may call the Rushall district into the borough, so everything that is done in the Rushall district comes under the laws which affect the whole borough. I think, therefore, that the town council are bound to execute sanitary works over the whole district of the enlarged borough, and to levy a general district rate to pay for them. The judgment of the Queen's Bench Division is therefore right and must be affirmed for these reasons, which are, I think, the same as those on which the judgment of the Court below proceeded.

COTTON, L.J.—There has been an arrangement by which our decision is to be given, not on the validity of this rate as a whole, but on the question whether an exemption as to a portion of the rate still exists, so that the railway company can claim to be assessed to the rate at only one-fourth of the net value of their property.

It is said on behalf of the appellants, the mayor and overseers of Walsall, who are the authorities on whom lies the duty of levying rates, that the circumstances of this case bring it within the first exception contained in section 207 of the Public Health Act of 1875. Now that exception does not apply to this case unless it be shewn that all the expenses for sanitary purposes in this borough were paid or were payable at the time of the passing of the Public Health Act, 1875, out of the borough fund or borough rate.

To see whether this was so, it is necessary to refer to the local Act of 1848. It appears that by that Act commissioners were appointed to exercise sanitary powers over a district which was partly within and partly without the borough. These commissioners were the only persons who had power to execute sanitary works, and the rate made by them was the rate by which the expenses of such works were to be defrayed, and the rate which they levied was a district rate.

This was the state of affairs down to 1872, and the railway company were by the local Act then in force, and which was only repealed in 1876 after the coming into operation of the Act of 1875, entitled to the deduction which they now claim to make, so that it lies on those who contend that recent legislation has deprived the respondents of this exemption to shew clearly what sections of what statutes deprive the company of this right. By the Public Health Act of 1872, the town council were made the urban sanitary authority within the district pointed out by section 4 of that Act, that is, as I understand, for the whole of the borough, save an outlying piece of wood or waste, and this district included a portion only of the district which had been under the commissioners, so that the Act of 1872 transferred to the town council the powers of the commissioners within so much of the district as came within the limits of the urban sanitary authority as constituted by that Act. Section 7 of the Act of 1872 is, however, to be read with section 3 of the Sanitary Laws Amendment Act of 1874, and these two sections shew that the powers of the commissioners under the Act of 1848 were transferred to the urban sanitary authority constituted by the Act of 1872. This transfer of powers was accompanied by a transfer of duties and liabilities, so that the obligations which bound the improvement commissioners would also bind their transferees, the urban sanitary authority, that is, the town council. Now the commissioners were bound to assess this railway at one-fourth of its net value, and I think that the town council who obtained a portion of the district formerly under the authority of the commissioners acquired that district subject to the obligations of the commissioners, one of which was that the railway was to be rated at only one fourth of its full value.

Reliance was placed on section 16 of the Act of 1872. Now it is not easy to construe that section; but remembering that it is a sound rule of construction that when a benefit is given by express enactment, express enactment is needed to take it away, I think that section 16

*Queen's Bench 49 L.J. N.C. 30.  
Mayor of Walsall v. Parish Walsall 53  
Gillespie v. Bulmer 53 L.J. N.C. 33  
N.C. 60 65*

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means that where there was a body with sanitary powers and paying for sanitary expenses by a rate not a borough rate, then there should be a general district rate out of which all such expenses should be paid. I think that if section 16 is construed literally it will be found not to apply to this case; because the urban sanitary authority mentioned therein as existing before the passing of that Act, did not exist at all before 1872, but was created by that Act. However, it seems to me that the reasonable interpretation is, that where any body had previously exercised powers given by that Act so as to provide for sanitary expenses by a general district rate, that then such expenses should still be provided for by a general district rate. This was, I think, the state of affairs down to 1875. There was, as regards the district of the township of Walsall and of the foreign of Walsall, power to pay the expenses incurred under the Act of 1848, out of some rate other than the borough rate, so that at the passing of the Act of 1875, there was a part of these expenses in respect of which the railway company had a right to claim exemption, and that part could not be paid out of the borough fund, but had to be paid out of a district rate. I think, therefore, that this judgment should be affirmed.

*Judgment affirmed.*

Solicitors—Sharpe, Parkers & Co., agents for Wilkinson & Gillespie, Walsall, for appellants; R. F. Roberts, for respondents.

1878.  
Nov. 26.

THE OVERSEERS OF THE FOREIGN OF WALSALL AND THE MAYOR, ALDERMEN AND BURGESSES OF WALSALL v. THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

*Court of Appeal—Jurisdiction—Case stated by Quarter Sessions for the Opinion of the Queen's Bench Division—Poor Rate—Judicature Act, 1873, ss. 19, 45.*

*The decision of the Queen's Bench Division in the matter of a poor rate, first, is not a mere opinion but a judgment binding on the sessions; secondly, is an order within section 19 of the Judicature Act, 1873, as interpreted by section 100. It is therefore subject to appeal.*

On an appeal by the respondents to the Quarter Sessions of Walsall in respect of a rate, an order of Sessions was made on the 1st of February, 1877, directing the rate to be amended, but subject to a Special Case being stated for the opinion of the Queen's Bench Division.

A Special Case was accordingly stated, in which four questions were set out for the opinion of the Court, and the case concluded as follows:—"If the Court shall answer the first question in the affirmative, the order of Quarter Sessions is to be confirmed. If the Court shall answer the second, third or fourth question in the affirmative, the rate is to be remitted to the Court of Quarter Sessions, to be amended in accordance with the opinion of the Court."

A writ of *certiorari* was subsequently issued by consent and duly returned with a schedule containing the order of Sessions and Special Case. A rule dated the 9th of May, 1877, was obtained by the appellants in the usual form, calling upon the respondents to shew cause why the order of Sessions "should not be quashed for the insufficiency thereof." By an order of the Queen's Bench Division made on the 24th of November, 1877, the rule of the 9th of May, 1877, was discharged and the order of Sessions affirmed. Special leave to appeal was given, and the case was taken to the Court of Appeal. The

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preliminary question was there raised and argued by direction of the Court, whether any appeal lay from the decision of the Queen's Bench Division. Cockburn, L.C.J., and Brett, L.J., held that it was a mere opinion without binding force, and therefore not subject to appeal. Bramwell, L.J., and Cotton, L.J., held that an appeal lay. The Court being equally divided the appeal stood dismissed.

The appellant then brought this appeal.

The judgments delivered in the Court of Appeal are reported 47 Law J. Rep. Q.B. 711; s. c. Law Rep. 3 Q.B. D. 457.

*Herschell* and *Anstie*, for the appellant.—It is submitted in the first place that the result of the proceedings, whether compulsory or not, is a judgment or order within the 19th section of the Judicature Act, 1873, as defined by the interpretation clause (section 100), and not within the exceptions provided for by sections 47 and 49 of that Act and section 20 of the Appellate Jurisdiction Act, 1876 (1). It is therefore subject to appeal. The only other clause in the Judicature Acts affecting the question is section 45 of the Judicature Act, 1873, which provides that the decision of the High Court of Justice shall be final in certain matters, of which appeals from Quarter Sessions are one, unless special leave to appeal be given. That section must refer to this class of cases, though not appeals strictly so-called, for there are no other appeals for the section to apply to. Special leave has been given here.

Next it is contended that the jurisdiction of the Queen's Bench Division in these matters is, and that of the Queen's Bench always was, compulsory. An examination of the history of the jurisdiction shews that the contrary view is erroneous. The cases, *The King v. The Justices of Monmouthshire* (2), *The King v. The Justices of Monmouthshire* (3), *The King v. The Justices of Leicestershire* (4),

cited in the judgment of Cockburn, L.C.J., only shew that where the order of Sessions is on the face of it correct, there is no appeal. Where the order is on the face of it incorrect, the Court has in numberless instances set it aside. *The King v. Malden* (5), *Ryship v. Hendon* (6), where Lord Holt, C.J., says: "Where the justices of peace do give a special reason for their settlement and the conclusion which they make in point of law will not warrant the premises, there we will rectify their judgment. But if they have given no reason at all, then we will not ravel into the fact." To the like effect are the observations of Lord Kenyon, C.J., in *The King v. Mast* (7).

It is admitted that a bill of exceptions does not lie from the judgment of the Quarter Sessions, but in *The King v. Oulton* (8), which settled the law upon that point, Lord Hardwicke said: "To be sure it is a thing very much to be censured and discommended, when an inferior jurisdiction endeavours to preclude the parties from an opportunity of applying to a superior jurisdiction." The words "inferior" and "superior jurisdiction" would be inappropriate if there were no obligation to accept the decision of the Queen's Bench.

It is not correct to say that the Courts of Quarter Sessions affirmed or quashed the order appealed against according to the decision of the Queen's Bench. The Queen's Bench always dealt with the order itself. Nor would the justices have power to do so, being *functi officio* as soon as the order appealed from is made—*The Queen v. The Justices of Staffordshire* (9). The Queen's Bench has revived orders of Quarter Sessions which it could not do if it merely gave opinions.

It is quite true that there was no obligation to adopt the opinion of the Judge of Assize, who was formerly consulted by the justices. But even where a Judge of Assize had been con-

(5) 3 Mod. 247.

(6) Holt 572; s. c. 5 Mod. 416.

(7) 6 Term Rep. 154.

(8) Burr. S.C. 64.

(9) 7 E. & B. 935; s. c. 26 Law J. Rep. M.C. 179.

(1) 39 & 40 Vict. c. 59.

(2) 4 B. & C. 844.

(3) 8 B. & C. 137.

(4) 1 M. & S. 442.

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sulted, and an order made in accordance with his advice, the King's Bench quashed the order upon *certiorari*—*The King v. Brightwell* (10), *Stanlock v. Bampton* (11). In *The King v. Natland* (12), where the Court refused to review the decision of the Judge of Assize, it was expressly on the ground that the decision had been given upon a reference by consent of the parties. If the reference were by the justices without consent the Court would quash it—*The King v. Northampton* (13). These cases shew that the jurisdiction of the Queen's Bench to quash, existed contemporaneously with the practice of consulting the Judge of Assize, and was totally distinct therefrom, the function of the Judge of Assize being exercised before, that of the Queen's Bench after, the order of Quarter Sessions. Nor is there any authority for the view that the latter rose out of the former and is comparatively modern. The case in 11 Will. 3. (14) cited in support of that view is in reality an authority against it; for the ground of the Court's refusal to hear the case was that the sessions must give their decision before the Court could deal with it. It is all the stronger because given a year after *The King v. Alverston* (15), in which a special order was quashed because the facts did not warrant it. As to the objection that the Quarter Sessions have exclusive jurisdiction by statute, the case is the same in proceedings under the Conventicle Act, yet *certiorari* lies to bring up a conviction—*The King v. Moreley* (16). If the decision is merely an opinion, where is the necessity for *certiorari*? Why not state a Special Case before the order of Quarter Sessions and agree to take the order in accordance with the decision on the case? But the Court of Queen's Bench repeatedly refused to advise. In *The Queen v. Dayman* (17),

Lord Campbell, C.J., said: "We are not a Court of advice, but of oyer and terminer; we sit here, not to deliver opinions which out of respect to us might be generally followed, yet which might without impropriety be neglected, but to deliver judgments which may be enforced; we ought not to give an opinion except as a judgment"—*The King v. Borton Abbey* (18), *The Queen v. Kes-teen* (19), *The Queen v. Sutton Coldfield* (20), *The Queen v. Chantrell* (21), which decides that there is no power to hear a case where a *certiorari* cannot issue.

The real origin of the practice is to be found in the jurisdiction with regard to special orders, which has existed for centuries, being part of the inherent jurisdiction of the Queen's Bench to correct the errors of the other Courts—*Oake*, 4th Inst. 71; *Blackstone's Commentaries*, vol. iii. p. 42; *Bacon's Abridgment*, Court of King's Bench A. 3. It may be difficult to discover any statutory authority for it; but the Judicature Acts found it existing and adopted it as part of the existing state of things. The order with Special Case annexed is a modern variation in form, by which the facts are stated in a schedule instead of being recited in the order itself.

[LORD PENZANCE. — The change is analogous to the substitution of a case stated for the old special verdict.]

The old form [for examples of which, with recitals at length, see *The King v. St. Bartholomew the Less* (22); *The King v. St. Luke's Hospital* (23); *The King v. St. Paul's, Covent Garden* (24)]; is retained alternating with the new all through the last century and into the present—*The King v. Newtown* (25). There is no difference in the form of *certiorari* and return. The schedule to the return is headed "Order of Quarter Sessions with the accompanying Case." The rule is

(10) 2 Term Rep. 207.

(11) 8 Q.B. Rep. 810; s. c. 18 Law J. Rep. M.C. 78.

(12) 43 Law J. Rep. M.C. 57; s. c. Law Rep. 9 Q.B. 153.

(13) 44 Law J. Rep. M.C. 94; s. c. Law Rep. 10 Q.B. 587.

(14) 4 Burr. 2435.

(15) 2 Burr. 1053.

(16) Cald. S.C. 158.

(17) 1 Ad. & E. 238; s. c. 3 Law J. Rep. M.C. 79.

(10) 3 Keb. 464.

(11) Ibid. 674.

(12) Burr. S.C. 793.

(13) Cald. S.C. 30.

(14) Anon. 2 Salk. 486.

(15) Holt 507.

(16) 2 Burr. 1040.

(17) 7 E. & B. 672; s. c. 26 Law J. Rep. M.C. 128.

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granted to shew cause why the order should not be quashed for the insufficiency thereof. But taken without the case the order is perfectly sufficient. The rule finally made is always an absolute order to quash or confirm. Thus the form of the records affirms, first, that the case is part of the order, secondly, that there is compulsory power to quash. The form of the case supports the same conclusion. It must not ask a general opinion—*The King v. Witney* (26)—nor an opinion on a particular point, reserving the final determination to the magistrates, though the opinion of the Judge of Assize might be so taken—*per* Probyn, J., in *The King v. Tedford* (27).

With regard to the objection that there is no power to enforce the decision of the Queen's Bench Division, the practical answer is that the order of sessions cannot be enforced after a decision against its validity. If the party resists and asks to see the order, it is in the Queen's Bench Division, and when produced is found to be quashed. Further, the writ of *certiorari* operates as a *supersedeas*, and makes all subsequent proceedings of the sessions erroneous; the whole matter is in the Queen's Bench Division, and if the inferior Court proceeds, that is a contempt punishable by attachment—*Bacon's Abridgment, Certiorari* G. K.; *Hawkins' Pleas of the Crown*, Book 2, c. 22. s. 28, c. 27. s. 62; and a *procedendo* to send a case back to the sessions cannot issue without a *supersedeas* to get rid of the effect of the *certiorari*—*Hawkins' Pleas of the Crown*, Book 2. c. 27. s. 63; and see the form in *Corner's Crown Practice*, Appendix 45. Nor will the Court grant a *procedendo*, except in cases where, there being a discretion in the inferior Court, or for some other reason, justice cannot be done in the superior—*The King v. Rushworth* (28); *The King v. Neville* (29).

As to the argument that, this being a submission which the sessions were not bound to make, they have not by submitting to the Queen's Bench Division submitted also to the Court of Appeal; it

is sufficient to reply that if this is an order from which there is an appeal, the sessions must be taken to have known that and to have submitted to an appeal.

[LORD PENZANCE.—In a Special Case the Court of Appeal is not mentioned, but unless expressly excluded there is an appeal.]

As to the expense, leave of the sessions is necessary before going to the Divisional Court, and leave of the Divisional Court before going to the Court of Appeal.

*Bosanquet* and *N. Neville*, for the respondents.—There are two questions in this case. The first, which was not substantially argued before the Court of Appeal nor dealt with in the judgment of Cockburn, L.C.J., is whether the Judicature Acts intended to give an appeal in Crown practice where there was no appeal before. The jurisdiction of the Court of Appeal is given by ss. 18 and 19 of the Judicature Act, 1873; the former transferring the jurisdiction previously vested in other Courts, the latter granting wider powers of appeal than had existed before but subject to rules. Section 45 does not apply. The appeals therein referred to were from Courts intended to be formed by Judges taken from each of the divisions. If it includes any orders upon *certiorari* it must include all, since all are equally appeals from inferior Courts. But by section 34 *certiorari* is assigned to the Queen's Bench Division, having been within the exclusive cognizance of the Court of Queen's Bench in the exercise of its original jurisdiction—*Ex parte Longbottom* (30). As to there being no other appeals from Petty and Quarter Sessions for section 45 to apply to, there are cases stated under Jervis's Act (31) and Baines's Act (32), under which (though the ordinary practice is to send the case before the judgment of Quarter Sessions and agree to take judgment in accordance with the decision on the case) the Quarter Sessions sometimes express their opinion subject to the case for the superior Court.

[THE LORD CHANCELLOR.—Suppose

(26) 5 Burr. 2634.

(27) Burr. S.C. 57, at p. 63.

(28) 1 New Sessions Cases 415.

(29) 2 B. & Ad. 299.

(30) 45 Law J. Rep. M.C. 163; s. c. *nom. Ellershaw*, Law Rep. 1 Q.B. D. 481.

(31) 20 & 21 Vict. c. 43.

(32) 12 & 13 Vict. c. 45. s. 11.



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orders upon *certiorari* not within section 45, would they not be within section 19 ?]

This is a purely negative argument directed against the view taken by Bramwell, L.J.

[THE LORD CHANCELLOR.—The difficulty in that view is that, if within section 45, the case is not within the jurisdiction of the Queen's Bench Division at all, but *coram non judice*.]

The practice since the Judicature Acts has been to try all these cases in the Queen's Bench Division. By section 19 appeals are subject to rules and orders. Then by Order LXII. (which is part of the Judicature Act, 1875) nothing in the rules affects the practice or procedure on the Crown side of the Queen's Bench Division. The mode of appealing therefore is not pointed out. In *Garnett v. Bradley* (33) the House held that the Acts and Rules were to be read together. Reading them together and looking to the fact that there was no appeal before, it seems as though no appeal were intended.

The second question is whether the decision of the Queen's Bench Division is anything more than an opinion, though no doubt given in the form of a rule or order. It is conceded that the old jurisdiction to decide on special orders was part of the original jurisdiction to review. The cases in which *certiorari* was granted may be divided into two classes. The first was where indictments or suits which might have been commenced in the Queen's Bench were removed to be proceeded with there. The cases of *superseas* and *procedendo* referred to belong to this class. The second class was where there was a question whether an inferior Court had legally exercised jurisdiction, and the *certiorari* issued simply to affirm or quash an order or conviction. Special orders were granted to raise that question. In the case in 11 Will. 3 (14) the Court refused to consider a case stated in the alternative, shewing that the jurisdiction to quash was not then allowed to be used to obtain an opinion. Down to the end of the last century the orders were all absolute orders to quash

(38) 48 Law J. Rep. Exch. 186; s. c. Law Rep. 3 App. Cas. 944.

or confirm. But of late years the Queen's Bench has, although saying that it was not bound to do so, answered cases stated in the alternative where the jurisdiction to quash seemed inapplicable—*The Queen v. Marton cum Grafton* (34); *The Queen v. Stoke-upon-Trent* (35); *The Queen v. West Houghton* (36); *Verrall v. The Croydon Union* (37). It is contended that the quashing and confirming is a mere form, a mode of giving an opinion. In this case, though the rule goes to shew cause why the order of sessions should not be quashed, there was in fact no question of quashing it, the rate being admittedly bad, but, as the case says, the order was to be confirmed or the rate remitted to be amended. The proceedings all through are by consent, and the Special Case provides that in certain events the rate is to be remitted to the Quarter Sessions to be amended.

[LORD PENZANCE.—That is the agreement between the parties, but the rule is to shew cause why the order of Sessions should not be quashed. The Court might decline to take notice of the agreement, and having the order before it, might deal with it by quashing or confirming.]

Probably in *The Queen v. Marton-cum-Grafton* (34), *The Queen v. Stoke-upon-Trent* (35), and *Verrall v. The Croydon Union* (37), the order was to quash or confirm; but no one regarded anything beyond the Special Case. If the form of the Special Case was improper, that might have been an objection to the Court hearing it at all—*The Queen v. Sutton Coldfield* (20). It was only by consent that it could be considered, and there was no consent intended to an appeal.

[THE LORD CHANCELLOR.—Orders by consent are liable to appeal if special leave is given—Judicature Act, 1873, section 49.]

*Herschell*, in reply.—Appeals under Baines's Act (32) are before the judgment of the Quarter Sessions, and cannot therefore be described as appeals from Quarter Sessions. Section 45 applies,

(34) 10 Q.B. Rep. 971.

(35) 5 Q.B. Rep. 303; s. c. 13 Law J. Rep. M.C. 41.

(36) 5 Q.B. Rep. 30; s. c. 13 Law J. Rep. M.C. 41.

(37) 33 Law Times 379.

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though the case was tried in the Queen's Bench Division, for Order LVIII. (rule 11 of Rules of the Supreme Court, December, 1876) has repealed the provision as to Special Divisional Courts for appeals from inferior Courts. But it is sufficient to rely on section 19.

THE LORD CHANCELLOR (EARL CAIRNS).—Your Lordships have heard this case very fully and ably argued, and after paying great attention to it, I think that no doubt exists in the minds of any of your Lordships as to the conclusion at which you ought to arrive.

The respondents were fixed by a decision of a Court of Quarter Sessions with the payment of a certain rate for sanitary purposes, but the overseers of the township of the foreign of Walsall, as the sanitary authority, being anxious to have a larger rate, obtained in the usual way in the Queen's Bench Division, an order for a writ of *certiorari* to bring up the proceedings under which that rate was fixed, for the purpose of having it quashed. I will refer presently to the form of the proceedings. When that case was argued before the Court of Queen's Bench, the order of the Court of Quarter Sessions was not quashed, but was confirmed, and thereupon the parties who had moved the Court of Queen's Bench, namely, the overseers, moved in the Court of Appeal to reverse the decision of the Court of Queen's Bench. When brought before the Court of Appeal, the objection was taken by the respondents that there was no jurisdiction in that Court to hear the appeal, the ground being that, having regard to the nature of the subject, the decision of the Queen's Bench Division was final.

The Court of Appeal, consisting of four learned members, was divided in opinion upon that point. The Lord Chief Justice of England and Lord Justice Brett were of opinion that there was no jurisdiction. Lord Justice Bramwell and Lord Justice Cotton were of opinion that there was jurisdiction; and, under those circumstances, the decision of the Queen's Bench Division remained. Your Lordships have now had the matter brought before this House, and have heard it

argued upon the question of jurisdiction merely. If you are of opinion that the decision of the Court of Queen's Bench was not final, that decision upon the merits has not yet been reviewed by the Court of Appeal, and therefore, in these circumstances, your Lordships will, I apprehend, take the course of sending the matter back to the Court of Appeal, if the Court of Appeal has, in your opinion, jurisdiction to deal with it.

That which is complained of is this:—A judgment of the Court of Queen's Bench discharged a rule nisi which had been obtained to shew cause why the order of the Court of Quarter Sessions fixing the lower rate should not be quashed. By the interpretation clause contained in the Judicature Act of 1873, the word "order" in the body of the Act is held to include "rule;" and therefore when, in the body of the Act, we read the word "order," we read it as if the word "rule" was also contained there. Now the 19th section of the Judicature Act of 1873 provides that "the Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice, or of any Judges or Judge thereof." The words "save as hereinafter mentioned," it is agreed, refer to particular exceptions afterwards made as to costs and as to orders by consent, and, having regard to the enactment passed afterwards, and which is to be read as one with the Judicature Act, these exceptions would also include cases where decisions of the primary Courts are made final by Act of Parliament. But none of those exceptions applies to the present case, and therefore, for the present purpose, the section may be read as if the words "save as hereinafter mentioned" were omitted; and, as I have said, it is to be read as if the word "order" included the word "rule." Reading it in that way, your Lordships find that it is enacted that the Court of Appeal shall have jurisdiction to hear and determine appeals from any rule of the Queen's Bench Division.

If the matter rests there, I own I do not think it is open to doubt that these

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clear and definite words of the Legislature must have their full effect given to them. Your Lordships have here, on the one hand, a rule of the Queen's Bench Division, and you have, on the other hand, an enactment that every rule of the Queen's Bench Division is to be open to appeal. That being so, unless there is something more which has not yet been brought forward, those clear words must have effect given to them, and it lies upon those who wish to cut down their effect, to shew how that is to be done.

Now the way in which it is attempted to be done is this:—It is said that in the particular matter which here came before the Queen's Bench Division, the Court of Queen's Bench, when it existed as a separate Court, did not act by virtue of its ordinary jurisdiction, and did not indeed act by analogy to its contentious jurisdiction, in the ordinary sense of that term, but acted in a consultative manner—to use the expression of the Lord Chief Justice—that it was, as it were, consulted by a Court of Quarter Sessions, and the Court of Quarter Sessions, it is suggested, never parted with a case upon which it was consulting the Court of Queen's Bench, but in some way kept seisin of the case, until it had obtained the opinion of the Court of Queen's Bench, and then, when it had obtained that opinion, proceeded to act by virtue of its own jurisdiction, that is to say, its jurisdiction as a Court of Quarter Sessions.

If that had been the case, if that was an accurate representation of the jurisdiction, no doubt an element of difficulty might be interposed. It would then have to be considered whether really what your Lordships have before you was a rule or an order of the Court of Queen's Bench at all. But I apprehend that that is, I must say, an inaccurate view of the jurisdiction exercised by the Court of Queen's Bench. As it seems to me, that jurisdiction may be stated very shortly, and there is really—I say it after hearing all that has been said on both sides—little or no controversy upon the subject. The Court of Quarter Sessions was in the first instance the Court of Appeal before which objections to rates of this kind were to be

brought. When the Court of Quarter Sessions had determined a rate, that determination was, as a general rule, final, upon the merits. There was no Court of Appeal in the ordinary sense of the term before which the facts upon which the Court of Quarter Sessions had proceeded could be brought by way of review. But the Court of Quarter Sessions, like every other inferior Court in the kingdom, was open to this proceeding; if there was upon the face of the order of the Court of Quarter Sessions anything which shewed that that order was erroneous, the Court of Queen's Bench might be asked to have the order brought into it, and to look at the order, and view it upon the face of it, and if the Court found error upon the face of it, to put an end to its existence by quashing it; not to substitute another order in its place, but to remove that order out of the way, as one which should not be used to the detriment of any of the subjects of Her Majesty.

That jurisdiction of the Court of Queen's Bench was found in many cases, in reference to the quarter sessions, a useful jurisdiction. It appears farther, if we go back to the ancient history of quarter sessions, that the quarter sessions had a power (the exact limit of which perhaps it is not necessary now to define), if they were in difficulty, of applying to the going Judge of Assize and asking his advice and assistance in making an order. An appeal to the Judge of Assize of that kind was not a parting by the Court of Quarter Sessions with its jurisdiction, but was really that which is spoken of by the Lord Chief Justice, a "consultative" act on the part of the Court of Quarter Sessions, the Court of Quarter Sessions still retaining and exercising its jurisdiction after the consultation had taken place. But supposing that the Court of Quarter Sessions did not adopt that course, there was still another mode by which any question of law which appeared to the Court of Quarter Sessions doubtful, might be left open for the exercise of the judgment of a higher tribunal. All that was necessary was that the Court of Quarter Sessions, in making its order, should not make it an unspeaking or unintelligible order, but should in some way

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state upon the face of the order, the elements which had led to the decision of the Court of Quarter Sessions. If the Court of Quarter Sessions stated upon the face of the order, by way of recital, that the facts were so and so, and the grounds of its decision were such as were so stated, then the order became, upon the face of it, a speaking order; and if that which was stated upon the face of the order, in the opinion of any party, was not such as to warrant the order, then that party might go to the Court of Queen's Bench and point to the order as one which told its own story, and ask the Court of Queen's Bench to remove it by *certiorari*, and when so removed to pass judgment upon it, whether it should or should not be quashed. In that case, as I said just now, the jurisdiction of the Court of Queen's Bench was merely a jurisdiction to leave the order standing or to remove it out of the way. It was not a jurisdiction to substitute for it another or a different order; that would be making the Court of Queen's Bench, in the ordinary sense of the term, a Court of re-hearing or of appeal. Now, if that is the jurisdiction of the Court of Queen's Bench, it is not a jurisdiction which in any respect can be called a consultative jurisdiction; it is a jurisdiction of the Court of Queen's Bench as a Court higher than the Court of Quarter Sessions to overthrow and destroy an act of the Court of Quarter Sessions, and to remove it out of the way.

But then that being, as I think it is, clear from the cases which have been cited, the origin of the jurisdiction and the form in which the jurisdiction really was exercised during the greater part, if not the whole, of the last century, it is obvious from the more modern cases which have been cited, that although that jurisdiction has not changed in substance, there has been some change in the form in which it has been appealed to. In modern times the practice has grown up, and a very wholesome and useful practice it is, of obtaining opinions from the Courts upon Special Cases. All Courts have from time to time had powers given to them to answer questions put to them upon Special Cases. And whereas in the

earlier times the orders of Courts of Quarter Sessions did nothing more than state by way of recital the facts which the Court had found, and then add the order which the Court had made, the more modern cases from the Courts of Quarter Sessions seem to have assumed rather the form of Special Cases as to which, in language loose, but not altogether inaccurate, it has been said that the Court of Quarter Sessions asks for the opinion of the Court of Queen's Bench. In the very case before your Lordships, although in form you find that the dissatisfied party first applied for a *certiorari*, and then obtained a rule *nisi* to quash the rate, and on the *certiorari* the order of the Court of Quarter Sessions was brought up and the Case appended to the order; still, when you look at the Case itself, you find that the parties who stated that Case, were obviously under the impression that they could induce the Court of Queen's Bench, if it did not simply confirm the order of the Court of Quarter Sessions, to answer a series of questions, after which the Case might be sent back, supposing the rate not to be confirmed, to the Court of Quarter Sessions, so that the rate might be amended or modified according to the answers so obtained from the Court of Queen's Bench.

Now, it is quite true that this form of the case has given a certain colour to the argument that the Queen's Bench Division was applied to for the purpose of advice and consultation, and not for the purpose of making an order. But that is simply upon the form of the Special Case. The form of the proceedings before the Queen's Bench Division is clear and unmistakable. In the old, the original form which indicates the foundation and the ground of the jurisdiction, the dissatisfied party simply called upon the Court of Queen's Bench to quash the order made by the Court of Quarter Sessions. When that application was made to the Queen's Bench Division, the Queen's Bench Division might, as it seems to me, very well decline to answer the various forms of questions which I find put in the Special Case; but whether it did or did not so decline, the party who objected to the rate and to the

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order of the Court of Quarter Sessions, had a right, if that order was an invalid one, to have it quashed and removed out of the way, and the circumstance that there were appended to the Special Case the series of questions to which I have referred, could not in any way destroy that right of the suitor, if he was otherwise entitled to an order quashing the order of the Court of Quarter Sessions. That is all that I have to observe upon the form of the Special Case. It has given rise to a little difficulty, but to no difficulty which is serious when the whole of the circumstances are looked at.

I will only add that I have proceeded upon the view of the 19th section of the Judicature Act. I am not persuaded that the 45th section has anything to do with the question. It seems to me that it is quite sufficient to look upon this as what it was, namely, a rule, that is to say an "order" of the Queen's Bench Division, to see that it was appealable under the 19th section, and to see that if leave to appeal was necessary (of which at present I am not convinced), that leave was given in the present case.

I shall, therefore, humbly recommend your Lordships to declare that the Court of Appeal had jurisdiction to hear and to determine this appeal upon the merits, and to remit the case to the Court of Appeal with that declaration. But, looking to the fact that the Judges in the Court of Appeal were equally divided, and that therefore it was necessary to bring this case to your Lordships' House, and looking still more to the fact that the difficulty or doubt in the case appears to have been one rather pressed upon the respondents in the Court of Appeal by the Court than strenuously urged by themselves, I think I should ask your Lordships to say at the same time that there should be no costs on either side in respect of this appeal.

**LORD PENZANCE.**—I entirely agree with what has fallen from my noble and learned friend.

I confess that I feel inclined to base my judgment in this matter entirely upon the simple proposition that the Judicature Act says that there shall be

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an appeal from all judgments and orders of the High Court of Justice, and the interpretation clause of the Act says that a "rule" is an "order," and consequently the 19th section is to be read as if it included the word "rule." If there is to be an appeal from all rules and orders according to the words of the statute, it seems to me that it would require an overwhelmingly strong case to make out that any particular proceeding, which is of the character of the present, does not fall within that enactment.

Now the ground on which the supposed exception is placed is shortly this, that this is not a "rule" or "order" of the Court within the purview of the Act, because the function of the Court of Queen's Bench was, and that of the Queen's Bench Division in these matters is, a purely consultative one; that it is the giving of an opinion and not the making of a judicial order in the exercise of the ordinary jurisdiction of the Court. The cases which the learned counsel for the appellants have brought before the House appear to me to establish conclusively that that is not a true view of the function which the Court of Queen's Bench, before the Judicature Act, discharged in respect of these cases. The cases are numerous to shew that the Court of Queen's Bench was in the habit of dealing with and reviewing these orders of an inferior Court upon the face of them, and if, upon the face of them, they were found insufficient, of quashing them. If they were not found insufficient, then they would not be quashed, that is to say, they would be affirmed. That was the function which the Court discharged, and it discharged that function at a time when the Courts of Quarter Sessions were still in the habit of consulting the Judges of Assize, as is shewn by the two cases that were cited by the learned counsel from Burrow. The practice was for the Quarter Sessions, when they were in doubt upon a question of law, to consult the Judge of Assize, but notwithstanding that, the Court of Queen's Bench at that time exercised the same jurisdiction which it did up to the time when the Judicature Act passed, of quashing any order of a Court of Quarter Sessions

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for any insufficiency which appeared upon the face of it. Of course until the Court of Quarter Sessions set out some facts upon the face of their orders, the Court of Queen's Bench could not interfere with them except upon matters of form, but whenever they did set out facts, and it is shewn that, I may say for centuries, the practice was to set them out whenever the justices at Sessions had doubts, the Court of Queen's Bench dealt with the facts as they appeared upon the face of the order, pronounced the order sufficient or insufficient, and quashed it if the Court saw reason to do so.

Now the action of the Court of Queen's Bench in this matter cannot be considered consultative merely if the result of what was done was to make an order which dealt with the proceeding itself and put an end to the very order of the Quarter Sessions. If the action of the Judges of the Queen's Bench in the matter was purely consultative, it would follow that they would remit in some form the result of that advice and consultation; to the Court of Quarter Sessions, and that the Court of Quarter Sessions would act upon it. But, as was well pointed out by the learned counsel for the appellants, the *certiorari* itself bringing up the proceedings, independently of the order subsequently made upon it, put an end to all farther jurisdiction in the Court of Quarter Sessions to deal with the matter. Therefore, the Judges of the Queen's Bench then had the proceeding before them, and could either quash it or could let it stand, but the magistrates in quarter sessions were then *functi officio*, they could no longer deal with the matter either by way of affirming or of quashing the order.

It seems to me, therefore, that it is abundantly made out that, according to the old practice of the Court, the function of the Court of Queen's Bench was that which has been contended for, namely, to consider an order of a Court of Quarter Sessions upon the face of it, and if the facts were stated upon the face of the order, to deal with them as they appeared upon those proceedings, and to apply the law to those facts, and then either to affirm the order or to quash it.

That being so, the question arises whether any change has been effected of late years which ought to lead to a different result as regards this appeal. Now from *The Queen v. Kesteven* (19), in which Lord Denman protested against what had been done [as referred to in the case of *The Queen v. Sutton Coldfield* (20)], it does seem that, at first, when attempts were made to vary this mode of proceeding, the Court of Queen's Bench repudiated accepting any function of the kind that that Court was asked to discharge. The Judges were asked to answer certain questions for the information of the parties, but they positively refused to do that, and said, "No; our business is to say whether this order is a good one or a bad one; if it is good it must remain; if it is bad it must be quashed;" but they held that the Court was not justified according to the practice in answering questions. Notwithstanding that, it seems that, in modern times, the practice has from time to time grown up, of putting before the Court something like an ordinary Special Case in an action, and of asking the Judges, in accordance with the findings on certain questions of fact, to give certain directions and remit the case to the Court of Quarter Sessions. And there is no doubt that the Special Case in this particular case does something of that kind. The petition at the end of the case is that "If the Court shall answer the first question in the affirmative, the order of Quarter Sessions is to be confirmed. If the Court shall answer the second, third or fourth questions in the affirmative, the rate is to be remitted to the Court of Quarter Sessions to be amended in accordance with the opinion of the Court."

But although that is so, there is in this case, as I suppose there is also in those cases in which this sort of practice has grown up, an order of the Court of Quarter Sessions to begin with. Now, when ordinary Special Cases are submitted to the opinion of a Court of Common Law, the practice has never been that there is a judgment, and then a Special Case, and that in accordance with the opinion of the Court upon that Special Case, that judgment should be affirmed or

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set aside, but the parties always agree, after stating the facts, that if the Court should be of opinion one way, judgment shall be entered one way, and if the Court should be of opinion another way, judgment shall be entered otherwise. That is the form it assumes when the function is purely consultative. But here the case starts with an order formally made by the Court of Quarter Sessions. At the same time it is evidently, upon the face of it, intended by the parties to ask the Court to go out of the way of its proper legal jurisdiction and to give answers upon certain questions. Now I agree with my noble and learned friend, that when a case was brought up on *certiorari*, and when one of the parties had moved for and obtained a rule to shew cause why the order of the Court of Quarter Sessions should not be quashed, it would be quite competent to the Judges of the Court, if they thought, upon the face of the Special Case, and upon the facts therein stated, that the order was a bad one, to quash it, and they might do that although the parties may only have asked them to give certain directions to the Court of Quarter Sessions as to the way in which the sessions should deal with their order. Having before them the order made by the Quarter Sessions, and having before them the facts upon which that order was made, and coming to a legal conclusion that, upon those facts, the order was one that was contrary to law, it was perfectly competent to the Judges of the Court of Queen's Bench to do what those who applied to that Court for a rule asked that they should do, namely, to quash the order.

Under these circumstances, therefore, although some little difficulty has, I think, been introduced into the discussion of this case, by reason of the form in which the parties have endeavoured to obtain the opinion of the Court of Queen's Bench, I nevertheless think, looking at the nature of the proceeding, which is what this House has to deal with, that it is a proceeding in which the Court of Queen's Bench is asked to exercise its original function of quashing an order said not to be legally made; and conse-

quently there is no more reason why this order or this rule should not be made the subject-matter of an appeal, than any other order or rule which the Court may make. Therefore I entirely agree with what my noble and learned friend has proposed.

LORD O'HAGAN.—I wish to be understood as basing my opinion upon, it seems to me, the plain meaning of the 19th section of the Judicature Act, as applicable to the undisputed facts in this case. We have to consider a "rule" of Court, which, according to the interpretation clause of the Act, is to be held to be an "order." We have a section of that Act giving full jurisdiction to the Court of Appeal to review every judgment or "order," with certain specified exceptions, and I cannot discover any sufficient reason for thinking that the rule with which we have to deal was not a legitimate subject of appeal. I wish to rest my concurrence with the proposal of my noble and learned friend expressly upon that ground, because I am not satisfied that the 45th section can be safely relied on for the purpose of sustaining it.

The judgments of two of the learned Judges in the Court below have been founded on the view, that the character of the jurisdiction of the Court of Queen's Bench is consultative and not mandatory.

That Court has, as we all know—we have heard many authorities cited on the point, perhaps unnecessarily—a supreme control over inferior jurisdictions, and its general relation to such jurisdictions is certainly not consultative. It dictates and controls; it does not merely advise. No doubt, originally, the Court of Quarter Sessions, in cases such as that before us, made decisions from which there was no appeal; and I am not prepared to go with the argument that there has been such a change introduced through the Judicature Act as would justify us, under its provisions, in assuming the existence of an appellate authority in cases of the kind. But there has been undoubtedly an established practice so long existing, as to forbid us now to call it in question, enabling the Court of Quarter Sessions to put itself in relation with the Court of

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Queen's Bench for the purpose of being directed and controlled as to its own action. It can state a case and require an answer; but the answer given is authoritative and decisive. Here a case was duly stated, and when that was done the jurisdiction of the Queen's Bench attached upon the whole matter submitted to it. The power of the inferior Court was gone; and the superior tribunal made its own ruling in the plenitude of its own powers, and enforced that ruling according to its own view of right and justice.

I observe that, in one of the judgments of the learned Judges, observations are made as to the necessity of avoiding an excessive increase of appeals in cases like that before the House, and making them "cheap and speedy, and not dilatory, expensive or burdensome." I approve the policy so indicated very strongly, but we have only to discover the meaning of the Act, and if that be clear we have nothing to do with its policy. Besides, I cannot shut out from my consideration that it was manifestly designed not to limit appeals but to extend the power of making them. Criminal cases, orders by consent, orders as to costs, and orders whose finality is declared by statute, are excepted from the general operation of the 19th section, but in all other matters, orders or judgments are subject to revision by the Lords Justices. They have authority far wider than the Exchequer Chamber formerly possessed, and every day they deal with cases over which it would have had no control. If policy is to be considered, this indicates that the Legislature intended to enlarge the appellate jurisdiction, and I cannot see that we are at liberty to contravene that policy where it is carried out by clearly intelligible words.

We are acting in our judicial and not in our legislative capacity, and we are not free to act on speculation or theory as to what law would be wisest or most desirable for the purpose of limiting the operation of provisions which appear to have a definite meaning and effect in harmony with the general aims of the statute.

What is there to sustain the statement that the proceeding here was of a consultative character? The distinction between what is consultative and what is magisterial and mandatory is illustrated by the many cases bearing on the old practice of the Courts of Quarter Sessions, when they consulted the Judges of Assize. When they were in doubt or difficulty, and desired information, they were in the habit of going to the assizes and asking for it, just as the foreman of a grand jury now seeks the assistance of the Court on the construction of an Act, or the settlement of a point of practice. But the Judges made no ruling. After the interpellation had taken place, and the advice had been received by the Court of Quarter Sessions, it seems to have pronounced its own decision as of its own authority, and carried that decision into effect. The Judge's proceeding there was consultative. He did not order. The final decision was pronounced by the justices after asking his assistance and advice.

In Ireland the Judges of assize have an appellate jurisdiction in civil bill cases, and there their decisions are final and conclusive. There they order, and do not merely give counsel. Their function is different from that formerly discharged by their English brethren, and is really analogous to that of the Queen's Bench.

The Judge in Ireland consults with no one, neither does the Queen's Bench. He makes no reference back to any one, and the Queen's Bench makes no such reference. In the one case, by statutable authority orders are pronounced and effectuated; in the other the jurisdiction is at Common Law, but in both, the proceeding is mandatory and decisive.

If there had been nothing but the documents in the case I should find it difficult to hold, on a consideration of the terms of the *certiorari* and the orders before us, that the proceeding was in any sense consultative. The *certiorari*, after requiring the production of all deeds and documents, and so forth, concludes in these words:—"That we may cause farther to be done thereon, what of right and according to the law and cus-



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tom of England we shall see fit to be done." The writ goes, not to obtain the information which may ground an ineffective opinion or a friendly counsel, but to enable the Court to act, to act for itself, and to act conclusively on its own judgment as to what, according to the law and custom of England, it "shall see fit to be done." These words do not savour of consultation, and as little do the rules which follow upon the return. By the conditional rule, the prosecutors are peremptorily "ordered" to shew cause why the order of sessions should not be quashed, and the absolute rule, in like manner, "orders" that the decision of the sessions be affirmed or nullified. There is nothing of consultation or advice suggested by these documents. The "order" is absolute, and all people are bound and expected to obey it without, as I understand, any further intervention from the Quarter Sessions. And obeyed it is accordingly. I find it stated by the Lord Chief Justice that "no instance has occurred in which the parties to the original order have failed to act on the decision of the Court of Queen's Bench," and that statement has been repeated and confirmed at the bar. The Court "orders," and the order is in every case respected.

I, as well as my noble and learned friends, was struck by the terms of the Special Case, and, certainly, some difficulty and confusion have arisen from them. That case, as it stands, has a consultative aspect, as it asks advice and not decision. But I ventured to suggest, in the course of the argument, that after the Special Case had been framed and put before the Court of Queen's Bench, the writ of *certiorari* issued on an order "by consent of counsel on both sides," and that the effect of such an order, so obtained, was to transfer all the proceedings from the one Court to the other, and, with the proceedings, the jurisdiction to deal with them; and that, thereupon, without any reference to antecedent transactions, it became the right of the Court of Queen's Bench to act according to its own established practice, and to do what, in the words of the *certiorari*, it considered "just and

fitting to be done." Therefore I concur with my noble and learned friend, it was quite immaterial to consider what were the terms of the Special Case, and how the parties by those terms had seemed to limit the operation of their demand upon the Court. I am of opinion that the appeal should be allowed and the judgment reversed without costs.

*Order appealed from, reversed: Declared that the Court of Appeal had jurisdiction to entertain, and ought to have entertained, the appeal from the rule or order of the Queen's Bench Division of the 24th of November, 1877; case remitted with this declaration to the Court of Appeal; no costs of this appeal on either side.*

Solicitors—Sharpe, Parkes, Pritchard & Sharpe, agents for Wilkinson & Gillespie, Walsall, for appellants; R. F. Roberts, for respondents.

[IN THE DIVISIONAL COURT FOR THE Q.B., C.P., AND EXCH. DIVISIONS.]

1879. } THE QUEEN v. NEWTON.  
Jan. 17. }

*Penalty—Company—Delivery of List of Members to Registrar within fourteen Days after General Meeting—Necessity to prove holding of General Meeting—Companies Act, 1862, ss. 26, 27—Companies Act, 1867, s. 39.*

By section 39 of the Companies Act, 1867, every company formed under the principal Act of 1862 must, under a penalty, hold a general meeting within four months after its Memorandum of Association is registered. By sections 26 and 27 of the Companies Act, 1862, every company under that Act must, within fourteen days after the first ordinary general meeting, make out a list of its members, and forward the same to the Registrar of Joint Stock Companies within a further period of seven days, subject to a penalty of 5l. per diem in default.

On a summons taken out against the Ladies' Dress Association (Limited) for not

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having forwarded a list of members as aforesaid, the magistrate decided that it was necessary for the complainant to prove that the first ordinary general meeting had been held, and on failure of such proof, dismissed the summons:—

Held, that the magistrate was right; for the date of the general meeting formed a *tempus a quo* from which the period of fourteen and seven days was to run, and that it could not be presumed against the company that a general meeting had been duly held.

Edmonds v. Foster (45 Law J. Rep. M.C. 41) distinguished, on the ground that the summons in the present case set out the period of time in the words of the statute, and therefore the requirements of the statute must be strictly followed.

This was a rule, in the nature of a mandamus, calling upon R. M. Newton, one of the magistrates at the Marlborough Street Police Court, and the Ladies' Dress Association (Limited), to shew cause why he (the magistrate) should not state a case, under 20 & 21 Vict. c. 43, on the application of one H. M. Carter.

On the 22nd of May, 1878, a summons had been granted, on the complaint of Mr. Carter, against the Ladies' Dress Association, "for that they, on the 6th day of October, 1877, and on each succeeding day between the said day and the date hereof, . . . being a company having a capital divided into shares, did make default in forwarding to the Registrar of Joint Stock Companies a list of all persons who, on the fourteenth day succeeding the day on which the first ordinary general meeting of the said company was held, were members of the said company, and stating the names, addresses and occupations of the said members, and the number of shares held by each, and the summary required by the Companies Act, 1862 (1), contrary to the statute, &c."

(1) The Companies Act, 1862 (25 & 26 Vict. c. 89), s. 26, enacts as follows:—

"Every company under this Act, and having a capital divided into shares, shall make, once at least in every year, a list of all persons who, on

When the summons came on for hearing before the magistrate the complainant

the fourteenth day succeeding the day on which the ordinary general meeting, or if there is more than one ordinary meeting in each year, the first of such ordinary general meetings is held, are members of the company, and such list shall state the names, addresses and occupations of all the members therein mentioned and the number of shares held by each of them, and shall contain a summary specifying the following particulars:— First. The amount of the capital of the company and the number of shares into which it is divided. Secondly. The number of shares taken from the commencement of the company up to the date of the summary. Thirdly. The amount of calls made on each share. Fourthly. The total amount of calls received. Fifthly. The total amount of calls unpaid. Sixthly. The total amount of shares forfeited. Seventhly. The names, addresses and occupations of the persons who have ceased to be members since the last list was made, and the number of shares held by each of them. The above list and summary shall be contained in a separate part of the register, and shall be completed within seven days after such fourteenth day, as is mentioned in this section, and a copy shall forthwith be forwarded to the Registrar of Joint Stock Companies."

Section 27.—"If any company under this Act, and having a capital divided into shares, makes default in complying with the provisions of this Act with respect to forwarding such list of members or summary as is hereinbefore mentioned to the registrar, such company shall incur a penalty not exceeding 5*l.* for every day during which such default continues."

The Companies Act Amendment Act, 1867 (30 & 31 Vict. c. 131), s. 39, enacts as follows:—

"Every company formed under the principal Act, after the commencement of this Act, shall hold a general meeting four months after its memorandum of association is registered, and if such meeting is not held the company shall be liable to a penalty not exceeding 5*l.* a day for every day after the expiration of such four months until the meeting is held."

*The Queen v. Newton.*

proved the registration of the Memorandum and Articles of Association in May, 1877, and also the fact that no list of shareholders had been sent to the registrar, but he failed to give any evidence to shew that a general meeting had ever been held. The secretary of the company was in Court with the books of the company, under a *sub poena duces tecum*, but the complainant declined to call him. The magistrate therefore dismissed the summons, and refused to state a case. The complainant then obtained the present rule *nisi*.

*O. Bowen* (with him *The Attorney-General*), for the magistrate, shewed cause against the rule.—The complainant did not inform the magistrate in writing that he was “dissatisfied with his determination as being erroneous in point of law,” as required by 20 & 21 Vict. c. 43. s. 1.

*Macintyre* (*H. Browne* with him), for the defendant company, also shewed cause.—The magistrate has found that the complainant failed to prove that the first ordinary general meeting had ever been held. This was a question of fact to be determined by the magistrate, and not a point of law, and the Court will not interfere with his decision.

*Murphy* (*A. M. Sullivan* with him), for the complainant, in support of the rule.—It has already been decided by the Common Pleas Division, in the case of *Edmonds v. Foster* (2), that it is not necessary to prove the holding of the general meeting. Lord Coleridge, C.J., in giving judgment in that case, said—“The words of the 26th section, upon careful attention, appear to enact that a list of members shall be made once at least in every year, and shall be then forwarded to the Registrar of Joint Stock Companies, even though a default may be made in holding the annual general meeting. It seems to me that the section is imperative as to making the list and forwarding it to the proper officer, and the primary object of the enactment is that the list therein mentioned shall be drawn up once a

year. It is true that a direction is given as to the day when it is to be made up and sent, but I think that a company and its directors cannot evade the mandatory part of the section by omitting to hold the meeting.” Archibald, J., and Amphlett, B., agreed that the provision as to the fourteen days is merely directory.

[COCKBURN, L.C.J.—*Edmonds v. Foster* (2) is not a case that we are bound to follow. The statute prescribes that a certain act must be done within a certain time after a given event. The *tempus a quo* must be proved before the time begins to run.]

That case was decided partly upon the 49th section of the Companies Act, 1862, which requires that a general meeting shall be held once at least in every year. The present case comes under the 39th section of the Act of 1867, by which a company must hold its first meeting within four months. The secretary was a co-defendant in another summons, and the complainant could not call him.

[COCKBURN, L.C.J.—You have brought the whole difficulty upon yourselves by not calling the secretary. The magistrate would not have treated him as your witness. You have expressly stated in the summons that the general meeting was held. You have introduced it into your charge as an essential fact, and you must prove it.]

According to *Edmonds v. Foster* (2) it is not an essential fact. We were bound to follow the words of the statute, and our only fault is that we have omitted to prove a fact unnecessarily stated in the summons.

COCKBURN, L.C.J.—I am of opinion that this rule ought to be discharged. With regard to the preliminary objection taken by Mr. Bowen, the statute does not expressly require that the applicant should state in writing his dissatisfaction on a point of law. It is enough if it appears, from all that took place before the magistrate, that there was a point of law in dispute. My judgment, however, is based, not upon that ground, but on the broader ground that the magistrate was right. I

*The Queen v. Newton.*

have no intention of overruling *Edmonds v. Foster* (2), either directly or indirectly, though I may have my doubts about that decision. In the present case we must deal with the charge in the summons before us, which states the offence in distinct terms, following the statute: "for that they . . . did make default in forwarding to the registrar a list of all persons who, on the fourteenth day after the general meeting was held, were members of the company." It is necessary to prove the complete offence as charged. It is not sufficient, upon failure of proof of the *tempus a quo*, to contend that no general meeting was held, that the time had run out, and consequently the offence was complete as stated in the summons. No doubt, assuming *Edmonds v. Foster* (2) to be well decided, it would have been enough merely to set out the interval of time that had elapsed since the Memorandum of Association was registered. If that case is held to be established it would be sufficient to follow it. But in this case the words of the statute have been followed, and it becomes essential to prove when the meeting was held as a matter of fact. After the date of that meeting the time begins to run, but not till then. It was incumbent on the complainant to give such proof. The witness was in Court, but it was thought inexpedient to call him. If the magistrate had stated a case we should have held that his decision was right, and therefore it would be idle to call upon him to state facts which we know already.

POLLOCK, B.—I am of the same opinion, looking at the form of the summons, without overruling *Edmonds v. Foster* (2); yet if that case ever again came up I think it worthy of reconsideration. There is also a further point, whether you can sufficiently fix the specified act which the company is bound to do until you have proved the date of the general meeting. The list is to be made up of those who are members of the company fourteen days after that date. Such a list would be a varying one, and the amount of the penalties would vary also.

Supposing the general meeting not held, what list ought to be made up? For these reasons the case would require further consideration, if it should ever arise again.

*Rule discharged, with costs both of the magistrate and the defendant company.*

Solicitors—A. K. Stephenson, Solicitor to the Treasury, for magistrate; A. Pulbrook, for defendant company; E. D. Lewis, for complainant.

## [IN THE EXCHEQUER DIVISION.]

1878. } *In re TERRAZ.*  
Dec. 2, 3. }

*Extradition—Warrant of Apprehension—Description of Offence—"Crimes against Bankruptcy Law"—Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 8, s. 26 and schedule 1—Extradition Act, 1873 (36 & 37 Vict. c. 60), s. 8, and Schedule—Habeas Corpus.*

*Upon a rule for a Habeas Corpus to discharge a prisoner arrested under the Extradition Acts, 1870 and 1873, on the ground that the warrant whereon he was arrested did not sufficiently describe the offence, it appeared that the warrant (which was a warrant issued by a metropolitan police magistrate without the order of a Secretary of State) described the offence as "the commission of crimes against bankruptcy law":—Held, that the warrant sufficiently described the offence.*

[For the report of the above case, see 48 Law J. Rep. Q.B., C.P. & EXCH. 214.]

[IN THE QUEEN'S BENCH DIVISION.]

1878. } ROSSITER (appellant) v. PIKE  
Dec. 4. } (respondent).

*Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), section 20—Fishing Mill Dam—Obstruction to Fish—Abandonment of Fishery—Removal of Fishing Appliances.*

*A fishing mill dam, which had been constructed originally partly for the purpose of fishing, and partly for the purpose of supplying water to a mill, had been used for both purposes for many years previous to the passing of the Salmon Fishery Act, 1861, and was so continued after the Act, until the occupier removed all the machinery and appliances for catching fish in the dam sluice, and ceased to use it for fishing purposes. Upon a subsequent information against him, under section 20, for not removing all obstructions to the free passage of fish, it was proved that the fenders at the sluice still remained, and were raised and lowered by the occupier solely for the purpose of regulating the supply of water to the mill, and irrespective of the close season or the passage of fish:—*

*Held, that, assuming the abandonment of the fishing and removal of the machinery and appliances to have been bona fide, notwithstanding its not having been done till after the passing of the Act, such abandonment prevented the application of section 20, as the structure was not, when the complaint arose, a fishing mill dam, but had been converted into an ordinary mill dam.*

This was a CASE stated by justices for the county of Devon, under 20 & 21 Vict. c. 43.

The following are the material facts stated in the Case:—

At a Petty Sessions held at Totnes on the 8th of October, 1877, an information preferred by the respondent against the appellant, charging, for that he the said appellant "on the 5th of September, 1877, then being the occupier of fisheries at the Totnes Weir, did not, within thirty-six hours after the commencement of the close season for the river Dart, cause to be removed and carried away from the waters within the fisheries all obstructions to the free passage of fish in

or through his cruires, cribs and boxes within the fisheries, contrary to section 20 of the Salmon Fishery Act, 1861," was heard and determined; and upon such hearing the appellant was duly convicted of the said offence, and ordered to pay a penalty, &c. . . .

At the hearing it was proved that the weir went across the whole river Dart, and that from above it a cut conducted the water down to the mill. The surplus water flowed over the weir, up to the foot of which the tide flowed, but the weir was a considerable height above ordinary high water, and there was no fish pass or ladder over it. At the side of the weir, between it and the right bank, there was a sluice, through which the water could be allowed to flow without passing over the weir or down the cut to the mill, but the upper end of the sluice was capable of being closed by three fenders or sluice doors, which, fixed in frames, could be raised or lowered at pleasure, and were, in fact, raised or lowered so as to regulate the supply of water to the mill.

The sluice was about forty-six feet in length, and at the lower end of it there had been inscales or lattice-work gates, which could be closed in a V shape, pointing up stream, and which, when so closed, converted the sluice into a fish trap, there being a narrow passage at the point of the V through which fish could enter the sluice, but by which it would be almost impossible for them to escape. At the time the inscales were in existence, the trap was made complete at the upper end by gratings, or as they were called hecks or trips, across the framework in which the fenders worked, so that when the fenders were raised the water could rush through the sluice, but the fish which might have entered by the passage between the inscales were prevented by the gratings from making their way higher up into the river above the weir. At that time the sluice was a fish box, and was constructed and used for taking fish; and the weir, together with the box, was properly designated a fishing mill dam, and was such at the time of the passing of the Salmon Fishery Act, 1861.

At the time of the committing of the alleged offence, neither the inscales nor

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*Rossiter v. Pike, Q.B.*

the gratings existed, but the fenders were at the upper end of the sluice as formerly, and when shut down were as high as the level of the weir, and permitted no water to flow over them. It was proved that keeping the fenders down would prevent fish from ascending to the higher waters of the river, unless there was a flood at the weir; and one witness stated that he had seen fish trying to pass up the sluice or box at the weir, but that he had always seen them fail in the attempt, and that when the fenders were only partially opened the effect would be to prevent fish passing up.

It was proved by the complainant that he was clerk to the Dart Board Conservators, and he laid the information pursuant to a resolution passed by the board. That the weir was built right across the river Dart, and that the box was on the Dartington side. That the dam turned the water into the mill leat for milling purposes, and if the gates and bars in the box were replaced, the effect would be that fish could be caught as they formerly were. That when the fenders were down it was impossible for fish to ascend to the higher waters, except there was a flood over the weir. That, on the 5th of September, 1877, the fenders at the weir were only partly open, but neither of them was clear of the water, and that they were in such a condition as to prevent any fish from passing through, and that they were then lifted about a foot or eighteen inches, and that the effect of this partial lifting would be that the weight of water behind would be so great that no fish could ascend, but in all cases the fish would fall back into the pool.

Another witness, who worked the Weir and Tucking Mill Fisheries for a company for three years, and up to 1862, stated that he fished the trips up to 1862.—See *Pike v. Rossiter* (1). That when he had charge of the fisheries the fenders were opened at twelve o'clock on Saturday night and closed at twelve o'clock on Sunday night, until the new law came into operation, and afterwards they were opened at twelve o'clock at noon on Sa-

turdays and closed at six o'clock on the following Monday morning, and that during these hours there was a free passage for fish. That the fenders used to be raised by means of a bar at first and afterwards by means of a handle.

A witness, who rented the Duke of Cleveland's fishery (not the before-mentioned fisheries, but the next fishery below the weir), from 1863 to 1876, stated that the bars at the bottom and the gates outside were removed in the year 1862. That the fenders used to be lifted up and down by witness as required. That the appellant then kept the keys, and that this witness used to apply to him, or at his mills, for them, whether the water was plentiful or not. That the appellant used to lend the keys that the fenders might be unlocked, as more fish were then caught by witness in the Cleveland fishery, but this was only done when the water was not required for milling purposes.

It was proved by the clerk of the Endowed School Governors for Totnes, who had succeeded to the property formerly held by the Totnes Charity Trustees, that the governors had the management and administration, amongst other properties, of the Totnes mill and weir, a portion of which property was the weir mill dam. He produced a certificate from the special Commissioners of English Fisheries, dated the 13th of December, 1871, shewing the legality of the fishing mill dam at the Totnes weir. This witness, so far as he knew, considered the fisheries were the same now as when they were examined by the special commissioners. This witness produced a minute book of the charity trustees, in which, under date of the 28th of October, 1862, occurred the following:—"The clerk reported that he had met Mr. Eden, the Government Inspector of Fisheries, and with him had viewed the weir trips, and that Mr. Eden had consented to waive the order of the Secretary of State with regard to the ladder in the weir, but the trips in the weir should be removed, so that all attempts to make the weir-trip available for fishing should be destroyed," and that at the time of the enquiry held by the special commis-

(1) 37 Law Times, 675.

*Rossiter v. Pike, Q.B.*

sioners on the 13th of December, 1871, the following occurred in the judgment which he produced, namely, "Evidence had been given by the same witness that these (the trips) have been there as far back as living memory goes, and up to the year 1861."

Another witness proved that he was surveyor to the endowed schools governors, and looked after their property, and collected the rents of the mills. That the bars, cribs, &c., at the weir had been removed about sixteen years since. That there were not now appliances there for taking fish. That the sills of the sluices were level with the pavement, and were so placed that they could not be removed without damage to the freehold. That one piece of the sill still remained, which was composed of wood. That there was nothing at present there like a box for taking fish, and that the stonework could not be removed without damaging the freehold.

On the part of the appellant, a witness stated that the fenders were part of the apparatus of the mill, and if they were removed the mill would be of little value.

The justices stated that they convicted the appellant because they considered—

1. That there were fisheries within the meaning of the statute, with an old fishing mill-dam (2) belonging thereto.

2. That the fenders with locks and keys belonging thereto, were part of an apparatus for taking fish up to the year 1862, and that recently the old wooden fenders had been replaced by new iron ones.

3. That no evidence had been given before us that the fenders might not be used again as part of an apparatus for catching fish.

4. That the appellant is the occupier

(2) The Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109).

Section 4. Fishing mill dam shall mean a dam used or intended to be used partly for the purpose of catching or facilitating the catching of fish, and partly for the purpose of supplying water for milling or other purposes.

of the town mills at the Totnes weir or mill dam and the fenders attached thereto.

5. That when the fenders at the weir are down no fish can pass through the box within that fishery and can get up the river.

6. That although the mill would be seriously injured by lifting the fenders during the whole of the annual close time, and partially in the weekly close time, yet it having been proved that the fenders or sliding doors were kept down by the appellant during a prohibited time, although previously to and for some time after the alteration in the law as to close time they had been opened during a weekly close time, we considered that the removal of all obstructions to the free passage of fish through the cruives, cribs, boxes, &c., of the fisheries had not been complied with by the appellant as required by the statute. (3)

The questions of law arising on the above statement for the opinion of this Court, therefore, are—

1. Whether all obstructions to the free passage of fish in and through the cruives, cribs, boxes, &c., within the fisheries at Totnes weir had been removed and carried away from the waters within the fisheries within thirty-six hours after the commencement of the close season for the river Dart, in accordance with the provisions of the Salmon Fishery Act, 1861, 24 & 25 Vict. c. 109. sect. 20 (3).

2. Whether, under the circumstances

(3) Section 20. The proprietor or occupier of every fishery for salmon shall within thirty-six hours after the commencement of the close season cause to be removed and carried away from the waters within his fishery the inscales, hecks, tops and rails of all cruives, boxes or cribs, and all planks and temporary fixtures used for taking or killing salmon and all other obstructions to the free passage of fish in or through the cruives, cribs and boxes within his fishery, and if any proprietor or occupier omits to remove and carry away in manner aforesaid any things hereby required to be removed and carried away, he shall incur the following penalties.

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before stated, the appellant as the occupier of the Totnes Town Mill, and having the use and control of the fenders, is also the occupier of the fisheries at the Totnes weir as alleged in the information, and, as such occupier of the fisheries, is responsible for the removal of all such obstructions as aforesaid, and is properly convicted for not having removed them.

*Charles Russell* and *Pitt Lewis*, for the appellant.—First, is this a fishing mill dam? The case finds that the appellant did not fish and could not fish since 1862. In reference to this same weir and between the same parties (1), it has been held that a fishing mill dam which ceased to be used as such before the Salmon Fishery Act, 1861, came into operation, was not subject to the regulations as to such structures where they continue to exist in working order. The object of the Act was to prevent the creation of such rights as those attached to fishing mill dams in future, but it recognised and preserved existing rights. No fish pass was required here by the inspector, because the appliances for taking fish had been removed; and this is in accordance with the true construction of section 4; that having ceased to be capable of being used as a fishing mill dam, it ceases to be within the terms of the Act. That being so, it is immaterial that the change has been made since the Act came into operation, because at the time this information was laid this was no longer a fishing mill dam.

*James Paterson* (*Bompas* with him), for the respondent.—The question is really this. Is a structure which was once a fishing mill dam, always a fishing mill dam? It is contended that it is so, for the statute carefully points to the distinction between a mill dam and a fishing mill dam, and puts the latter under stringent regulations, and the intention is that every one who is owner of that particular sort of structure must comply with section 20.

[*MELLOR, J.*—That argument would be equally applicable to the former case.]

No, because we say that after the Act had passed and characterised the structures no owner had then a right to abandon that part of the structure which

was called a fishing-box and maintain the other part, namely, the weir. The case of *Hodgson v. Little* (4) is very similar to the present. See too *Garnett v. Backhouse* (5). The words "intended to be used" apply to the time of making the structure. This could be used in an hour or two, and the appellant is in effect keeping his fishing in reserve. The disuse causes the fenders to be down, and in fact creates a bigger obstruction. The object of building it was to make the weir so high that fish could not get over it, but must pass through the sluice. If this had been made only for the mill it would have been made several feet lower. It has not, therefore, changed its characteristic and it still remains a fishing mill dam. Since the Act passed it has been used for fishing purposes. It had therefore not changed its character at all up to that time, and so was within the statute, and must remain subject to it.

*Charles Russell*, in reply.

*MELLOR, J.*—I am entirely satisfied to stand by the decision of this Court in the former case, *Pike v. Rossiter* (1). The facts then stated are on all-fours with those in the present case, indeed they are identical in the two cases with the exception of there being now one additional fact which was not found expressly before.

It is this: that although the facts are in reality the same then as now, yet they were not made to appear exactly in the same way either to the justices or to the Court, and it must, therefore, now be taken as beyond all question that the fishing mill dam which is the subject of complaint has been used for fishing purposes at a date subsequent to the coming into force of the Act of 1861.

The only question then open to argument now is this—Does the fact that the abandonment of the fishing by the change in the use of the weir (a change which we must assume to have been adopted *bona fide*) did not take place till

(4) 33 Law J. Rep. M.C. 229.

(5) 37 Law J. Rep. Q.B. 1; s. c. Law Rep. 3 Q.B. 30.



*Rossiter v. Pike, Q.B.*

after the Act was in force make any difference in our judgment as to whether at the time of the complaint there was a fishing mill dam in existence, within the meaning of, and subject to the restrictions of the Act; whether in short the impress of fishing mill dam still remains, because it undoubtedly once was properly described as such, or whether the proprietor of such a structure can by alteration of it, get rid of the obligation imposed on owners of fishing mill dams by the Act.

Now there is nothing in the Act which says that the character is unalterable, and it would, I think, be highly inconvenient that it should be so; for although the object of the Act, which is to protect salmon, is very important, yet it is wholly unnecessary for that object that the Act should say that a weir which was once a fishing mill dam is so to continue for ever.

Especially would such a provision seem an inconvenient one, when as in this case it should be found that to hold that this is now a fishing mill dam and so subject the appellant to compliance with section 20, would be ruinous to him as a miller. For sixteen years he has evinced his intention to abandon the use of this place for fishing purposes, and has devoted himself to the interests of the mill alone. As the Act is silent on the subject and the construction to which we are invited would be so inconvenient in practice and sometimes, as we see, so productive of hardship, I am glad to be fortified in my opinion as to the meaning of the statute, by referring to section 23 (6), because that shews that if the weir be in fact an obstruction

(6) Section 23. "Any proprietor of a fishery with the written consent of the Home Office may attach to every dam existing at the time of the passing of this Act, a fish pass, of such form and dimension as the Home Office may approve, so that no injury be done to the milling power or to the supply of water to or of any navigable river, canal or other inland navigation by such fish pass . . . . provided that if any injury is done to any dam by reason of the affixing of a fish pass in pursuance of this section, any person sustaining any loss thereby may recover compensation

to the passage of fish up the river, it is easy for the owner of any other fishery to remove such an obstruction by getting a license from the Secretary of State to fix a fish pass over the weir. And, therefore, I find that there is a remedy provided in the Act itself for all the inconvenience which it has been suggested will arise from holding as we do. I think that the abandonment and removal of the machinery and appliances have converted this into an ordinary mill dam and have relieved the owner from the liabilities created by section 20. Under the circumstances appearing in this case, and dealing with this point only, I am satisfied that this was no longer a fishing mill dam, and so was freed from the obligations imposed with respect to such structures.

MANISTY, J.—I also am of opinion that our judgment must be given for the appellant. Sitting in this division we are bound by the former decision in *Pike v. Rossiter* (1) so far as to be compelled to hold that a dam which prior to the Act, and up to within a short time of its passing, was a fishing mill dam, but had ceased before the Act to be used for fishing purposes, does not come within the provisions of the Salmon Fishery Act of 1861. That case was stated in respect of this very dam, and between the same parties; and it then appeared, that having been originally constructed partly for the purpose of fishing and partly for the purpose of supplying water to the mill, the weir had ceased to be used for the former purpose in 1859, and the Court held that it was therefore not a fishing mill dam within the Act.

The only point left open is whether the fact that it has been used as a fishing mill dam since the Act makes any difference.

It is said that the point is concluded in the respondent's favour by *Hodgson v. Little* (4), and were it open to him to set that case up against the decision in *Pike*

for such injury in a summary manner from the person or body of persons by whom such fish pass has been affixed."

*Rossiter v. Pike, Q.B.*

*v. Rossiter* (1), the arguments of the respondent's counsel might require consideration, but we are really precluded by the later case from re-opening what was there decided.

Now it is argued that, if a structure has been once used as a fishing mill dam since the Act, you cannot restore it to the condition of a simple mill dam. That might be urged with some force, I think, were it not for the provisions of the Act which seem to have contemplated just that sort of case in section 23 (6). But look a little further and take a case such as the present, where compliance with section 20 would be ruinous to the mill, and then consider why the owner should not be at liberty if he likes to abandon the fishing and keep up the mill. If he does so, section 23 prevents hardship on the proprietors of the other fisheries, for any one of them may apply to the Home Office for leave to put up a fish ladder at a weir existing at the passing of the Act; and this was such a weir.

It therefore seems reasonable that the owner of a fishing mill dam may give up the fishing part of the structure, without being compelled to do that which may destroy his water supply to the mill, leaving it to any one else who may desire it, to put up a fish pass, in which case the original owner will be compensated for any injury so caused. I see nothing in the Act of Parliament to prevent this reasonable power being exercised by an owner, converting, as has been done here, his fishing mill dam into a dam used for the purposes of his mill only, and therefore, I think, the appellant is entitled to our judgment.

*Judgment for the appellant.*


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Solicitors—Makinson & Carpenter, agents for Merlin Fryer, Exeter, for appellant; Parkers, agents for Hooper & Michelmore, Newton Abbott, for respondent.

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## [IN THE EXCHEQUER DIVISION.]

1879. } GREGSON (appellant) *v.* POTTER  
March 21. } AND OTHERS (respondents).

*Toll—Pier Act—Exhibition of Tolls on a Board—10 Geo. 4. c. xlix.*

*Where a Pier Act requires the exhibition on a board of "the duties for the time being authorised to be taken as therein-before mentioned," and supplies a schedule of maximum tolls, but allows their being reduced and raised again by resolution of the proprietors, it is not enough for the board to contain the schedule, but it must exhibit the tolls as at the time in question fixed by resolution.*

CASE stated under 20 & 21 Vict. c. 43 by justices of the peace for the county of Essex, upon an information preferred by the appellant, clerk to the Southend Local Board, against the respondents, charging that the respondents, on the 8th of August, 1878, unlawfully resisted one Chignell in the execution of 10 Geo. 4. c. xlix., an Act for making and maintaining a pier at Southend.

On the 8th of August two barges were loaded at the pier, within the limits of the Act, with bricks from a brickfield, of which the respondent Potter was foreman. Chignell being the officer duly appointed by the Local Board, demanded duty at the rate of one shilling per thousand bricks, which the masters of the vessels, by Potter's direction, refused to pay, tendering ninepence per thousand. Chignell refused to accept the sum tendered, and after reading to the respondents section 96 of the Act, proceeded to distrain for the sum demanded, when the respondents and others, acting under Potter's orders, forcibly resisted and prevented the levy, but without unnecessary violence.

By the Act, 10 Geo. 4. c. xlix., "The Southend Pier Company" was formed for the purposes of the Act, and by section 85, after the completion of the works, "every master of every ship, vessel, boat or other craft who shall lade or unlade any goods, wares or merchandise shall pay to the said company the several rates or duties mentioned in the first schedule hereunto annexed set down in

*Gregon v. Potter, Exch.*

figures against the same respectively; and every such master, being an alien or merchant stranger, shall pay double the rates of a subject of the United Kingdom." The first schedule contains, *inter alia*, the following item:—"For every 1,000 bricks...0l. 2s. 0d."

By section 95, "The said company shall from time to time cause to be painted on boards, and affixed and stuck up, and continued and renewed as often as the same shall be obliterated or defaced, upon a conspicuous place or conspicuous places in or near the said proposed pier or piers, jetty or jetties, causeway or causeways, in large and legible characters, a list of the several rates or duties for the time being authorised to be taken, as hereinbefore is mentioned, in respect of the said proposed pier or piers, jetty or jetties, and causeway or causeways. And it shall not be legal for the said company to demand or take, or cause to be demanded or taken, any of the rates or duties hereinbefore mentioned to be taken in respect of the said proposed pier or piers, jetty or jetties, causeway or causeways, but during such time as the board, so painted as aforesaid, shall remain fixed as aforesaid."

By section 96, "It shall and may be lawful for the treasurer, collector or collectors, or any other person or persons authorised and deputed by the said company, to go on board any ship or other vessel to demand, collect and receive the said duties and rates by this Act due and payable, and for non-payment thereof to take and distrain every such ship or vessel, and all her tackle, apparel and furniture thereunto belonging, or any part thereof, and the same to detain and keep until he or they be satisfied, and paid the same rates and duties."

By section 126, "In case any person or persons shall resist or make forcible opposition against any person or persons employed in the due execution of this Act, . . . every person shall for every such offence forfeit and pay any sum not exceeding 5l."

By section 130, "The said company shall have full power from time to time, at any annual or special general meeting,

to lower or reduce all or any of the tolls and duties hereby granted, but no reduction of any such tolls or duties shall be made or take place unless a majority of the proprietors present at such general meeting as hereinbefore directed shall assent thereto; and it shall be lawful for the said company in like manner again to raise the said tolls to such sum or sums as they shall think proper, not exceeding the sums hereby authorised to be taken."

By section 3 of the Southend Local Board Act, 1875, the local board were empowered to purchase the pier and undertaking of the Southend Pier Company, and by section 4, after the purchase, might exercise all the rights and powers of the Pier Company, and whatever might have been done by the company at a meeting, general or special, might be done by the local board in their ordinary course of proceeding.

The pier had been duly constructed as required by the Pier Company's Act, and the purchase by the Southend Local Board had been completed in the year 1875. A board with a table of rates or duties corresponding to the first schedule of the Pier Company's Act had been placed, and at the date of the alleged offence remained affixed near the pier, and in such table the rate or duty on bricks was stated to be 2s. per 1,000. Since the erection of the board the rate on bricks had been several times altered under the authority of section 130 of the company's Act, being at one time 1l. per barge load, afterwards 9d. per 1,000 bricks, and by resolution of the local board, duly passed shortly before the offence charged, raised to 1s. per 1,000 bricks. No board painted with such altered rates or duties had ever been affixed pursuant to section 95 of the Companies Acts, and no public notice, by placard or otherwise, was given of the raising of the rate or duty on bricks from 9d. to 1s. per 1,000, but the before-mentioned board, painted with the original rate or duty of 2s. per 1,000, still remained affixed near the pier, and was the only board purporting to contain any notice of the rates or duties payable under the Act.

*Gregson v. Potter, Exch.*

The justices dismissed the information and submitted for the decision of the Court the questions of law: First—Was the maintenance of the board on which was painted a list of the rates or duties originally authorised by the Company's Act, without any notice of the alterations from time to time made being affixed, a sufficient compliance with section 95 of the Company's Act? Second—Was the officer of the Board, in demanding and attempting to levy the altered rate or duty, under the circumstances stated, employed in the due execution of the Act, and entitled to the protection of the 126th section?

*Henry Matthews (E. Pollock with him)*, for the appellant.—The magistrates ought to have convicted, as the notice board had on it all that is required by section 95 of the Pier Company's Act. The "duties authorised to be taken as hereinbefore is mentioned" are the duties mentioned in section 85 and the schedule thereto. The ground for the opposite contention is that the words "from time to time" imply that if the company reduce the rates below the maximum allowed, the reduction must be notified. But these words are satisfied by section 86, by which authority is given by an Order in Council to reduce the rates payable by foreigners referred to in section 85. If such Order in Council had been made, the reduction ought to have appeared on the board; but no such order has been made. The words "duly authorised to be taken" occur again in section 130, referring to the tolls mentioned in the schedule. It would be most inconvenient and embarrassing if the Local Board were obliged to alter the notice every time a single alteration was made, because if the board is wrong in one respect none of the other tolls can be levied. Moreover, if the decision be adverse to the appellant, all the tolls taken have been illegally exacted, and can be recovered from the Local Board as money had and received. The decision of this case against the appellant will compel railway companies to alter their boards from time to time. The words of the Railway Clauses Act (8 Vict. c. 20) are very similar: "A list of all tolls

authorised by the special Act to be taken shall be published by the same being painted on a board," &c. The provision is penal, having the effect of forfeiting the Board's right to recover tolls, and must be strictly interpreted.

*S. Prentice (with him Channell)* was not called upon to argue.

*KELLY, C.B.*—The Railway Acts raise a totally different case from the present, and it is useless to refer to them. No one, I think, after reading this Act of Parliament, can come to any other conclusion than that arrived at by the magistrates. In spite of the ingenious argument we have heard there is nothing in the section calculated to raise a doubt. The tolls authorised to be taken for the time being are to appear on the board. For what purpose is this intended? That those who do not know what the tolls are, including foreigners, may learn what they are, and that they may not pay more than they ought. It is intended for those who demand the toll, and above all for those who have to pay it. This purpose is not carried out by publishing the maximum tolls allowed by the Act of Parliament, when the actual tolls are altogether different.

*HAWKINS, J.*—I am of the same opinion. There is no necessity for us to reject either the words "as hereinbefore authorised" or "from time to time." They refer to the maximum tolls authorised by the Act, subject to their being reduced by resolution of the board. I do not think, with reference to one argument used, that the failure to give notice of an alteration in one toll payable would affect the right to take others.

*Decision affirmed.*

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Solicitors—Austen, De Gex & Harding, agents for W. Gregson, Rochford, Essex, for appellant; Digby & Jones, agents for Digby & Evans, Maldon, for respondents.

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## [IN THE COMMON PLEAS DIVISION.]

1879. } STANANOUGH (appellant) v.  
March 14. } HAZELDINE (respondent).

*Municipal Election—Ballot Act, 1872 (35 & 36 Vict. c. 33), s. 4—Infringement of Secrecy—Communication—Means of Knowing.*

The 4th section of the Ballot Act, 1872 (35 & 36 Vict. c. 33), makes it an offence punishable on summary conviction for an agent at a polling station to communicate before the poll is closed to any person any information as to the name or number on the register of voters of any elector who has applied for a ballot paper or voted at that station:—

Held, that in order to justify a conviction of such an offence under that section, it must be shown that the information reached the mind of the person to whom it is communicated, and it is not enough to shew that such person had the means of knowing it.

Therefore, that where the evidence was only that the agent had during a municipal election gone from the polling station to the committee room of the candidate for whom he was agent, and had there left his part of the burgess roll on which he had put a mark against the name of every voter who had obtained a ballot paper, but did not shew that any one there had looked into such part of the burgess roll, or had in fact obtained any information from it, the Court held there was no evidence on which a magistrate ought to convict the agent under the said 4th section.

CASE stated by the police magistrate of the borough of Liverpool, under 20 & 21 Vict. c. 43.

On the 6th day of November, 1878, the appellant laid an information before the said magistrate against the respondent, of which the following is a copy:—

“Borough of Liverpool to wit.

“Be it remembered, that on the sixth day of November, in the year of our Lord, 1878, at Liverpool, in the borough aforesaid, in the county of Lancaster, Joseph Stananought, at Liverpool aforesaid, cometh before me, the undersigned, one of Her Majesty’s justices of the peace in and for the said borough of Liverpool, and informeth me, the said justice, that Francis

Hazeldine, on the first day of November instant, at the borough of Liverpool aforesaid, being a personating agent duly appointed and in attendance at a certain polling station in connection with the municipal election for a town councillor for St. Anne Street Ward in the said borough, did not then and there maintain and aid in maintaining the secrecy of the voting in such station, but did then and there communicate, without it being for some purpose authorised by law, before the poll was closed, to a certain person or persons, certain information as to the names and numbers on the register of voters of certain electors who had and had not applied for ballot papers or voted at that station, contrary to the form of the statute in such case made and provided.”

On the 19th day of November, 1878, the said information came on to be heard before the said magistrate, when both parties appeared before him.

The complaint arose under the Ballot Act, 1872 (35 & 36 Vict. c. 33), the 4th section of which enacts as follows:—

“Every officer, clerk and agent in attendance at a polling station shall maintain and aid in maintaining the secrecy of the voting in such station, and shall not communicate, except for some purpose authorised by law, before the poll is closed, to any person, any information as to the name or number on the register of voters of any elector who has or has not applied for a ballot paper or voted at that station, or as to the official mark; and no such officer, clerk or agent, and no person whosoever, shall interfere with or attempt to interfere with a voter when marking his vote, or otherwise attempt to obtain in the polling station information as to the candidate for whom any voter in such station is about to vote or has voted, or communicate at any time to any person any information obtained in a polling station as to the candidate for whom any voter in such station is about to vote or has voted, or as to the number on the back of the ballot paper given to any voter at such station. Every officer, clerk and agent in attendance at the counting of the votes shall maintain and aid in maintaining the secrecy of the

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voting, and shall not attempt to ascertain at such counting the number on the back of any ballot paper, or communicate any information obtained at such counting as to the candidate for whom any vote is given in any particular ballot paper.

"No person shall directly or indirectly induce any voter to display his ballot paper after he shall have marked the same so as to make known to any person the name of the candidate for or against whom he has so marked his vote. Every person who acts in contravention of the provisions of this section shall be liable on summary conviction before two justices of the peace to imprisonment for any term not exceeding six months, with or without hard labour."

On the hearing of the information it was proved that on the 1st of November, 1878, there was an election for a councillor for the St. Anne Street Ward in the said borough, the vacancy being caused by Mr. Ronald McDougall's term of office having, pursuant to the Municipal Corporation Act, 1835, expired by effluxion of time upon that day.

The candidates at such election were the said Ronald McDougall and Thomas Hayes Sheen.

Pursuant to the 85th section of the 6 & 7 Vict. c. 18, personating agents were appointed by each candidate, and amongst these the respondent was appointed personating agent for Mr. Thomas Hayes Sheen, and notice of his appointment was duly given to the returning officer.

The respondent made the declaration of secrecy required by rule 54 in the first schedule to the Ballot Act, 1872, except that section 4 of this Act was not read over to him by the justice who took his declaration, which the note to the form of such declaration in the second schedule to the Act states must be done.

The appellant was duly appointed and declared to act as presiding officer at the polling station in which the respondent acted as personating agent.

The appellant deposed that he acted as presiding officer on the occasion, that he saw the respondent with a part of the burgess roll in his hand, and that he (the respondent) put a tick opposite the name of every voter when he obtained a ballot

paper. Between two and three o'clock in the afternoon he noticed that the respondent had left the booth without his, the appellant's, permission. He also noticed that the respondent's part of the burgess roll was not upon the table where he had placed it on one or two occasions on which he had left his seat in the polling station. The respondent returned in about a quarter of an hour after the appellant had missed him. On being asked by Mr. Stananought where his part of the burgess roll was, he replied that he was not going to work for nothing, and as his committee had not supplied him with any refreshment, he had given up his part of the burgess roll to them. The appellant told him he had done very wrong, and had committed an offence under the Ballot Act. The appellant also told him he could not remain in the booth, and he left. The respondent had been in attendance at the polling station from nine o'clock in the morning until the time he left the station as aforesaid, and had not been supplied with any refreshment during that time.

The fact that the respondent left the part of the burgess roll in the committee room of the candidate by whom he was employed was admitted by his solicitor.

The matters mentioned in this paragraph took place before the close of the poll.

On the part of the respondent it was contended, first, that the information contained two offences, and was therefore bad under the 10th section of the 11 & 12 Vict. c. 43, which provides that every information shall be for one offence only, and not for two or more offences. This objection the magistrate overruled on the ground that there was really only one offence charged, namely, that of communicating before the poll was closed to some person information as to the names or numbers on the register of voters of certain electors who had or had not applied for ballot papers. The respondent's solicitor then contended that the appellant had no authority or power to lay the information, contending that his powers were limited to matters arising within the polling station, and that the information should have been laid by the alderman of

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the ward. The magistrate overruled this objection, as the Ballot Act does not contain any directions as to the persons by whom the information for the offences under it should be laid.

The respondent's solicitor then contended as follows:—"The question is whether any offence has been committed under the 4th section. The object of this section is to prevent other persons becoming acquainted with the proceedings in a polling station. Now what does this man do? According to the evidence all he does is this. He takes a book (it has not been produced to us) out of a polling station and leaves it at a committee room. That is not communicating to persons information. To communicate information he must impart it to some person capable of understanding it. If he had whispered into the ear of a deaf man something that had taken place, that would not have been a communication. There must be a communication from one man's mind to another man's mind, so that the man may comprehend what has been done. There was no communication made by the defendant to any other person as required by the Act of Parliament to constitute an offence." The respondent's solicitor denied that the book referred to had been looked into or any information obtained therefrom by any person, but called no witness upon this or any other point.

The respondent's solicitor also contended that, as the magistrate did not read over the 4th section of the Ballot Act to the respondent at the time that he made the declaration of secrecy, the appointment of the respondent was informal and he could not be convicted. The magistrate was of opinion that upon the facts proved before him, the respondent had violated the 4th section of the Ballot Act, but he considered this last objection fatal, and he dismissed the information.

The following questions of law were submitted to the Court:—

1. Whether the information was bad for containing two offences?

2. Whether the information should have been laid by the alderman of the ward instead of by the appellant?

3. Whether it was necessary to prove that the respondent communicated in-

formation as to the persons who had or had not applied for ballot papers to some individual person or persons? and

4. Whether it was necessary, in order that a conviction should take place under the Act, that the declaration of secrecy should be read over to the personating agent by the magistrate?

*R. S. Wright*, for the appellant.—The magistrate was right in deciding that the information did not contain two offences. There is only one offence in fact charged, namely, that of communicating information contrary to the Ballot Act, and therefore the 10th section of Jervis's Act, 11 & 12 Vict. c. 43, does not apply. By 19 Geo. 2. c. 21, a penalty is imposed on any person who "shall profanely curse or swear, and be thereof convicted," and it was held in *The Queen v. Scott* (1), that the using several oaths on one and the same occasion is one offence only, and therefore not within the 10th section of Jervis's Act. So in *Onley v. Gee* (2), an information, laying the offence of keeping a betting house on a certain day which was named, "and on divers other days," was held good, notwithstanding 11 & 12 Vict. c. 43. s. 10. With regard to the second point, there is nothing in the Ballot Act which requires the information for an offence under it to be laid by any particular person. The offence is against public policy, and the information may therefore be laid by anyone—*Cole v. Coulton* (3). The third point raises the question whether it was necessary to shew that the book, in which was entered the names of those who had voted, had been opened and read by anyone in the committee room of one of the candidates. No evidence was given by the respondent to shew that it had not been read, and the magistrate having found that, in his opinion, the 4th section of the Ballot Act had been violated, the question for the Court is only whether, on the evidence, it was impossible for the magistrate to find, as he has, that the respondent did communicate information contrary to the Act

(1) 4 B. & S. 368; s. c. 33 Law J. Rep. M.C. 15.

(2) 30 Law J. Rep. M.C. 222.

(3) 29 Law J. Rep. M.C. 125.

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It is not necessary to shew to which individual member of the committee the information was communicated, nor to shew that it penetrated the mind of somebody. It is enough to make it an offence within the 4th section of the Act if the means of having the information were placed by the offender within the reach of anyone, whether such person availed himself or not of those means.

[The Court having intimated that they were against the appellant on this point, it became unnecessary to argue the fourth point, on which alone the magistrate had decided against the appellant.]

*Fullarton*, for the respondent, was not called on to argue.

BRAMWELL, L.J.—Our judgment must, I think, be for the respondent. As at present advised, I am inclined to think that a double offence is stated in the information, but as I am not clear on this point I state it with some reserve. It seems to me that the 4th section of the Ballot Act, 1872, refers to the actual voting; if it does, then maintaining the secrecy of the voting, is different from not communicating any information as to the names or number of those who have applied for ballot papers, or voted, and therefore I am not sure that the information in this case does not allege a double offence; but it is not necessary to determine this, for granted that it does not do so, there is the third question, viz., whether the respondent had communicated information to anyone contrary to the provisions of the 4th section, and I do not think he had done so. It is not enough, in my opinion, to give the means of knowing, for I do not think there is any communication until it has reached the mind of the person communicated with. It would, I think, have been sufficient for a conviction to have shewn that after the book had been taken into the committee room, several of the persons there had looked into it, without specifying who in particular had done so. But, in default of the proof to the contrary, it might well be presumed that the members of the committee acted as right-minded men would have done, namely,

shut up the book, and refused to look at it. Therefore there was no evidence to shew that the respondent had communicated the information contained in the book to anyone, and, in my opinion, it was not a case on which the magistrate ought to have convicted. Then ought we to send the case back to the magistrate to re-state it? I think not, for I think it was not intended to ask us whether it was necessary to identify any particular individual to whom the communication had been made, but that what the magistrate meant was to raise the question whether it must be shewn that the intelligence had reached the mind of the person communicated with; and therefore, if the case were sent back, there would not be any substantial alteration made in it, and, consequently, it would be useless to send it back. In order to communicate information within the meaning of the Act there must, I think, be a common knowledge in the mind of the person communicating and of the person to whom it is communicated.

LOPES, J.—I entirely agree.

*Appeal dismissed.*

Solicitors—F. Venn & Son, agents for the Town Clerk of Liverpool, for appellant; W. W. Wynne, agent for J. P. Harris, Liverpool, for respondent.

## [IN THE COMMON PLEAS DIVISION.]

1879. } DAVIS (*appellant*) v. BROWNE  
Mar. 14. } (*respondent*).

*Highway*—*Locomotive on Highway*—*28 & 29 Vict. c. 83. s. 3—41 & 42 Vict. c. 77. s. 29—Person preceding Locomotive on Foot.*

*The 3rd section of 28 & 29 Vict. c. 83, which, as amended by 41 & 42 Vict. c. 77. s. 29, requires one of the three persons employed to conduct a steam locomotive on a public highway to precede such locomotive on foot by twenty yards, and in case of need to assist horses or carriages drawn by*



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*horses, in passing the same, is not the less complied with because such person, whilst preceding the locomotive on foot, leads a horse and cart of his own.*

CASE stated, under 20 & 21 Vict. c. 43, by the justices for the parts of Kesteven, in Lincolnshire. The following are the material facts as stated in the Case:—

At a Petty Sessions, held at Bourne, in and for the said parts on the 10th of October, 1878, the said justices heard and determined a complaint by the respondent preferred against the appellant, that the appellant, on the 25th of September, 1878, at the parish of Careby, in the said parts, then being the driver of a certain locomotive engine on a highway there situate, unlawfully had not any person preceding such engine by at least twenty yards on foot, contrary to the statute.

It was proved before the said justices by the evidence of a police-constable as follows:—

That on the 25th of September, 1878, a locomotive engine was seen by him travelling in the daytime upon a public highway in the parish of Careby aforesaid, and that the appellant was the driver of such engine, and that another man was with and assisting him upon the engine.

That at about sixty yards preceding such engine was a third man, on foot, leading a pony, which was drawing an empty light cart, and upon such cart was a red and white pocket handkerchief by way of a flag, attached to a pole fastened to the said cart.

That the appellant, on being asked by the policeman if the said last-mentioned man was his signal-man, replied in the affirmative, and thereupon the policeman said that such man had no right to be in charge of a horse and cart. The appellant then added that they had come some distance to fetch the engine, and had brought the cart to ride in, and that if any accident occurred they would pay for it. The policeman said that there should be a flag and a person on foot not leading a horse and cart.

It was not proved in evidence before the said justices, or suggested, that any case arose in which horses and carriages

drawn by horses passing the said engine needed assistance.

At the close of the case for the complainant, the defendant's solicitor submitted that no offence had been proved against the appellant, and contended, *inter alia*, that there was (as the fact was) a person preceding the locomotive on foot by at least twenty yards, for the purpose of warning the riders and drivers of horses, and that if occasion for assistance, such as that contemplated by the last-mentioned section, had arisen, such person would, and that the justices were bound to assume, that he would have rendered the necessary assistance, and if he had done so, no offence under the Act would have been committed. That had a case of need occurred, and proper assistance not have been given by such man, then and then only under the circumstances would an offence have been committed. That the fact of a man leading a horse did not cause him the less to be a person complying with the said 29th section of the Act 41 & 42 Vict. c. 77.

It appeared to the justices that a person necessarily engaged in attending to his own horse and cart was certainly unable to comply with the said 29th section of 41 & 42 Vict. c. 77, since he could not render the assistance mentioned in this section of the Act, without himself committing a breach of the law, by leaving his own horse and cart on the highway beyond his control, and the said justices were of opinion that it could not be said that three persons were employed "to drive or conduct the locomotive" whilst one of them was engaged in leading a horse attached to a cart. They therefore convicted the appellant of the offence with which he was charged, and sentenced him to pay a fine of 5s. and 11s. 6d. costs.

The question of law was, whether or not upon the evidence above stated, the said justices were justified in so convicting and fining the appellant.

*Graham*, for the appellant.—The conviction was under section 3. of 28 & 29 Vict. c. 83, and was for non-compliance with its provisions, as amended by 41 & 42 Vict. c. 77. s. 29, and one of

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the points taken before the justices, but which they overruled, was, that the appellant was only the driver, and not the owner of the locomotive, and that as driver only he was not liable to be convicted under that 3rd section. The substantial point, however, and upon which the opinion of the Court is especially desired is, whether the fact that one of the three persons employed with the locomotive led a horse attached to a cart, whilst walking in front of the engine, prevented him from being a person preceding the locomotive on foot, as required by the statute. The 3rd section of 28 & 29 Vict. c. 83, enacts that every locomotive propelled by steam on any public highway, shall be worked according to certain rules, *inter alia*, those stated in paragraph first and paragraph second of such section. Paragraph first states that, "at least three persons shall be employed to drive or conduct such locomotive," &c., and paragraph second states that "one of such persons, while any such locomotive is in motion, shall precede such locomotive on foot by not less than sixty yards, and shall carry a red flag constantly displayed, and shall warn the riders and drivers of horses of the approach of such locomotive, and shall signal the driver thereof, when it shall be necessary, to stop, and shall assist horses and carriages drawn by horses passing the same. This second paragraph of section 3 is repealed by 41 & 42 Vict. c. 77. s. 29, and the following is substituted for it, namely, "Secondly, one of such persons, while the locomotive is in motion, shall precede by at least twenty yards the locomotive on foot, and shall in case of need assist horses and carriages drawn by horses passing the same." The last enactment, therefore, reduces the distance from sixty to twenty yards, and omits the flag, and imposes the duty of giving assistance only in case of need. There is no reason why this person, who was on foot in front of the locomotive, was not quite as well able to give the assistance required by the Act, when he had the pony, as he would have been without it. It does not appear that the pony was not perfectly under his control, even when not held by him, so that in case of need

he could have safely left the pony on the road, or have taken it back to the locomotive and fastened it to the engine, or left it in charge of the appellant and the other man there while he went and assisted any other horse or carriage in passing the locomotive. The case of *Morris v. Jeffries* (1) is an instance of horses, while grazing on the side of a turnpike road four or five yards from the person in charge of them, being deemed to be under the control of such person, and, therefore, not liable to be impounded under 4 Geo. 4 c. 95. s. 75, as being horses found "wandering, straying or lying about" the road within the meaning of that enactment.

No one appeared for the respondent.

BRAMWELL, L.J.—This conviction cannot be sustained. There was a person who preceded the locomotive on foot by the prescribed distance, but the Act requires him in case of need to assist horses in passing the engine, and it was said that he could not do this because, if he did, he would have then to leave his own pony and cart on the highway unattended. I do not think that that consequence would necessarily follow, as he might, as Mr. Graham suggested, take it back to the locomotive, and give it in charge of one of his men there, or do many other things with it without leaving it unattended or beyond his control. The conviction, therefore, must be quashed on its merits.

LOPES, J., concurred.

*Conviction quashed.*

Solicitors—Whyte, Collison & Pritchard, agents for J. E. Atter, Stamford, for appellant.

(1) 35 Law J. Rep. M.C. 143; s. c. Law Rep. 1 Q.B. 261.

[IN THE QUEEN'S BENCH DIVISION.]

1879. } TOMLINSON (appellant) v.  
March 25, 27. } BULLOCK (respondent).

*Bastardy*—35 & 36 Vict. c. 65. s. 3—  
*Application of Statute to Children born*  
*"after passing of Act"*—*Order for Main-*  
*tenance*—*Birth the same day as the passing*  
*of Act.*

*Where an Act comes into operation on a*  
*given day, it becomes law as soon as the*  
*day commences.*

*By the Bastardy Laws Amendment Act,*  
*1872 (35 & 36 Vict. c. 65), s. 3, any single*  
*woman who may be delivered of a bastard*  
*child "after the passing of the Act" may*  
*apply to a justice for a summons to be*  
*served on the man alleged to be the father*  
*of the child, &c.*

*A child was born on the 10th of August,*  
*1872, being the day on which the 35 & 36*  
*Vict. c. 65, received the royal assent:—*  
*Held, that such child was born "after the*  
*passing of the Act," which in contemplation*  
*of law took place as soon as the clock began*  
*to strike twelve on the previous night.*

This was an appeal from the decision  
of justices, dismissing an application for  
an order made under the Bastardy Acts.  
The facts and arguments sufficiently ap-  
pear in the judgment of the Court.

*Lockwood*, for the appellant.

*Charles Crompton*, for the respondent.

*Our. adv. vult.*

The judgment of the Court (1) was (on  
March 27), delivered by

LUSH, J.—The application was made on  
the 5th of September, 1872, but, by rea-  
son of the absence of the respondent from  
England, the summons was not taken out  
till the 26th of July, 1878. It appeared  
on the hearing that the child was born on  
the 10th of August, 1872, being the day  
on which the 35 & 36 Vict. c. 65, received  
the Royal assent. That Act, which came  
into operation immediately on its passing,  
repealed the 7 & 8 Vict. c. 101, and en-  
acted other provisions in lieu thereof.  
The 3rd section enacts that "any single

woman who may be delivered of a bastard  
child *after the passing of this Act* may,  
either before the birth, or at any time  
within twelve months from the birth of  
the child; or at any time thereafter, upon  
proof that the man alleged to be the  
father of such child has, within twelve  
months past after the birth of such child,  
paid money for its maintenance, or at any  
time within the twelve months next after  
the return to England of the man alleged  
to be the father of such child, upon proof  
that he ceased to reside in England within  
the twelve months past the birth of such  
child, make application," &c.

The repealing clause excepted anything  
theretofore duly done under the repealed  
Act, and kept the latter Act alive, for the  
purpose of supporting and continuing any  
proceedings taken before the passing of  
the Act in question, but it made no pro-  
vision as to children born before its  
passing, and in respect of which no pro-  
ceedings have been taken. Consequently,  
the mother of a child born on the 9th of  
August, 1872, had no remedy under the  
Act then in force (the 7 & 8 Vict. c. 101),  
because that Act was repealed on the fol-  
lowing day, and no remedy under the  
repealed Act, because that applied only  
to children born after its passing.

To supply this defect another Act was  
passed at the commencement of the fol-  
lowing session, the Act 36 Vict. c. 9. The  
3rd section of that Act enacts, that "any  
woman delivered of a bastard child on or  
before the 10th day of August, 1872 (the  
day on which the repealing Act was  
passed), who, but for the repeal by the  
last-mentioned Act, would have been en-  
titled to apply for a summons against the  
putative father of such child, shall be en-  
titled to apply for such summons as fol-  
lows:—

In any case in which she would have  
been entitled to apply at any time within  
twelve months from the birth of the  
child, she shall be entitled to apply at  
any time within six months past after the  
passing of this Act."

If the 7 & 8 Vict. c. 101 had not  
been repealed the applicant would have  
been entitled to apply for a summons  
within twelve months from the birth of  
the child. She might therefore have

(1) Mellor, J., and Lush, J.

*Tomlinson v. Bullock, Q.B.*

availed herself of the amending Act by applying within six months after its passing; but she did not do so; and although that Act in the 8th section rendered valid all orders made in respect of children born before the 10th of August, 1872, it says nothing of pending applications, nor does it say anything in respect of children born not before, but on the day on which the Act of 1872 passed.

It seems to have been assumed on all hands that a child born on the 10th of August was not within the Act of 1872, and the justices upon this assumption considered, as the applicant had not brought herself within the repealed Act of 1873, she had no *locus standi*. If this assumption were well founded we should be of opinion that the decision was right. That, we think, is an erroneous assumption.

At Common Law all statutes passed in a session of Parliament had relation back to the first day of the sessions, unless some other day was appointed for the Act coming into operation. This relation was productive of most serious consequences, many instances of which are to be found in the books. And in the thirty-third year of the reign of George the Third, an Act was passed (33 Geo. 3. c. 13) which required the clerks of the Parliaments to indorse on every Act, the day, month and year when the same received the Royal assent, and enacted that such indorsement should be taken as part of the Act, and should be the date of its commencement where no other commencement was provided.

The only point of time which this Act makes material is the day on which the Royal assent was given. It thus recognises the well-known maxim that the law takes no notice of fractions of a day, and excepting in cases where there are conflicting rights between subjects and subjects, for the determination of which it is necessary to ascertain the actual priority, such is the universal rule. An Act which comes into operation on a given day becomes law as soon as the day commences. By the operation of the repealing clause of the Act of 1872, the Act of 7 & 8 Vict. c. 101 was repealed,

and the new Act came into effect, at the first moment of the 10th of August, 1872. Every event which occurred during that day was, in contemplating law, an event which took place after the passing of the Act.

The same maxim as to time applies to the birth of a child. In computing the age of a person, the day and not the hour of his birth is required when no conflicting right is in question. A person born on the 3rd of September was held to be of age on the 2nd of September twenty-one years afterwards, without regard to the fractions of the days (1 Lord Raymond, 480), but, on the other hand, a fiction of law is not allowed to prevail against the plain intent of an Act. Now it is clear that the Act of 1872 was not intended to deprive the mother of a child born on the day in which it passed of all remedy against the putative father. It intended to substitute another remedy for that which it took away, and if that intent can be effectuated without violence to its language, our duty is so to construe the Act as to carry out that intent. We do no violence to its language by holding that a child born at any time during the 10th of August was born after the passing of the Act, which in contemplation of law took place as soon as the clock struck twelve on the night of the 9th of August.

We are therefore of opinion that the decision of the justices was erroneous, and we remit the case to them to be determined upon the merits.

*Case remitted.*

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Solicitors—G. B. Wheeler, agent for R. F. Thompson, Kendal, for appellant; T. J. & H. Backhouse Burnley, for respondent.

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[IN THE QUEEN'S BENCH DIVISION.]

1879. } BOYLE (*appellant*) v.  
March 27, 28. } HITCHMAN (*respondent*).

*Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), ss. 6, 13, 14, 17 and 20*—*"To the Prejudice of the Purchaser"*—*Purchase by Officer for Analysis.*

*Where an inspector duly appointed under section 13 of the Sale of Food and Drugs Act, 1875, purchased for analysis an article of food, and took the proceedings upon such analysis prescribed by the Act, and it was proved that the article so purchased was not of the nature, substance and quality of the article demanded by him, but an inferior article, though not known by him to be so at the time of the purchase,—Held, that it was a "sale to the prejudice of the purchaser" within section 6 of the Act.*

*Semble, per LUSH, J.—Section 6 is not limited to the case of an admixture of a foreign substance with the article demanded, but may apply where the article supplied is of a different and inferior quality from that demanded.*

*Davidson v. McLeod, in the Scotch Court of Justiciary, dissented from.*

CASE stated by Sir James Ingham, one of the Metropolitan police magistrates.

1. The respondent was on the 24th of September, 1878, duly summoned on the complaint of the appellant, under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), for that he, the said William Pitt Hitchman, of No. 5, Museum Street, in the parish of St. George, Bloomsbury, in the county of Middlesex, on Friday, the 13th of September, 1878, within the Metropolitan Police District, did sell to the prejudice of the said John Hoyle a certain article of food, to wit, milk, which was not of the nature, substance and quality of the article demanded by the said John Hoyle, contrary to the statute 38 & 39 Vict. c. 63.

2. On the 4th day of October last the case was heard by me, Sir James Ingham, the chief magistrate of the Police Courts of the metropolis.

3. The appellant was the Inspector of Nuisances of the Board of Works for the St. Giles's District, in the county of Middlesex, and was also the inspector duly

appointed under the 13th section of the Sale of Food and Drugs Act, 1875. He went on the 13th of September last to the respondent's shop and asked for half a pint of milk, and upon being told that the price was one penny farthing, he paid that sum out of money belonging to the said board, for which he had to account, and took possession of the milk.

Directly after the purchase was so completed he told the respondent's shopman that he was an Inspector of Nuisances, and an Inspector under the Sale of Food and Drugs Act, 1875, and that it was his intention to have the milk analysed by the Public Analyst, whom he named.

4. He then offered to divide the milk into three parts, and did in fact so divide it, and sealed up such parts, as required by the Act. One part he delivered to the shopman, and the remaining two parts he took away with him, and delivered one of them to Dr. Redwood, the Public Analyst, and produced the third part before me on the hearing of the case.

5. The milk so purchased was found by the Public Analyst to contain seventy-six parts milk and twenty-four parts water, which water had been added to the milk after it came from the cow.

6. On cross-examination by the respondent, the appellant stated that he was not prejudiced, and that no injury had been done to him personally.

7. The respondent submitted to me that no offence had been established under the 6th section of the Act, as the milk sold was not sold to the prejudice of the purchaser.

8. I found that the appellant demanded milk; that the article sold was not of the nature, substance and quality of the article demanded, as it was in fact milk and water and not milk; that the appellant at the time when he purchased the milk had no knowledge as to whether the milk which the respondent sold to him was adulterated or not; that no notice of any kind was given to him that the article sold was milk and water and not milk. Had the purchase in this case been by one of the ordinary customers of the respondent the offence mentioned in the Act would, in my judgment, have been committed.

*Hoyle v. Hitchman, Q.B.*

9. I, however, dismissed the summons, because I thought that although the appellant did not get the article he paid for, the sale was not, under the circumstances mentioned, a sale to the prejudice of the purchaser within the meaning of the Act, as the milk was purchased by an inspector for the purpose of analysis only.

10. The appellant duly required me in writing to state a case for the opinion of this Honourable Court, which I now do.

The question for the opinion of this Honourable Court is, whether I was right in point of law in dismissing the summons? If I was wrong, I pray this Honourable Court to remit the case to me, with its opinion thereon, so that I may impose such a fine as, under the circumstances of the case, I may deem just.

*Poland*, for the appellant.—The magistrate ought to have convicted. There was no question about the adulteration in fact, and he has found that the appellant did not know at the time he purchased the milk that it was adulterated. This is, therefore, quite different from *Sandys v. Small* (1), where the Court held that, if the purchaser knows that the article he buys is not of the nature, substance and quality demanded, but nevertheless buys it, he is not prejudiced within the meaning of the 6th section.

The Court then called on

*Morton Smith*, for the respondent.—The sale here was not to the prejudice of the appellant; he stated that no injury had been done to him personally. The section requires that in the case of articles adulterated, but not rendered by such adulteration injurious to health, the purchaser shall be proved to have been prejudiced; a distinction being by the insertion of these words pointedly drawn between the offence created by the 6th section and that under sections 3 and 4. The inspector bought the milk with public money, and he could not be prejudiced. He had not to pay for, and he did not wish to consume the milk. These words did not occur in the older Act, and were intentionally inserted, and must have

some effect given to them. The appellants's contention is that the offence is complete upon proof of the fact of adulteration, but *Sandys v. Small* (1) shews that this is not the true construction. The case in the Court of Justiciary in Scotland has decided the very point—*Davidson v. McLeod* (2), where five Judges to two decided that an inspector purchasing for analysis is not a purchaser within section 6, so as to make the sale to him of an adulterated sample a sale to his prejudice.

*Poland*, in reply, cited *Sandys v. Markham* (3).

MELLOR, J.—In this case, which was argued yesterday and the day before, we have to give judgment on an appeal from the decision of Sir James Ingham, the chief magistrate at Bow Street, on a question of what was an offence within the Sale of Food and Drugs Act, 1875, 38 & 39 Vict. c. 63. s. 6. Now it is material to consider what is the precise statement that the magistrate has made of the facts found by him, and in what respect they came short, in his opinion, of constituting the offence charged, as it seems to me that he has very much narrowed the matter left for our consideration. [The learned Judge then read section 6 and paragraphs 3 to 9 of the case, and proceeded.] Therefore, the only ground on which the magistrate decided to dismiss the summons was the fact elicited as an answer from the appellant, namely, "that he was not prejudiced, and that no injury had been done to him personally."

That seems to give rise to this question—Is the prejudice meant by the Act pecuniary prejudice? Such a reading of the Act would go far to nullify the beneficial effect of it; and if the words mean that the article must be bought with the purchaser's own money, I hardly see how an offence could be brought home to the seller. That consideration alone makes it most important to see that the

(1) 47 Law J. Rep. M.C. 115.

(2) Cases decided in the Court of Justiciary, 4th series, vol. v. part 22, p. 1.

(3) 41 J. P. 52.

*Hoyle v. Hitchman, Q.B.*

construction put on the Act is the right one.

As to authority, there is no case directly in point in the English Courts, but there are two bearing on the subject. One is *Sandys v. Markham* (3), heard before my brother Lush and myself. As that was sent back for further statement of fact it is not to be considered an authority; but my brother Lush does say this:—"If the purchaser does not get pure mustard, as he was entitled to, prejudice must be presumed." I must have concurred, as in the result we sent the case back to be re-stated, a course which would have been utterly useless if the point now made had been pressed upon us and had been agreed in.

Then there is another case—*Sandys v. Small* (1)—the argument of which suggested an observation of the Lord Chief Justice, by way of query, not as a dictum, when he asked whether, if the money with which the article was bought was not that of the purchaser, the sale would be to his prejudice? No answer was given to the question, and in the judgment of the Lord Chief Justice nothing is said which could be considered even as an intimation of his opinion in the negative, while it is very clear on the facts in that case on what ground the decision was given, namely, that the purchaser knew perfectly well what he was buying. There is nothing from beginning to end of the case to shew that either of us entertained an opinion that the contention now raised was one in which we acquiesced.

That being the state of the authorities in the English Courts, we were referred to an important case in the Scotch Courts, which was decided after hearing before seven Judges. Had the opinions of those seven Judges been uniform I should have felt most reluctant to pronounce an opinion of my own in conflict with theirs, and indeed I am not prepared to say that I think their conclusion in that case a wrong one on the facts of the particular case. They, however, divided the consideration of the case into two parts, the first question being, what was the nature of the adulteration struck at in the statute? On this some of the

Judges thought that, to constitute the offence, there must have been some admixture of a foreign substance in the article sold, and that mere weakness in the quality of the stuff was not sufficient. The majority thought that the clauses in section 6 were not disjunctive, but that all the elements stated in them must combine to constitute the offence; that is to say, that the article supplied must be of a different nature, of a different substance and of a different quality from that demanded. That is a point which I need not here decide, but if that were the only question to be discussed I should, as at present advised, be inclined to yield to the reasoning of the majority of the Scotch Court. But on the other point, what is the meaning of "to the prejudice of the purchaser," a great difference of opinion prevailed as to the answer to be given, and there were also great differences as to the reasoning on which the ultimate decision of the majority was founded, and the strength with which even the assenting members of the Court held the opinions they pronounced.

The Lord Justice Clerk on both points was of opinion that the sheriff was wrong, and, on the second, thought that the purchaser, to be prejudiced, within the meaning of section 6, "must be in the position that he *bona fide* desired the article to be of the nature, substance and quality which he demanded, and was prejudiced by not obtaining it." An inspector purchasing in order to obtain a conviction against the seller is therefore outside the definition given by the Lord Justice Clerk; but then he goes on to say, "I forbear to pursue this matter further. I am quite aware that the views which I have taken may make the future operation of the 6th section of the Act very difficult;" and this shews that the learned Judge thought that his judgment would in effect nullify the Act.

Then Lord Deas on this point says:—"I think that that is a very doubtful question, and, though I have formed an opinion on it, I hold that opinion with no great confidence." So that, as far as he is concerned, the authority cannot be cited as a very strong or decisive one. Without going through all the judg-

*Hoyle v. Hitchman, Q.B.*

ments, it is enough to say that, after four had held otherwise, two of the Judges agreed with the sheriff substitute that the sale had been to the prejudice of the purchaser within the section. Lord Craighill says:—"Pecuniary prejudice is not a condition prescribed by section 6 of the statute; prejudice—any prejudice, whatever it may be—is all that is required to entitle a purchaser to complain. And if an article has been supplied different in nature, substance and quality from that demanded, and is of an inferior nature, substance and quality, there is warrant for the conclusion that the delivery of such an article was, within the meaning of the statute, to the prejudice of the purchaser. There is, so far as I can see, no distinction between the case of a purchase by a private individual and that of a purchase by one of the public officers specified in section 13. The language of the statute referable to the one is the same as that referable to the other, and consequently, if it shall be decided that the purchaser in this case had not a title to complain, or could not be prejudiced, there cannot, in my judgment, be a good conviction under section 6, because all the requisite proceedings are statutory, and of these the procuring for analysis, the offer to the seller of a third of the article purchased, and the examination of another portion by the analyst, are steps which are expressly prescribed. This is my reading of the Act of Parliament. I think that arguments which would lead to a result virtually equivalent to a repeal of section 6 are presumably unsound, and anxious consideration of the case has led me to the conclusion that they are unsound." Lord Adam concurred in this judgment. Then the Lord Justice-General, in a judgment which carries great weight in favour of the view which we are prepared to take, says:—"In order to justify a conviction under section 6, it must be proved that the sale was to the prejudice of the purchaser. I am not prepared to lay down that it must be to his pecuniary prejudice. The words of the statute are, I think, sufficiently satisfied, provided there be prejudice of some kind, whether pecuniary or not."

I am therefore inclined to think that, in that diversity of opinion, and having regard to the expressions of the Judges to which I have alluded, the weight of authority is in favour of our construction of section 6; and with all respect to the Scotch Judges, I cannot admit that their judgment, as a whole, when carefully looked into, is a judgment against the construction I conceive to be the right one. That being so, I do not feel pressed by the weight of the actual decision in *Davidson v. McLeod* (2), as I might have done had the judgments and the reasoning been uniform; and it is open to us, in my opinion, to say what is the true construction of section 6 in relation to the facts of the case now before us.

There is nothing in the section to limit its operation, as the words are general. Then I find, in sections 13, 14 and 17, express provisions that a public officer may compel the sale of any article for the very purpose of analysis, and in order to detect these offences of adulteration. Now, although the inspector acted under section 13 directly he had purchased the milk, yet at the moment of purchase we must look upon the transaction as a purchase by a private individual. But then, if a person at a shop ask for something and receives, as is found was the case here, an article with a foreign admixture in it, and not, therefore, of the nature, substance and quality demanded, what can it matter whether the money with which the article has been purchased is public money or not? The facts do necessarily prejudice the purchaser, and I cannot conceive that the statute meant otherwise. The object of the Act was to prevent fraud by the sale of articles of inferior quality; and the necessity of putting in the words now under discussion is this—that a purchaser might get an article not of the nature, substance and quality demanded, but a much better one, and it was requisite to provide against such a possibility.

Therefore, taking all these matters into consideration, and reading section 6 with sections 13, 14, and 17, I am satisfied that we should make the Act perfectly valueless, if, on the findings of the magistrate,



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we held that this offence was not complete within the true meaning of section 6. It is not less complete because the money was not the purchaser's own money, that is a matter wholly immaterial to the seller who commits the fraud. So that I am driven to the conclusion that the magistrate was wrong in saying that the offence was not complete because the money came from a public fund; and the appellant is entitled to succeed, and have the case remitted for the infliction of a penalty on the respondent.

LUSH, J.—The 6th section of this Act has unfortunately given rise to diversities of judicial opinion, which have had the effect of hindering the beneficial operation of the Act. The magistrate in this case had, no doubt, high authority for the view he took of the law. The Court of Justiciary in Scotland, and I believe other magistrates in England, either independently, or following the Scotch Court, had taken the same view. An impression also had gone abroad that the Lord Chief Justice had expressed a similar opinion in *Sandys v. Small* (1), although the only expression in the report bearing on the question is when the Lord Chief Justice says, that to hold that the mere fact of the article supplied being inferior to the demands satisfies the section, gives no substantial meaning to the words "to the prejudice of the purchaser."

But further, it was proved that in that case the purchaser did know what was the quality of the article which he was buying; and I quite agree in what was said in that case as to the purchaser knowingly buying the article; the judgment was not, therefore, upon the point now before us at all.

On the other hand, my brother Mellor and I considered this point, and we agreed in the case of *Sandys v. Markham* (3), that it was quite immaterial by whom the article proved to be adulterated was bought, for it is clear that if we had not so decided we should not have sent the case back to be restated.

Those are the only two cases in this country bearing on the question of the construction of this section; but our attention has been called to a case decided

in Scotland, and having a full report before me I have studied it carefully, and I am obliged to say that I am unable to concur in the reasons given by the majority of the Court in it for their decision.

I agree, if I may be allowed to say so, in the result at which they arrived. The article there complained of was cream; and cream has no standard quality, but varies in richness, according to the proportion of fat mixed with the other substances of milk, being, through all such variations, still genuine cream. Such a case cannot, I think, be within the Act at all. But here the article demanded was milk; and the article supplied was milk and water. It was therefore clearly within the Act, and the magistrate says, that if it had been bought by an ordinary customer the offence would have been complete. Then does it make any difference that the purchaser was an official, buying, not for consumption, but for analysis? The magistrate thought it did; and the Court of Justiciary in Scotland thought it did. I cannot at all concur in that view. What was the intention of that Act? Obviously to protect the public from the sale of adulterated articles; and to carry out the intention and raise the protection, the Act has a machinery providing for there being a buyer and an analysis of the article purchased by that buyer, and proceedings being taken on that analysis. Section 13 says that any inspector may procure any sample, and if he suspects the same to have been sold to him contrary to the provisions of the Act, shall submit the same to be analysed. Then, in section 14 are instructions what he is to do if he intends to proceed with the analysis, and section 17 makes the sale to him, on which the analysis and subsequent proceedings are founded, compulsory on the shopkeeper.

Now the inspector is authorised to do all this in the interests of the public, in order to find out what sort of article the shop supplies to its ordinary customers, and he is to go as a customer. Then what is he to do next? Section 20 explains. The inspector buys the article; he submits it to analysis, and if the analysis shews adulteration, he is authorised to proceed before a magistrate for re-

*Hoyle v. Hitchman, Q.B.*

covery of the penalties "imposed for such offence." What offence? Why the offence of selling to him. He is, therefore, the purchaser contemplated by section 6.

I cannot follow the reasoning which says that he is not the purchaser in the face of these words. The inspector is authorised in terms to prosecute the seller for that very act of selling to him. I observe that the Lord Justice Clerk says, that the 13th and 14th sections, the only ones which authorise the inspector to buy and analyse, do not apply to section 6; but there I do not agree. The purchase and analysis apply, no doubt, to sections 3 and 4, but they apply also to other cases not within sections 3 and 4, and the inspector is authorised to buy "any sample, article of food or drugs."

Then what is the meaning of "prejudice"? It cannot be pecuniary prejudice. It cannot be "prejudice" from taking unwholesome food, because the inspector does not intend to consume the article. The prejudice meant is, I think, the prejudice which the customers of the shop have sustained; and it is to find out that that the Act is aimed.

Some such qualifying words were necessary, as if omitted, though a purchaser might have paid for a second-rate article and been given a first-rate, yet the seller would have been liable to the penalty for not selling the very thing demanded.

This shows that the offence is, not in selling only a different thing, but the imposture of selling a worse thing. The official purchaser being thus made a customer for the purposes of the Act, I am led irresistibly to the conclusion that section 6, as well as sections 3 and 4, is intended to apply to the person authorised to buy for testing purposes, no less than to the ordinary customer.

I am anxious to guard against being thought to agree in the further construction which all the Scotch Judges have put on section 6, when they say that it only applies to the admixture of a foreign substance in the article demanded. That is a question which must, in our Courts, be decided when it arrives. There is, for instance, a great difference between Carolina and East India rice, and I am not prepared to say that to sell East India for

Carolina rice would not be an offence within section 6. I do not, however, decide this, but only throw it out, to guard against being thought to decide otherwise.

I am clearly of opinion, for these reasons, that in this case a conviction ought to have been made, and the case must be sent back to the magistrate, as he requests, for him to impose a suitable penalty.

*Judgment for appellant.*

Solicitors—J. H. Jones, for appellant; W. T. Ricketts, for respondent.

[CROWN CASE RESERVED.]

1878. }  
Nov. 16. } THE QUEEN v. TREADGOLD.\*

*Embezzlement—Venue—Jurisdiction.*

*It was the duty of the prisoner, a commercial traveller, to remit daily to his employers the moneys which he collected without reduction. The prisoner on the 1st and 2nd of March, 1878, collected at Newark two sums of money, which he did not remit or account for. There was no evidence that the prisoner returned to Grantham, where he resided, on either of those days. In the first week in April, one of his employers went to Grantham and saw the prisoner, and taxed him with receiving moneys and not accounting to them for them. The prisoner thereupon handed to his employer a list of moneys he had collected and not accounted for, including the above two sums. He was indicted and convicted at the borough of Grantham Quarter Sessions for embezzling the above two sums of money:—Held (MANISTY, J., dubitante), that there was no evidence of embezzlement within the borough of Grantham.*

CASE reserved by the Recorder of Grantham.

The prisoner was tried before me at the sessions held for the borough of Grant-

\* *Coram* Kelly, C.B.; Denman, J.; Lindley, J.; Manisty, J.; and Hawkins, J.

*The Queen v. Treadgold, C.C.B.*

ham on an indictment charging him with having in the borough of Grantham embezzled the several sums of 2*l.* 5*s.* and 6*l.* 11*s.* 6*d.* respectively, the property of Nathan Defries and another, his masters.

The prisoner was employed by the prosecutors as a commercial traveller under a written agreement, by which he was bound to remit daily, without any reduction whatsoever, any moneys collected by him on their account.

On the 1st and 2nd of March, 1878, the prisoner being then at Newark, in the course of his occupation as commercial traveller, received, on account of his masters, the sum of 2*l.* 5*s.* from one H. Slater, and the sum of 6*l.* 11*s.* 6*d.* from Thomas Edwards respectively. He never accounted to them for the money, or informed them that he had received it, except as hereafter stated. It was proved that the prisoner resided at Grantham, but there was no evidence to shew that he returned to Grantham on either of the days or at what time on the respective days he received the said several sums of money.

It was within the knowledge of the jury that Newark was 14½ miles from Grantham, and within easy access of it by train, although no formal proof was given of the fact.

In the first week in April Nathan Defries, one of the prisoner's employers, proceeded to Grantham and had an interview with the prisoner there, and on taxing him with receiving money on account of his employers, which he had not accounted for to them, the prisoner handed to the said Nathan Defries a list of amounts he had received, and not accounted for, in which list the two items of 2*l.* 5*s.* and 6*l.* 11*s.* 6*d.* appeared.

Upon the above facts it was contended on behalf of the prisoner that the indictment failed of proof, the embezzlement, if embezzlement there was, having been committed at Newark, in the county of Nottingham, where the money was received and appropriated by him, and not at Grantham, in the county of Lincoln.

On the part of the prosecution it was contended that the venue was well laid at Grantham, the offence having been commenced at Newark and completed at

Grantham, and that by virtue of the statute 7 & 8 Geo. 4. c. 64. s. 12, a person may be tried either in the county in which he began or that in which he completed the offence.

I overruled the objection, holding that as the prisoner lived at Grantham, but a short distance from Newark, that there was evidence from which the jury might infer that the prisoner would return home from Newark on the day he received the money, and that as it was his duty to remit daily the money he collected, the failure to do so was sufficient evidence of embezzlement, and I declined to withdraw the case from the jury. The prisoner was found guilty.

The question reserved is, whether under the circumstances above disclosed the venue was well laid in Grantham.

*W. J. Smith* appeared for the prisoner, and referred to *The Queen v. Rogers* (1), and *The Queen v. Murdock* (2).

No counsel appeared for the prosecution.

KELLY, C.B.—This conviction must be quashed. There was no evidence at all which shewed the completion of the offence of embezzlement at Grantham. It is quite consistent with the facts stated in the case that there was probably an act of embezzlement at Newark, but even that is not clear. The case states that the prisoner resided at Grantham, and that there was no evidence to shew that he returned to Grantham on either of the days he received the several sums of money. It further states that one of the prisoner's employers proceeded to Grantham, and had an interview with the prisoner, and taxed him with receiving moneys which he had not accounted for to them, and that the prisoner handed to him a list of amounts he had received and not accounted for, in which list the two items charged in the indictment appeared, and there the evidence stops. It is impossible to say on these facts that there

(1) 47 Law J. Rep. M.C. 11; s. c. Law Rep. 3 Q.B. D. 28.

(2) 2 Den. C.C. 298; s. c. 21 Law J. Rep. M.C. 22.

*The Queen v. Treadgold, C.C.R.*

was any evidence of embezzlement at Grantham.

DENMAN, J., and LINDLEY, J., concurred.

MANISTY, J.—I am not free from doubt, but my doubt is not sufficiently strong to justify me in differing from the rest of the Court.

HAWKINS, J., concurred.

*Conviction quashed.*

Solicitors—Routh, Stacey & Co., agents for Henry Thompson & Sons, Grantham, for prisoner.

*William - Ali 49 & 2 M. C. 48.  
Bartholomew - Priest 57 & 2 M. C. 64 & 2 M. C. 148.*

[IN THE QUEEN'S BENCH DIVISION.]

1879. } TAYLOR (*appellant*) v. GOOD-  
March 25. } WIN (*respondent*).

*Highway Act (5 & 6 Will. 4. c. 50),  
s. 78—Furious Driving of Carriage along  
Highway—Bicycle.*

*A bicycle is a "carriage," and the propulsion of it by means of a person seated on and carried by it is a "driving of a carriage" within 5 & 6 Will. 4. c. 50. s. 78.*

CASE stated by justices under 20 & 21 Vict. c. 43.

At a petty sessions holden at Highgate, the appellant was charged by the respondent, a police inspector, with unlawfully and furiously driving a carriage called a bicycle in a highway at Muswell Hill on the 8th of July, 1878, so as to endanger the lives and limbs of passengers thereon contrary to the provisions of 5 & 6 Will. 4. c. 50.

The evidence given on behalf of the respondent shewed that on the evening in question, at 8.15 p.m. the plaintiff was going down Muswell Hill at the rate of fourteen miles an hour on the roadway; that there were several passengers on the road, and that the appellant knocked down one of them with his bicycle.

The appellant gave proof that bicycles were introduced into this country in 1869, and contended that a bicycle was not a carriage within 5 & 6 Will. 4. c. 50. s. 78; and, further, that the Act applied only to carriages drawn by horses or other animals, but not to such as are automatic.

The justices being of opinion that the respondent was driving by propelling a bicycle on a highway at a furious rate so as to endanger the lives and limbs of passengers thereon, convicted the appellant.

The question for the decision of the Court was, whether a bicycle on which a person is seated, and which is driven by his propulsion, is a carriage within the meaning of 5 & 6 Will. 4. c. 50. s. 78, although it was not drawn by any animal, and had not been introduced at the time the Act was passed.

If the Court should be of opinion that this bicycle was a "carriage," and that the propulsion of it by means of the person seated on and carried by it was "a driving of a carriage" within the meaning of the statute the conviction was to be enforced; otherwise the complaint was to be dismissed.

Rose (Poyser with him), for the appellant.—The conviction was wrong. The appellant was not a "driver," neither was the bicycle a "carriage" within the meaning of 5 & 6 Will. 4. c. 50. s. 78. That statute enacts, *inter alia*, that "if any person riding any horse or beast, or driving any sort of carriage, shall ride or drive the same furiously so as to endanger the life or limb of any passenger; every person so offending in any of the cases aforesaid, and being convicted of any such offence, either by his own confession, the view of a justice, or by the oath of one or more credible witnesses, before any two justices of the peace, shall, in addition to any civil action to which he may make himself liable, for every such offence forfeit any sum not exceeding 5*l.*, in case such driver shall not be the owner of such waggon, cart or other carriage; and in case the offender be the owner of such waggon, cart or other carriage, then any sum not exceeding 10*l.*" Now

*Taylor v. Goodwin, Q.B.*

the appellant was not a driver at all. The term "drive" means driving a beast of some kind; "ride" is the proper word to use in connection with a bicycle. It has been decided that no conviction for "furious riding" can take place under this section because the application of the penalties is limited to persons driving their own, or other persons' carriages—*The Queen v. Bacon* (1), *coram Kelly, C.B.*

[*James Paterson, amicus curiæ.*—*The Queen v. Bacon* (1) has been overruled by *Williams v. Evans* (2).]

They also referred to the Highways and Locomotive Amendment Act, 1878, sect. 26, where the term "bicycle" is used as well as "carriage."

*Gorst (C. S. O. Bowen with him)*, for the respondent.—The term "carriage" is not restricted to vehicles with wheels. "Carriage" includes anything on which men or goods are carried; for instance, railway carriages or water carriages. So also a wheelbarrow may be a carriage. Then the word "drive" is simply an old English word signifying "to make move"; e.g., to drive an ox, to drive a steam-engine, to drive nails. So an engine driver is one who makes an engine move, and a carriage driver one who makes a carriage go.

*Rose* replied.

*MELLOR, J.*—I think that the question to be determined is a simple one, and that the magistrates have come to a right conclusion. The statute 5 & 6 Will. 4. c. 50. s. 78 is very general in its terms, and the words used are "any sort of carriage," the largest description that can be given of the term carriage. Now, though bicycles were not in vogue at the time when the Act passed, and could not, therefore, have been specially in the contemplation of the Legislature, I think the statute was intended to prohibit the improper use of any kind of carriage on highways which might endanger the safety of passengers. Is this then a carriage? I think that it is, and that the definition given by Mr. *Gorst* is a correct one. A carriage need not be necessarily on

wheels; for instance, it may be drawn as a sledge, so as to facilitate its use on a road. The word carriage is large enough to embrace a machine which gives a seat to a person on it, and, therefore, includes a bicycle. A bicycle is on wheels, and when motion is applied to it by a person guiding it, such person does all that is required, much the same indeed as a driver of an engine does to the machine he is guiding; the term driver, therefore, may be properly applied to a person who propels a bicycle. The respondent accordingly was in my judgment the driver of a carriage, and the justices were warranted under the circumstances in convicting him as such.

*LUSH, J.*—I also am of opinion that the justices were right in the conclusion at which they arrived. The mischief intended to be remedied by the Legislature was furious driving, that is to say, driving at such a rate of speed as would endanger the safety of other passengers. In my judgment it is utterly immaterial what the motive power is, so long as the lives of passengers are endangered. The Legislature, I think, intended to embrace all kinds of machines which would do the mischief intended to be provided against. Such a machine is a bicycle when it is driven at the rate of fourteen miles an hour in a populous district. Is it then a carriage? I think it is; it carried a rider and was impelled by means of the rider's feet. We are therefore only carrying out the intention of the Legislature when we hold that a bicycle is embraced within the very large words "every sort of carriage."

*Judgment for respondent.*

Solicitors—*S. F. Langham*, for appellant; the Solicitor to the Treasury, for respondent.

(1) 11 Cox C. O. 540.

(2) 35 Law Times N.S. 864.

[CROWN CASE RESERVED.]

1879. }  
 March 22. } THE QUEEN v. HERMANN.\*

*Coining—Uttering Counterfeit Coin—*  
 24 & 25 Vict. c. 99. s. 9.

*The 24 & 25 Vict. c. 99. s. 9, enacts that "whosoever shall tender, utter or put off any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, shall be guilty of a misdemeanour."*

*The prisoner uttered two coins which were or had been real sovereigns, coined at the Mint, but they had been fraudulently filed at the edges to such an extent as to reduce the weight by one twenty-fourth part. The effect of the filing was to remove the milling entirely, or almost entirely. In order to restore the appearance of the coins, a new milling had been made on each coin with tools:—*

*Held, per LORD COLERIDGE, C.J., POLLOCK, B., and HUDDLESTON, B. (dissentientibus LUSH, J., and STEPHEN, J.), that the coins were false and counterfeit within the meaning of the statute.*

CASE reserved by the Recorder of Liverpool.

The prisoner was convicted on an indictment under the 9th section of the Act 24 & 25 Vict. c. 99 (1), for uttering and putting off two false and counterfeit sovereigns, knowing them to be false and counterfeit.

The evidence of uttering and of guilty knowledge was complete. The question submitted to the Court was whether the coins which were uttered could properly be held to be false and counterfeit coins within the meaning of the statute. They were or had been real sovereigns coined at the Mint. They had been fraudulently filed at the edges to such an extent as to

reduce the weight by one twenty-fourth part. The effect of the filing was to remove the milling entirely or almost entirely. In order to restore the appearance of the coins a new milling had been made on each coin with tools. The Recorder held that this was a counterfeit milling, and that a coin upon which any part of the impression was counterfeit was a counterfeit coin. The prisoner had first been tried under the 4th section of the same Act, and acquitted for want of evidence that the act of lightening or diminishing had been done by himself.

No counsel appeared for the prisoner.

*Eyre Lloyd*, for the prosecution.—A coin upon which the milling has been removed, and a new milling placed, is a counterfeit coin within the meaning of the statute.

[HUDDLESTON, B.—The difficulty arises on the meaning of the words "false or counterfeit coin" in the interpretation clause (2).]

If there had not been a new milling put on, there would have been greater difficulty in contending that the coins became counterfeit, but the new milling is an act of imitation which renders the coins uttered spurious.

[POLLOCK, B.—In construing the words "resemble, or apparently intended to resemble," does it matter that the coin was once a genuine one?]

No. By removing the original milling the sovereign lost one of its essential attributes—weight; and if of less than the authorised weight it ceased by virtue of 33 Vict. c. 10. to be current coin, and therefore became false and counterfeit.

STEPHEN, J.—I am unable to arrive at the conclusion that there was in this case the uttering of a counterfeit coin within the meaning of the Act. The interpretation clause says that "the Queen's

(2) Section 1 enacts that the expression "false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin" shall include any of the current coin which shall have been gilt, silvered, washed, coloured or cased over, or in any manner altered so as to resemble or be apparently intended to resemble or pass for any of the Queen's current coin of a higher denomination."

\* *Coram* Lord Coleridge, C.J.; Lush, J.; Pollock, B.; Huddleston, B.; and Stephen, J.

(1) "Whosoever shall tender, utter or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, shall be guilty of a misdemeanour."

*The Queen v. Hermann, C.C.R.*

current coin shall include any coin coined in any of Her Majesty's mints, or lawfully current by virtue of any proclamation, &c." This piece of coin was certainly a gold coin coined at Her Majesty's mint and not a thing made in imitation of such a coin. Therefore, we start with the fact that it was a genuine coin, and the next thing that appears is that it had been fraudulently lightened in weight by filing off the edges and removing the milling. Whoever did so, committed an offence under section 4 of the Act, and whoever was in possession of any filings or clip-pings which have been produced or obtained by impairing, diminishing or lightening any of the Queen's current gold or silver coin was guilty of an offence under section 5. But I do not find any provision in the Act which makes a genuine coin which has been fraudulently lightened become a counterfeit coin, or makes a person who passes such a coin guilty of the offence of passing counterfeit coin. If a man had passed a coin, knowing that it had been fraudulently lightened, he would not have committed the offence of passing a counterfeit coin. Then, would a person by putting on a fresh milling for the purpose of concealing the fact that it had been so lightened, and of pretending that the coin was of full weight, be guilty of passing a counterfeit coin? The whole question is, does it thereby become a counterfeit coin within the meaning of the Act? I think that it does not. It seems to me that this was a genuine coin fraudulently lightened in such a manner as to conceal the fact that it had been fraudulently lightened, and that it was not a counterfeit coin within the meaning of the Act.

HUDDESTON, B.—I am of opinion that this conviction should be supported. The conviction was under the 9th section of the 24 & 25 Vict. c. 99, which makes it a misdemeanour to put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit. What the prisoner has been found guilty of is putting off a false or counterfeit coin resembling, or apparently in-

tended to resemble, a sovereign. The evidence was that almost the whole of the milling had been fraudulently removed from a gold coin, and when the milling had been removed that was a coin which no one was bound to take, and in my opinion it then was no longer the Queen's current gold coin. And then in order to make that coin pass for a current coin another milling was put on, so as to make it apparently resemble the Queen's current gold coin. That was an act done to make it resemble, or apparently to resemble, the Queen's current coin, and therefore was a counterfeit coin.

POLLOCK, B.—I also think that the prisoner was properly convicted. In dealing with section 9, I think it is sufficient to say that the section contains clear and precise language, without referring to the interpretation clause. I agree with my brother Huddleston that when the original milling was taken off for the purpose of deteriorating the sovereign, the coin ceased to be a sovereign; and taking that basis as a starting point, it seems to follow that it becomes something else; and then the putting on a new milling so as to make it pass for a genuine sovereign, appears to me to make it a counterfeit sovereign. A person having machinery might take off the milling from a great number of sovereigns and make a new milling so as to make them pass for the current gold coin of the realm. I have no doubt that that would be substantially putting off false or counterfeit coin, apparently intended to resemble the Queen's current gold coin, within the spirit and intention of the Act.

LUSH, J.—I am unable to agree with the majority of the Court. To hold the sovereigns in question to be counterfeit coins, would, in my opinion, be straining the word "counterfeit" beyond its legitimate meaning. Had there been nothing more done to the coins than filing off the original milling, and then passing them in that state, the prisoner could not have been guilty of uttering false and counterfeit coin, for they would still have been the Queen's current coin, though deficient in weight. The words "false and counterfeit coin" involve the idea of spurious imitation, and the interpretation

*The Queen v. Hermann, C.C.R.*

clause defines that "it shall include any of the current coin which shall have been gilt, silvered, washed, coloured or cased over, or in any manner altered so as to resemble, or be apparently intended to resemble, or pass for any of the Queen's current coin of a higher denomination." I take it that if a farthing had been gilded over so as to be apparently intended to resemble a sovereign, it would have been counterfeit coin within the meaning of that clause. Section 4 makes it penal to impair, diminish or lighten coin, with intent that it might pass for the Queen's current coin. The prisoner was tried and acquitted for an offence under that section. Another section (section 5) makes it an offence to have possession of any filings or clippings obtained by impairing, or diminishing, or lightening any of the Queen's current gold or silver coin, but there is no section which makes the attempt to pass clipped or lightened coin an offence where it is intended to pass for coin of the same denomination. I think that the mere cutting off of the original milling and putting on a new milling, as in the present case, is not sufficient to turn the coin into false or counterfeit coin within the meaning of the Act.

LORD COLERIDGE, C.J.—I am clearly of opinion that this case is within the meaning of the Act, and am content to rest my judgment on either of the two views. First, I say that the prisoner was guilty of passing a counterfeit sovereign. What he did was this: he filed off the milling from a genuine sovereign, and that being done, the sovereign, reduced below the proper weight, in my opinion ceased to be a genuine sovereign, he then made a new milling to it, and in that state passed it as a genuine sovereign. That, in my judgment, was putting off a counterfeit, resembling, or apparently intended to resemble, a genuine sovereign. That view may be wrong, however, and if so, I am content to rest my judgment on the ordinary sense of the word—"counterfeit," that is, imitation. By the act of the prisoner in removing the original milling and making the new milling, the coin was made to resemble and pass for a current sovereign, that is in my view a coun-

terfeit sovereign. The interpretation clause adds strength to this view; it says in plain language that "the expression false and counterfeit coin . . . shall include any of the current coin which shall have been gilt, silvered, washed, coloured or cased over, or in any manner altered so as to resemble, or be apparently intended to resemble, or pass for any of the Queen's current coin of a higher denomination." That is an inclusive, but by no means an exclusive or complete definition. I think the term counterfeit applies where anyone does anything which shall have the effect of making a coin which is no longer a genuine current coin pass for a genuine current coin. On either of the above views I think the conviction may be supported.

*Conviction affirmed.*

Solicitor—The Solicitor to the Treasury, for the prosecution.

*Pearson v. Hay, 50 L.J. 125.*  
*Southey v. Scott, 50 L.J. 57.*  
*Harley v. Austin, 50 L.J. 107.*  
 [IN THE QUEEN'S BENCH DIVISION.]  
 1879. } STACEY (appellant) v. LINTELL  
 March 28. } (respondent).

*Bastardy—35 & 36 Vict. c. 65 (Bastardy Laws Amendment Act, 1872), s. 3—"Single Woman"—Marriage of Mother after Birth of Child.*

*Davis v. Davis, 57 L.J. 134.*  
 To entitle a woman to apply under s. 3 of 35 & 36 Vict. c. 65, for a summons to be served on the man alleged by her to be the father of her child, she must at the date of such application be either unmarried or separated from her husband.

Where, therefore, a woman who, while single, had been delivered of a bastard child, subsequently married, and while living with her husband applied for an affiliation summons against the putative father,—Held, that the justices had no jurisdiction to hear the information.

This was a CASE stated by justices under 20 & 21 Vict. c. 43, for the opinion of the Court.

At a Petty Sessions for Chipping Wycombe an information was preferred



*Stacey v. Lintell, Q.B.*

under 35 & 36 Vict. c. 65. s. 3, by Sarah Stacey, formerly Sarah Cogdell, against Charles Lintell, charging him with being the father of her bastard child. Upon the hearing the justices dismissed the information and stated the following case:—

1. Upon the hearing of the said information and application it was proved that the appellant at the time of the birth of the child mentioned in the said information, namely, in January, 1876, was a single woman, and she deposed on oath that the respondent was the father of the said child, and that his wife, within twelve months next after the birth of the said child, paid her money, which the appellant considered was intended for its maintenance. In cross-examination it was admitted by the appellant and proved to our satisfaction that since the birth of the said child, but previous to the filing of the said information, namely, on the 6th of February, 1878, the appellant had intermarried with and become the wife of Edward Stacey, and was at the date of the said hearing the wife of the said Edward Stacey, and living with him as his wife.

2. It was therefore contended by Mr. Daniel Clark, the solicitor for the respondent, that the appellant was not a single woman within the meaning of s. 3 of 35 & 36 Vict. c. 65, and that an order to affiliate the said child could not under the circumstances before stated be made on her application. The following cases were referred to—namely, *The King v. Luffe* (1); *The Queen v. Collingwood* (2); *Ex parte Grimes* (3). The solicitor for the respondent contended that those cases were distinguished because there the woman was not living with her husband at the time the order was made, and, further, that the cases were decided on the ground that if an order could not be made the child would be unprovided for, and he pointed out that such would not be the case with regard to the child of the appellant, as by section 57 of 4 & 5

Will. 4. c. 76, the husband of the appellant would be liable to maintain it.

3. We, the said justices, in the absence of any decision as to the words "single woman" applying to a married woman living with her husband at the time of the application and hearing, dismissed the said information as before mentioned without going into further evidence as to the respondent being the father of the said child, or having paid monthly as alleged in the said information, on the ground that the appellant was not entitled to prefer the said information, or to obtain an order thereon, because she was a married woman and living with her husband at the time the said information was preferred and came on for hearing.

4. The question of law arising on the above statement for the opinion of the Court is, whether an order to affiliate the child named in the said information can be made on the application of the appellant, assuming that the paternity of the child can be proved by the mother and the necessary corroborative testimony can be given, and the payment by or on behalf of the alleged father of money for the child's maintenance within twelve months of its birth and before the marriage of the appellant can be proved to our satisfaction.

*Graham*, for the appellant.—The question is, whether the meaning of the section is that the woman must be single at the time she makes her application, or whether it is not sufficient that she be single at the time the child is born. It is quite clear that she could have obtained an order before her marriage, and such order would have continued good after and during her marriage. That being so, what difference does it make that she applies after marriage? The Act of 35 & 36 Vict. c. 65, repeals the old provision, rendering an affiliation order void on subsequent marriage of the woman. It was, therefore, intended by the Legislature that marriage should not affect the right to apply. This also disposes of any argument on section 57 of 4 & 5 Will. 4. c. 76, which makes the husband liable to maintain his wife's

(1) 8 East 193.

(2) 12 Q.B. Rep. 681; s. c. 17 Law J. Rep. M.C. 168.

(3) 2 E. & B. 546; s. c. 22 Law J. Rep. M.C. 163.

*Stacey v. Lintell, Q.B.*

bastard; for, as pointed out, where an order has been made before her marriage, the double liability undoubtedly exists. Under 7 & 8 Vict. c. 101, where the words were "a single woman," it has been held that a married woman may get an order—*The Queen v. Collingwood* (2); *The King v. Luffe* (1); *Ex parte Grimes* (3). The case of *Lang v. Spicer* (4), which will be relied on on the other side, has no application to an order made at the instance of the woman. In that case the order was for maintenance only so long as the child should be chargeable to the parish, and of course when the mother married, as her husband became liable to maintain the child, the order ceased to have effect in charging the putative father.

*Croome*, for the respondent.—The repeal of the provision in 7 & 8 Vict. c. 101, only restores the law to the state in which it was before that Act, and then the decision in *Lang v. Spicer* (4) is important as shewing that the Poor Law Act transferred the liability to the husband on the marriage of the woman, and that the marriage made any existing order inoperative. The ground of the decision in *The Queen v. Collingwood* (2) was that the married woman was living apart from her husband, and having by adultery forfeited her rights as a married woman was thrown back on her rights as a single woman. And in *Ex parte Grimes* (3), Lord Campbell put it on the ground that the child would otherwise be unprovided for.

*Graham*, in reply.—The 7 & 8 Vict. was passed while the Poor Law Act was in force; there was, therefore, direct reference to its provisions making the husband liable. But now that the present Act abstains from saying that the order shall cease on her marriage, it must be intended that the order shall be one to which the woman is entitled during her lifetime or during the youth of the child irrespective of her own marriage. The words (5) are satisfied by reading them

thus, "If as a single woman she has been delivered of a child she may apply."

MELLOP, J.—I think that the justices were right in this case in holding that the appellant did not come within the definition of a single woman. It appears to me that the reasoning in the case of *Lang v. Spicer* (4)—although this case is not actually governed by the decision there—shews us that we ought not to hold that a woman who is married at the time of her application for an order is within the contemplation of the 3rd section of 35 & 36 Vict. c. 65.

By her marriage her husband becomes liable to maintain her bastard child, and if she were at liberty also to apply and obtain an order against the putative father, there would be a double liability in reference to the maintenance of the same child.

The reason of the thing is thus against the argument of Mr. Graham founded upon the acts; but I think also that we are acting within the strict meaning of the words in the section. His Lordship then read section 3 of 35 & 36 Vict. c. 65.

I think that the intention is that the woman throughout should be a single woman, or at least that she should be so in the sense of those cases where a woman separated from her husband has been held to be a single woman for the purpose of obtaining an order of affiliation. Those cases, however, only shew that for the purposes of the Poor Law Acts a married woman might come within the provision, throwing the cost of the maintenance of the bastard of a single woman upon the putative father.

LUSH, J.—I am of the same opinion. The policy of the law is to assist the mother in maintaining the child, and to

this Act, may, either before the birth or at any time within twelve months from the birth of such child, or at any time thereafter upon proof that the man alleged to be the father of such child has within the twelve months next after the birth of such child paid money for its maintenance . . . make application to any one justice of the peace . . . for a summons to be served on the man alleged by her to be the father of the child."

(4) 1 Mee. & W. 129.; s. c. 5 Law J. Rep. M.C. 60.

(5) 35 & 36 Vict. c. 65. s. 3, "Any single woman who may be with child or who may be delivered of a bastard child after the passing of

*Stacey v. Lintell, Q.B.*

ensure that she shall not throw the cost of it upon the parish; and so the word single woman has received an interpretation which enables us to say that it does not necessarily mean "unmarried," but may include a woman separated from her husband who, during such separation, has had a bastard child, and who by such separation has been reduced as it were to the position of a single woman. But the woman here was living with her husband at the time of her application, and by section 57 of the Poor Law Act (4 & 5 Will. 4. c. 76), "Every man who shall marry a woman having a child at the time of such marriage shall be liable to maintain such child as part of his family." Therefore, as soon as the woman married, the child had a father, a person bound to maintain it. Now it has been observed that in the Act 7 & 8 Vict. c. 101, there was a proviso that no order for the maintenance of a bastard child should be of any force after the marriage of the mother, and that that proviso is purposely omitted in the later Act; whence it is to be inferred that the Legislature intended that her subsequent marriage should not invalidate the order. I, however, do not so read the Act. I think the effect is this, that the order does not now become *ipso facto* void upon the marriage of the woman, but if the order have been made while she was single, it may be continued after her marriage under the order of the justices until the child is thirteen; that is, whether she marries or not, the order may be kept alive and in force up to that time.

That is not this case. The question then is, when she applied was she in the position of a single woman? I think not; she was not, therefore, capable of applying, for to be within the Act she must be either single or separated from her husband.

*Appeal dismissed.*

Solicitors—King & McMillin, agents for James Batting, Great Marlow, for appellant; D. Clarke, High Wycombe, for respondent.

[IN THE QUEEN'S BENCH DIVISION.]

1879. { THE GUARDIANS OF THE HEREFORD UNION (appellants) v.  
March 1. { THE GUARDIANS OF THE WARWICK UNION (respondents).

*Poor Law—Divided Parishes Act (39 & 40 Vict. c. 61), s. 35—Derivative Settlement of Pauper Lunatic—Order of Removal.*

*A pauper born in 1840 in the appellant union, had never acquired a settlement in her own right. The pauper's father was born in the L. union, and he had never acquired a settlement elsewhere:—Held that the 35th section of 39 & 40 Vict. c. 61 was retrospective in its operation, and that therefore the pauper at the age of sixteen acquired her father's settlement which was a birth settlement and could be ascertained without inquiry into his derivative settlement.*

*The Guardians of the Westbury Union v. The Overseers of Barrow-in-Furness, 47 Law J. Rep. M.C. 79, followed.*

This was an appeal to the Quarter Sessions for the county of Warwick, by the Guardians of the Hereford Union against an order obtained by the Guardians of the Warwick Union, adjudicating the settlement of one Emma Jones, a pauper lunatic, to be in the appellant union. The sessions confirmed the order of removal, but stated the following case for the opinion of this Court:—

The pauper lunatic was born in the parish of St. John, Hereford, in the appellant union, in April, 1840, and was the lawful daughter of James and Ann Jones.

James Jones, the pauper's father, was born at Leominster in 1798, and acquired a settlement there by birth, but never acquired any settlement elsewhere.

The said pauper lunatic was never married, and had never done anything to acquire a settlement in her own right.

The pauper was adjudged a lunatic by a justice for the county of Warwick, on the 12th of May, 1878, and was received as an inmate of the County Lunatic Asylum.

An order was afterwards made by two justices adjudging the parish of St. John,

*Guardians of Hereford Union v. Guardians of Warwick Union, Q.B.*

Hereford, in the appellant Poor Law Union, to be the last legal settlement of the pauper, and ordering the guardians of the appellant union to contribute to her support.

The question for the opinion of the Court was, whether the sessions rightly confirmed the order.

*Lumley Smith*, for the respondents, supported the judgment of the sessions.—The order of removal adjudging the place of the last legal settlement of the pauper lunatic to be in the appellant union was correct, inasmuch as the derivative settlement of the pauper ceased on her attaining the age of sixteen years before the passing of 39 & 40 Vict. c. 61, s. 5 (1). He cited *The Guardians of the Woodstock Union v. The Overseers of St. Pancras* (2).

*Colmore*, for the appellants.—The case is governed by *The Guardians of the Westbury-on-Severn Union v. The Overseers of Barrow-in-Furness* (3), where it was decided that the 35th section of 39 & 40 Vict. c. 61, was retrospective throughout. The pauper lunatic accordingly took and retained the birth settlement acquired by her father in the Leominster Union. The decision in *The Guardians of the Woodstock Union v. The Overseers of St. Pancras* (2) has no application because there it was proved that the pauper's father had derived from his father a distinct settlement, and consequently it could not be ascertained what settlement the pauper derived from her father without enquiry into his derivative

settlement, and the statute expressly provides that in that case the child was to be deemed to be settled in the parish in which she was born.

[He was stopped by the Court.]

FIELD, J.—I think that this case is governed by the decision in *The Guardians of the Westbury-on-Severn Union v. The Overseers of Barrow-in-Furness* (3), which we are bound to follow.

The pauper in question was born at Hereford in 1840, and never acquired any settlement in her own right. At the time the Act of 1876 passed, the pauper was past the age of sixteen years, and had it not been that the 35th section was retrospective in its action, a difficulty might have arisen. But the Exchequer Division has come to the conclusion that the 35th and 36th sections are retrospective as well as the excepting clause contained in the former. That being so, the pauper was under sixteen within the meaning of the 35th section, and so acquired her father's settlement and has retained it, having never subsequently acquired another. Mr. Lumley Smith has argued on the strength of *The Guardians of the Woodstock Union v. The Overseers of St. Pancras* (2), that the case fell within the third or last branch of the 35th section, and that as the birth settlement may be displaced you would have to see where the grandfather was last settled, and that as this was not allowed it consequently followed that the pauper was to be deemed to be settled in the parish in which she was born, namely, Hereford. If this contention were sound, the result would be to exclude all birth settlements, because in each case you would have to go back and ascertain past settlements. This in my judgment was not the intention of the Legislature, for if so, express words to that effect would have been used.

MANISTY, J., concurred.

*Judgment for the appellants. Order of sessions quashed.*

Solicitors—Cooke & Jones, agents for Llanwarne, Hereford, for appellants; Henry Tyrrell, agent for H. C. Passman, Leamington, for respondents.

(1) By the Divided Parishes Act (39 & 40 Vict. c. 61), s. 35, derivative settlements are abolished "except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another."

If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without enquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

(2) 48 Law J. Rep. M.C. 1; s. c. Law Rep. 4 Q.B. D. 1.

(3) 47 Law J. Rep. M.C. 79; s. c. Law Rep. 3 Ex. D. 88.

[IN THE QUEEN'S BENCH DIVISION.]

1879. } MELLOR (appellant) v. DEN-  
March 26, 29. } HAM (respondent).

*Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 74—Factory, Education of Children employed in—Bye-laws of School Board compelling Attendance.*

*The proviso in section 74 of the Elementary Education Act, 1870, precludes a school board from using its power so as to interfere with the arrangements already made by the Factory Acts. A school board is, therefore, not entitled to enforce its bye-laws as to the hours of attendance by children, against a child who, though not obeying such bye-laws, is attending an efficient elementary school pursuant to the Factory Acts.*

CASE stated by justices under 20 & 21 Vict. c. 43, on dismissing an information preferred by the appellant, clerk to the Oldham School Board, under the bye laws of the school board, against the respondent, for neglecting to cause his child to attend school during the whole of the ordinary school hours as required by the bye-laws.

The following paragraphs of the case sufficiently shew the findings, the contentions of the parties, and the questions for the decision of the Court:—

4. Upon the hearing of the said information it was proved on the part of and by the appellant, and found as a fact, that the said child did not attend school during the whole of the ordinary school hours, and that the child was ten years and six months old, and the bye-laws of the said school board were put in evidence and proved.

5. It was also proved on the part of the respondent that the child was employed at the cotton factory of Messrs. Radcliffe & Sons, in Oldham, and was attending an efficient elementary school regularly, pursuant to the Factory Acts, 1833 to 1874.

6. It was contended on the part of the appellant that by virtue of the bye-laws of the board made in pursuance of the 74th section of the Elementary Education Act, 1870, the board could, if they thought fit, compel children to attend school

during the whole of the school hours, and that this applied notwithstanding that such children were working at a factory and attending an efficient elementary school, in conformity with the provisions of the Factory Acts, 1833 to 1874, and that there was nothing in the said Acts restraining the powers conferred on the board by the Elementary Education Act, 1870. That there was nothing in the bye-laws contrary to anything contained in any Act for regulating the education of children employed in labour, and that the Elementary Education Acts, 1870 and 1876, control the Factory Acts, 1833 to 1874.

7. We, however, being of opinion that as the child was attending an efficient elementary school, pursuant to and was otherwise fulfilling the conditions and provisions of the Factory Acts with respect to the education of children between the ages of ten and thirteen years employed pursuant to those Acts, and that the bye-laws with reference to the case before us, were *ultra vires*, gave our determination against the appellant in manner before stated.

8. During the hearing before us reference was made to the following bye-laws of the school board and Acts of Parliament:—

(1) The 74th section of the Education Act, 1870, under the authority of which the said bye-laws were made, which enacts (*inter alia*) as follows:—

“Every school board may from time to time, with the approval of the education department, make bye-laws for all or any of the following purposes: First, Requiring the parents of children of such age not less than five years, nor more than thirteen years, as may be fixed by the bye-laws, to cause such children (unless there is some reasonable excuse) to attend school. Second, Determining the time during which children are to attend school, provided that no such bye-law shall be contrary to anything contained in any Act for regulating the education of children employed in labour.”

(2) The first of the bye-laws made by the Oldham School Board under the above section and this provides that the term “child” shall in those bye-laws mean a

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child between the ages of five and thirteen, residing in the district of the Oldham School Board.

(3) The second bye-law and this enacts that the parent of every child shall cause such child to attend a public elementary school, unless there be a reasonable excuse for non-attendance.

(4) The third bye-law and this enacts that the time during which children are to attend school shall be the whole of the ordinary school hours at the school selected, being not less than twenty-seven hours in each week.

(5) The fourth bye-law and this enacts (*inter alia*) as follows:—

In the case of a child over ten years of age, who has passed the second or third standard of examination, or who has passed in one or more subjects of the fourth, fifth or sixth standard of examination, and is employed in accordance with any Act for regulating the education of children employed in labour or is otherwise beneficially and of necessity employed, the board may make an order for a renewable period not exceeding six months, allowing such exemption as they think fit, and such order may at any time be cancelled if the exemption stated thereon is exceeded, or if the child changes school without informing the clerk of the board, or fails to be presented for examination by the inspector of schools at the first opportunity.

(6) The fifth bye-law, which enacts that nothing in the present bye-laws shall have any force or effect in so far as it may be contrary to anything contained in any Act for regulating the education of children employed in labour.

(7) The 31st section of the Factory Act, 1844.

(8) The 28th section of the Factory Act, 1844.

(9) The 6th section of the Factory Act, 1874.

(10) The 15th section of the Factory Act, 1874.

(11) The 5th section of the Elementary Education Act, 1876.

(12) The 6th section of the Elementary Education Act, 1876.

(13) The 8th section of the Elementary Education Act, 1876.

(14) The 7th section of the Elementary Education Act, 1876.

9. The questions of law arising on the above statement for the opinion of this Court therefore are—

1. Are the Oldham School Board entitled to enforce these bye-laws against children between the ages of ten and thirteen years, who, although not obeying such bye-laws, are attending efficient elementary schools pursuant to and otherwise fulfilling and observing the conditions of the Factory Acts, 1833 to 1874?

2. Do the Elementary Education Acts, 1870 and 1876, control the provisions of the said Factory Acts, regulating the education of children employed in pursuance of the last-mentioned Acts?

10. And the Court is hereby solicited, according to the power vested in the Court by the said statute, 20 & 21 Vict. c. 43, to remit the case to us the said justices, with the opinion of the Court thereon, or to make such other order as the Court may deem fit.

*Hamilton*, for the appellant. — The Education Acts are intended to control and override the Factory Acts. The latter are not enabling statutes, but are simply restrictive of the hours of labour. The Education Acts which have been passed subsequently are intended to apply, and do apply, to all children however employed. The point has been in effect decided by *Bury v. Cherryholme* (1).

*Aspland*, for the respondent. — The Education Acts are general; but cannot be read so as to give power to a school board to prohibit juvenile labour. The Factory Acts deal only with children employed in factories, and are expressly preserved in force side by side with the later Education Acts.

[LUSH, J.—The Factory Acts were the first Education Acts.]

As to *Bury v. Cherryholme* (1), that was decided under the Workshop Regulation Act, 1867, and after that decision section 8 of the Education Act of 1876 was passed expressly substituting the

(1) Law Rep. 1 Ex. D. 457.

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provisions of the Factory Acts for those in the Workshop Regulation Act, hitherto applicable to children employed in workshops.

*Our. adv. vult.*

The judgment of the Court (2) was (on March 29) delivered by—

LUSH, J.—We have gone through the various Factory Acts and the Education Acts, and the result is that we entertain no doubt that the decision of the justices, the propriety of which is submitted to us, was substantially correct. The question in this case, which undoubtedly is one of great and general importance, arose out of an information laid against the father of a boy between ten and eleven years old for neglecting to cause him to attend school during the whole of the ordinary school hours as required by the bye-laws of the school board for the district of the borough of Oldham.

The defence set up was that the boy was employed at a cotton factory in Oldham and was regularly attending an efficient elementary school pursuant to the Factory Acts, and this the justices found to be the fact.

The bye-laws of the school board which were put in evidence at the hearing, contained an express enactment that nothing therein should have any force or effect in so far as it might be contrary to anything contained in any Act for regulating the education of children employed in labour; thus following the words of the proviso in the 74th section of the Elementary Education Act, 1870, which prohibits the making of any bye-law which shall be contrary to any such Act.

We observe here in passing, that the finding of the justices that the bye-laws were *ultra vires* cannot be sustained. They are, in our opinion, strictly within the powers conferred on the board by the 74th section, inasmuch as they contain the enactment above-mentioned, together with the other provisions required by that section. The question is as to the meaning of the enactment above quoted and its application to the state of facts

found by the justices. The contention on the part of the school board was that the Education Acts overrode and controlled the provisions of the Factory Acts; and that children employed in factories, though receiving the education provided for and required by the Factory Acts, were in the same position as other children not so employed, and were like them compellable to attend school during the whole of the school hours. The argument in support of the contention was that the Factory Acts, which commenced at a time when no scheme of general education existed, are merely restrictive; that they do not enact that children shall or may be employed for a given number of hours in the factory, and while so employed shall receive a certain amount of education; but that all which they enact is that children shall not be employed for a longer time in the factory, and shall not during such employment receive less than the given amount of education; that the policy of the Education Act, which passed long afterwards, was to secure to all children, however employed, a much larger amount of education than the Factory Acts provided, and that it cannot be said to be "contrary to" the provisions of the Factory Acts, for the school board to require that all children should attend school for a longer period than factory children had been required to attend, although the effect might and would be virtually to put an end to child labour in factories. What the construction might have been if the Education Act had made no reference to the Factory Acts, it is needless to consider. The meaning of the 74th section of the Education Act, 1870, already adverted to, does not appear to us to admit of a doubt.

That section says that the school board may make bye-laws for the following purposes, amongst which purposes is the following, namely, "determining the time during which children are to attend school;" to which is added a proviso that "no such bye-law shall prevent the withdrawal of any child from any religious observances or instruction in religious subjects, or shall require any child to attend school on any day exclusively set

(2) Mellor, J., and Lush, J.

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apart for religious observance by the religious body to which his parent belongs, or shall be contrary to anything contained in any Act for regulating the education of children employed in labour."

Placed thus as a limitation of the power of fixing the time of school attendance, the meaning of this part of the proviso obviously is, that the board shall not use the power given to them so as to interfere with the arrangements already made by the Factory Acts, which arrangements embrace both the time of working and the time of attending school, each being dependent on the other, and neither of which can be interfered with without disturbing the other.

That this was the meaning intended is further shewn by the later Acts. The Education Act of 1876 recognises the Factory Acts as an existing code for regulating the employment and education of children employed in factories; and the Factory Act of 1874, while it gives the Education Department the power to recognise or to refuse to recognise a school as a proper school for the education of a factory child, says in terms, in another part of the Act, that a child employed in a factory shall attend school in manner directed by the Factory Act, 1844.

We are therefore of opinion that the justices were right, and we answer the questions submitted to us in the terms in which they are put, as follows:—

1. The school board are not entitled to enforce their bye-laws against children between the ages of ten and thirteen years, who, although not obeying such bye-laws, are attending efficient elementary schools pursuant to, and otherwise fulfilling and observing the conditions of the Factory Acts.

2. The Elementary Education Acts do not control the provisions of the Factory Acts regulating the education of children employed in accordance with those Acts.

*Judgment for the respondent.*

Solicitors—Chester & Co., agents for Ponsonby & Carlile, Oldham, for appellant; Chester & Co., agents for H. Booth, Oldham, for respondent.

[IN THE QUEEN'S BENCH DIVISION.]

1879. { THE QUEEN (on prosecution of  
April 26. { THE GUARDIANS OF LEWISHAM)  
v. THE LONDON, BRIGHTON AND  
SOUTH COAST RAILWAY COMPANY.

*Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 159, 161—District Rate—Inequality of Benefit—Exemption of Part of a Parish.*

*By the Metropolitan Management Act, 1855, s. 158, district boards may require the overseers of the parishes within their district to levy the sum which such boards may require for the execution of the Act. By section 159 district boards may either exempt parts of parishes if not benefited by the expenditure from payment or require a less rate to be levied. By section 161 the rates are to be levied on the persons and in respect of the property ascertained by the rate for the time being for the relief of the poor.*

*The Guardians of Lewisham, as overseers of the parish, were required by the district board to levy a sum of 11,524*l.* for expenses incurred in the execution of 18 & 19 Vict. c. 120, and as the sum was not for the equal benefit of the parish the precept directed that as regards such parts of the parish as consisted of land used as arable, meadow or pasture land, the rate should be assessed on a lower scale. There were 3,000 acres of such land in the parish, the whole of which were assessed on the lower scale though they did not lie together, but were scattered about:—Held, that the board had a discretion, under 18 & 19 Vict. c. 120, s. 159, to exempt or order a less rate to be levied on the arable meadow or pasture land in question, though not all grouped together but scattered about in various parts of the parish.*

*Howell v. The London Dock Company (27 Law J. Rep. M.C. 177) followed.*

This was an appeal to the sessions for the county of Kent against a general rate made for the parish of Lewisham by the Guardians of the poor of Lewisham, as overseers of the parish, on the 1st of January, 1876, at the rate of tenpence in the pound on all houses, buildings and property other than land, and at the rate of twopenny half-penny in the pound on



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all land used as arable, meadow or pasture ground only, or as woodland, orchard, market garden, hop, herb, flower, fruit or nursery ground, and levied in pursuance of a certain precept or order of the board of works for the Lewisham district, dated the 3rd day of November, 1875, and also in pursuance of the several Acts of Parliament relating thereto on the persons and in respect of the property by law rateable to the relief of the poor in the parish of Lewisham, and being assessed upon the net annual value of such property ascertained by the poor rate for the parish.

The sessions confirmed the rate subject to the opinion of the Court upon the following

#### CASE.

1. The said rate was expressed to be made under the provisions of the Metropolis Management Act, 1855.

2. By section 158 of the said statute, vestries and district boards are empowered from time to time by order under their seal to require the overseers of the several parishes within their district to levy the sums which such vestry or district board may require for defraying the expenses of the execution of the Act.

3. By section 159 of the said statute, it is enacted that—

“Where it appears to any vestry or district board that all or any part of the expenses for defraying which any sum is by such vestry or board ordered to be levied have or has been incurred for the special benefit of any particular part of their parish or district, or otherwise have or has not been incurred for the equal benefit of the whole of their parish or district, such vestry or board may by any such order direct the sum or sums necessary for defraying such expenses or any part thereof to be levied in such part or exempt any part of such parish or district from the levy, or require a less rate to be levied thereon as the circumstances of the case may require.”

4. By the 161st section of the said Act it is enacted that—“the overseers of the poor of every parish to whom any such order as aforesaid is issued, shall levy the amounts mentioned therein according to

the exigency thereof, and shall for that purpose make separate equal pound rates upon their parish, or the part thereof upon which any sum specified in such order is required to be levied in respect of each sum thereby ordered to be levied, that is to say a separate rate in respect of each sum ordered to be levied for defraying expenses connected with sewerage, to be called a sewer's rate; a separate rate in respect of each sum ordered to be levied for defraying expenses of lighting (where a separate rate is ordered to be levied for defraying such expenses), to be called a lighting rate, and a separate rate in respect of each sum ordered to be levied for defraying other expenses of executing this Act, to be called a general rate, and shall make such respective rates of such amount in the pound on the annual value of the property rateable as will in their judgment, having regard to all circumstances, be sufficient to raise the sums specified in such orders, and such rates shall be levied on the persons, and in respect of the property, by law rateable to the relief of the poor in the respective parishes, and shall be assessed upon the net annual value of such property, ascertained by the rate for the time being for the relief of the poor.

5. The Guardians of Lewisham were constituted under a local Act (54 Geo. 3. c. 43), for the better management and relief of the poor of the parish of Lewisham, in the county of Kent, and for better assessment and collecting the parochial rates in the said parish. Their powers for the management and relief of the poor were however superseded under the General Poor Law Act of 4 & 5 Will. 4. c. 76, but, for the purpose of assessing and collecting parochial rates, they are overseers within the meaning of the Metropolis Local Management Acts.

6. The order or precept upon which the said rate so appealed against was levied, was as follows:—

“The boards of works for the Lewisham district, constituted by the Metropolis Management Act, 1855, in pursuance of the provisions of the said Act, and of the Acts for amending and extending the same, hereby order and require the guardians of the poor of the parish of Lewis-

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ham to levy within the said parish the sum of 11,524*l.* for the purpose of defraying the expenses already or hereafter to be incurred by the said Board in the execution of the said Act or Acts, and to pay the said sum to the London and Westminster Bank, No. 6, Borough High Street, in the borough of Southwark, the treasurers and bankers of the said board, by two equal instalments of 5,762*l.* each, the first on the 7th day of February, and the second on the 23rd day of March, 1876. And it appearing to the said Board that the expenses in respect of which the said sum of 11,524*l.* is required are not for the equal benefit of the said parish, the said board do further order and require that the rate or rates to be raised in pursuance of this present precept, shall, as regards all such parts of the said parish as consist of land used as arable, meadow or pasture land only, or as woodland, orchard, market, hop, herb, flowers, fruit or nursery market garden, hop, herb, flower, fruit or nursery ground, be assessed and levied in the proportion of one-fourth part only of the net value of such land. Given under the common seal of the said board this 3rd day of November, 1875."

7. The property of the London, Brighton and South Coast Railway Company in the said parish consisted of the Forest Hill and Sydenham stations, lands occupied by station buildings and appurtenances, and land over which their main line of railway passed, and the whole of such property was rated and assessed in the said rate at 10*d.* in the pound. No part of such property was land used as arable, meadow or pasture land only, or as woodland, orchard, market-garden, hop, herb, flower, fruit or nursery ground.

8. The parish of Lewisham is very extensive in area, containing in the aggregate about 5,500 acres. Of this area a very considerable proportion is covered with houses; about 3,000 acres are lands under cultivation, and fall under the classes of land mentioned in the precept. There is also land in the parish used in other ways, and rated at the higher rate. The 3,000 acres do not lie together, but are scattered through the parish. The rateable value of the 3,000 acres accord-

ing to the valuation list, amounts to about 11,000*l.* The total rateable value of property in the parish amounts to 324,009*l.*

9. Throughout the said parish, all property, wheresoever situate, which consisted of land used as arable, meadow or pasture land only, or as woodland, orchard, market-garden, hop, herb, flower, fruit or nursery ground, was rated or assessed in the said rate at 2½*d.* in the pound, and all other property was rated or assessed at 10*d.* in the pound upon the net annual value of such property respectively as ascertained by the rate for the time being for the relief of the poor.

The questions for the opinion of the Court were, first, whether the said rate was good in law; second, whether, if the said rate was good in law, such property of the appellants as consists of land used for their railway, ought not to be rated at the lower rate.

A *certiorari* having issued, and a rule *nisi* to quash the order of sessions having been obtained,

*Meadows White* (Payne with him), now shewed cause.—The substantial question here is whether the district board had the right, under 18 & 19 Vict. c. 120. s. 157, to exercise a discretion in favour of the property mentioned in paragraph 9. *Howell v. The Great Western Railway Company* (1), is decisive on this point in favour of the Guardians of Lewisham, and it has never been overruled.

*Oppenheim*, for the defendants, in support of the rule.—The board may exempt a part of a parish, but has no power to exempt certain descriptions of property not all grouped together. To decide in favour of the Board would be to overrule section 161, which requires equal pound rates to be made. In *The Queen v. The Great Western Railway Company* (2), Erle, J., who delivered the judgment of the Court in *Howell's Case* (1), protested against that decision being cited as an authority.

COCKBURN, L.C.J.—I think that this rule must be discharged and the order of the Sessions confirmed. I confess that

(1) 8 E. & B. 212; s. c. 27 Law J. Rep. M.C. 177.

(2) E. B. & E. 613, note a; s. c. 28 Law J. Rep. M.C., at page 64.

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on the first reading of the 159th section I was inclined to come to the opposite conclusion to that at which I have arrived. The question, however, submitted to us is, in my judgment, covered by the decision in *Howell v. The Great Western Railway Company* (1). That is a binding authority on us. There a general rate had been uniformly made on the whole of a dock property without regard to differences arising on the different parts; and it was held that, under the 159th section, a duty was laid upon the vestry to apportion the burden according to the benefit, and that if part of the dock property had not equal benefit with the rest of the property in the parish, in respect of that part the dock property was entitled to be relieved *pro tanto*. That is an authority for saying that without distinguishing local area you may distinguish between classes of property under the powers contained in section 159, and as that course was pursued here, I think the principle laid down in that case decides the question before us. I don't think we ought to overrule a decision arrived at some twenty years ago, and given after deliberation, inasmuch as the construction put on the section must have been acted upon over and over again, and the Legislature might have interfered, if dissatisfied with the interpretation put upon it by this Court. Accordingly I think that the decision of the Sessions upholding this rate ought to be affirmed.

LOPES, J.—The question submitted to us depends on the construction to be placed on the 159th section; and if it had come before the Court for the first time, I rather think I should have favoured the contention put forward on behalf of the defendants. But I feel bound by the decision in *Howell v. The Great Western Railway Company* (1), notwithstanding the observation reported to have been made by Erle, J., in a more recent case.

*Rule discharged.*

*Order of sessions affirmed.*

Solicitors—Norton, Rose, Norton & Brewer, for defendants; Samuel Edwards, Lewisham, for prosecutors.

[IN THE QUEEN'S BENCH DIVISION.]

1879. } THE QUEEN v. THE SWINDON  
April 2. } NEW TOWN LOCAL BOARD.

*Public Health Act, 1875* (38 & 39 Vict. c. 55), ss. 150, 257—*Paving private Streets—Recovery of Expense from Owners*—“*Owner in Default.*”

*Where an owner of premises having received a notice from the urban sanitary authority under section 150 of the Public Health Act, 1875, to pave, &c., the street adjoining his premises, fails to comply with the same, and afterwards the local authority execute the works, but after the work has been begun by the local board and before completion of it, the owner sells the premises, he ceases upon such sale to be an “owner in default,” and cannot be ordered to pay the expenses incurred by the local authority in executing the works; such expenses being by section 257 of the same Act recoverable only from the person who is “owner of the premises when the works are completed.”*

This Case was reserved by the Court of Quarter Sessions of the peace for the county of Wilts, holden on Tuesday, the 3rd of July, 1877.

2. The Swindon New Town local board is the urban sanitary authority of Swindon New Town in the county of Wilts, and is herein called “the respondents.”

3. The respondents on the 22nd of March, 1875, in pursuance of section 69 of the Public Health Act, 1848, gave the following notices to the appellant, the then owner of certain premises at Swindon aforesaid, and similar notices to the owners of adjoining premises.

“The local board of health for the district of Swindon New Town, in the county of Wilts.

“To Mr. James Hinton, the owner of certain premises fronting, adjoining or abutting upon a certain street called Mill Street within the said district. Whereas the said street is not metalled, levelled, channelled, curbed, sewered and lighted to the satisfaction of the above named local board of health, and whereas your

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premises front, adjoin or abut on certain parts of the said street which requires to be metalled, levelled, channelled, curbed, sewered and lighted;

"Now, therefore, the said local board of health hereby give you notice, in pursuance of the statute in that case made and provided, to metal, level, channel, curb, sewer and light the same within twenty-eight days from the date hereof in the manner following:—

[The case then set out the notices in detail.]

4. The notices mentioned in paragraph 3 not having been complied with, the respondents contracted with a Mr. Phillips, a builder, to carry out the works in the said notices referred to for a special sum.

7. The respondent's surveyor under the provisions of section 69 of the Public Health Act, 1848, apportioned the estimated expenses which had been incurred under the contract for the before-mentioned works between the appellant and the several owners according to the frontage of their respective premises, and on the 3rd day of July, 1876, the respondents served upon the appellant notices of apportionment.

8. The appellant did not give any notice to dispute these apportionments under the Public Health Act, 1858 (21 & 22 Vict. c. 98), s. 63.

9. On the 15th day of December, 1876, the respondents served upon the appellant three several notices demanding payment for the said three sums of money so assessed upon him within fourteen days.

10. The appellant on or about the 19th day of December, 1876, returned the said three notices to the clerk of the respondents.

11. On the 29th of May, 1877, the respondents preferred complaint by way of summary proceedings before the justices acting in and for the Swindon division of the county of Wilts, within whose jurisdiction the premises were, for the recovery of 27l. 19s. 4d.

12. The complaint was heard before the said justices at Swindon, on the 7th day of June, 1877, who made an order for payment.

14. On the 18th of June, 1877, the

appellant served the justices by whose decision he considered himself aggrieved, and the respondents, with notices of appeal from the order of the justices for payment to the then next general quarter sessions for the county of Wilts, on the following grounds:—

1. That he was not then, nor was he at the time of making the order, liable at law to pay the said sum of money to the said urban sanitary authority.

2. That he was not nor had he been so liable to pay the said sums of money as aforesaid, on the grounds set forth in the said order.

3. That at the time when the works referred to in the order were completed, he was not the owner of the premises nor receiving the rent therefor.

4. That at the time when, if ever, the said sum of 27l. 19s. 4d. became payable to the respondents in respect of the said premises, he was not the owner of them.

5. That at the time aforesaid he was not the owner of the premises within the meaning of the Act under which these proceedings were taken or of any other statute relating to the matters in question.

15. At the hearing of the appeal the respondents called two witnesses, namely, William Read, the surveyor to the respondents, and John W. Jolliffe, their rate collector.

16. William Read, surveyor to the respondents, proved the progress and execution of the works under Messrs. Phillips' contract, that he had made the before-mentioned apportionment on the 21st day of June, 1876, that he had never given a final certificate of the completion of the works in respect of which the before-mentioned expense had been incurred by the respondents as there had been a dispute and subsequent arrangement between the board and the contractor, which was not adjusted until September, 1876.

17. J. W. Jolliffe, the collector of the local board rates, proved that the appellant had received the demand notes for local board rates as owner up to December, 1875, the last of those rates having been made in November, 1875,

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and paid by him in February, 1876; that J. P. Deacon had paid the next local board rate as owner in May, 1876, the demand note having been delivered to him on the 4th of May; that he then knew the said J. P. Deacon; that he knew he had purchased the said premises from the said James Hinton, and was and from the date of completion of his purchase had been receiving the rents of the same, and that the name of the said J. P. Deacon then appeared as owner of the said premises in the local board rate book; that the said rate collected in May had been made some time previously, and that the owners' names in the local board rate book had been taken from the owners' names in the poor rate book; that in the poor rate book, J. P. Deacon was stated to be the then owner.

18. The respondents did not adduce any evidence that the appellant had at any time received the rack rents of the said premises or any part of them except that of his assessment as owner as aforesaid to the poor rates and local board district rates, and his having paid the same to the time aforesaid.

20. The appellant called no witnesses.

21. The Court of Quarter Sessions, after hearing the parties, directed the order of the justices to be quashed with costs, on the ground that the appellant was not the owner under the facts proved within the terms of the order appealed against.

A *certiorari* having issued, and a rule *nisi* to quash the order of sessions having been obtained,

*J. W. Mellor* (*Goldney* with him), in support of the order of Quarter Sessions, shewed cause.—The question here is whether Hinton was the owner of the premises at the time the works were completed within the meaning of section 257 (1) of the Public Health Act, 1875.

(1) Public Health Act, 1875 (38 & 39 Vict. c. 55), sect. 257.—“Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred, is made liable under this Act or by any agreement with the local authority, such expenses may be recovered, together with interest, at a rate not exceeding 5*l.* per centum per

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That section shews that there is no liability until the works are completed and demand made. Although in section 150 (2) it is said that the expenses may be recovered from the owner in default, yet that does not mean the owner to whom the notice was given, but the owner who is made liable to pay, and who has made default in payment by section 257. The default is, therefore, in payment, not in not doing the work. Under section 150 there is no time mentioned for disputing the apportionment or demand; but these are provided for in section 257, and the apportionment only becomes conclusive three months after notice of it on the owner upon whom it is made, and that is the owner for the time being.

*A. Charles* (*W. W. Ravenhill* with him), in support of the rule.—The notice was given according to the statute upon the owner to do this work; after receiving such notice and after failing to comply

annum, from the date of service of a demand for the same till payment thereof, from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest, the same shall be a charge on the premises in respect of which they were incurred.”

(2) The Public Health Act, 1875 (38 & 39 Vict. c. 55), sect. 150.—“Where any street within any urban district (not being a highway repairable by the inhabitants at large), or the carriage-way, foot-way or any other part of such street is not sewered, levelled, paved, metalled, flagged, channelled and made good, or is not lighted to the satisfaction of the urban authority, such authority may by notice addressed to the respective owners or occupiers of the premises fronting, adjoining or abutting on such parts thereof as may require to be sewered, levelled, paved, metalled, flagged or channelled, or to be lighted, require them to sewer, level, pave, metal, flag, channel, or make good, or to provide proper means for lighting the same within a time to be specified in such notice.

“If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority (or in case of dispute) by arbitration in manner provided by this Act; or the urban authority may by order declare the expenses so incurred to be private improvement expenses.”

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with it, the owner becomes owner in default. It is intended that the local authority shall know before beginning the work to whom they can look for payment; and it would be most inconvenient that the liability should be continually shifting as the premises changed hands.

[COCKBURN, L.C.J.—When he has sold the premises, can he be said to be still owner?]

Yes, he continues to be the "owner in default;" the remedies given by the Act are cumulative. If the contention on the other side is right, that "owner in default" in section 150 means the owner who does not pay when the works are completed, then section 257 is superfluous. It is not unreasonable to give a further remedy against the succeeding owner—*The Bermondsey Vestry v. Ramsey* (3).

COCKBURN, L.C.J.—I think that these sections may be reconciled with one another and with common sense and justice. Common sense and justice seem to require that, if the owner of premises has adopted the alternative given him of leaving the authorities to do the work and has afterwards sold, he cannot be the owner in default at the time the money becomes payable, for he is not then owner at all. Section 150, indeed, speaks of the person not complying with the notice as the owner in default; but section 257, which at first sight seemed to be against the contention of the appellant, may be brought in to supplement section 150, as shewing what is the meaning of "owner in default." It means the person who was required to do the work and did not do it, subject nevertheless to his having ceased to be owner in default by reason of his not being owner of the premises at the time the works are completed, but having transferred his interest and liability to another. It cannot be intended that a man who has sold the premises and has ceased to have any benefit from the work done, should still be liable to be followed, and made to pay for the improvement of another man's property.

(3) 40 Law J. Rep. C.P. 206; s. c. Law Rep. 6 C.P. 247.

Section 257 cures the difficulty apparently arising on section 150 by treating the person who is owner when the works are completed as the person on whom the authorities may come for payment.

If the owner who was originally called on to do the work continues owner when the work is done, then he is liable by section 150. If he ceases to be owner by sale or otherwise, then section 257 makes the other person, the then actual owner, liable in his stead. Thus the person who gets the permanent benefit will be called upon, as I think he ought to be, to pay for the improvements to his property.

MELLOR, J., concurred.

Solicitors—W. Moon, agent for Townsend, Swindon, for appellant; Clarke, Woodcock & Ryland, agents for Kinnear & Tombs, Swindon, for respondents.

[IN THE QUEEN'S BENCH DIVISION.]

1879. } THE PRISON COMMISSIONERS v.  
May 13. } THE CORPORATION OF LIVERPOOL.

*Prison Act, 1877* (40 & 41 Vict. c. 21), ss. 4, 57—*Expense incurred in Maintenance of Prisoners—Prison Commissioners—Boy sent after Imprisonment to Reformatory—Expense of supplying proper Clothing for Reformatory—Prison Authorities—Reformatory Schools Act, 1866* (29 & 30 Vict. c. 117. s. 23).

*The expense of providing a youthful offender sentenced to be detained, after a term of imprisonment, in a reformatory, with suitable clothing for admission to such reformatory, is an expense incurred for "the maintenance of a prisoner," for which the Prison Commissioners are responsible under the Prison Act, 1877.*

[For the report of the above case, see 48 Law J. Rep. Q.B., C.P. & Exch. 436.]

## [IN THE QUEEN'S BENCH DIVISION.]

1879. { THE QUEEN on the prosecution of  
April 2. { THE GOVERNOR AND COMPANY  
OF THE NEW RIVER v. THE  
ASSESSMENT COMMITTEE OF THE  
PARISH OF ST. MARY, ISLINGTON.

*Poor Rate—Water Company—Valuation of Property (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), ss. 43, 46 and 47—Supplemental Valuation List.*

*During the first year after a quinquennial valuation list in the metropolis had come into operation, some new houses were connected by means of service pipes with a water company's mains previously existing and assessed in the quinquennial list. Such connections caused an increase of the company's gross receipts arising from the additional rentals derived from the new houses; but no alteration was made in the mains themselves, the service pipes being the property of the owners or occupiers of the houses:—*

*Held, that the increased rental so derived constituted an alteration of the matters stated in the valuation list, within section 46 of the Valuation of Property (Metropolis) Act, 1869, and was properly taken into account in a supplemental list made under that section, whereby the rateable value of the company's mains was assessed at a*

*greater amount than it had stood at in the quinquennial list.*

The Governor and Company of the New River duly appealed against the supplemental valuation list for the parish of Saint Mary, Islington, which was made and deposited on the 31st day of May, 1877, under the Valuation of Property (Metropolis) Act, 1869, 32 & 33 Vict. c. 67, and the Court of General Assessment Sessions held at the Guildhall, Westminster, on the 14th day of February, 1878, on the trial of the appeal, ordered the said supplemental list to be altered by reducing the gross value of the company's property in the said parish from 23,250*l.* to 22,612*l.*, and the rateable value from 20,700*l.* to 20,100*l.*, subject to the opinion of the High Court of Justice (Queen's Bench Division) on the following

## CASE.

1. In 1875, pursuant to the Valuation of Property (Metropolis) Act, 1869, the overseers of the parish of Saint Mary, Islington, duly made their second quinquennial valuation list, in which the land occupied by the water mains, pipes and reservoirs of the said New River Company, in the parish of Islington, were assessed as follows:—

Name of Occupier	Name of Owner	Description of property	Name or situation of property	Gross value as estimated by Overseers	Rate of deduction per cent.	Rateable value	Gross value as finally determined by Assessment Committee	Rateable value as finally determined by Assessment Committee
New River Company	New River Company	Water mains, pipes and reservoirs	All through the parish	£22,500	11½	£20,000	£22,500	£20,000

2. That list duly came into force on the 6th of April, 1876, and the company have since paid the rates made in conformity with such list.

3. Between the 6th of April, 1876, and the 6th of April, 1877, a certain length of new mains had been laid by the company.

4. Between the 6th of April, 1876, and the 6th of April, 1877, a number of new houses had been built, many of which had in that interval been connected by means

of service pipes with mains in existence prior to the 6th of April, 1876.

5. The service pipes from the mains to the houses belong to the owners or occupiers of the houses.

6. All houses in the parish of Islington are supplied with water by the New River Company, which is empowered by Act of Parliament to charge the occupiers at the rate of 4*l.* per cent. upon the annual value of the respective houses.

7. A large number of new houses are

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built and connected with the mains every year within the said parish.'

8. In February, 1877, the overseers of the parish made, in pursuance to section 47 of the said Act of Parliament, a provisional valuation list containing the gross and rateable value of the company's property as increased in value, being 23,250*l.* gross, and 20,700*l.* rateable.

9. The company in due course objected to such provisional valuation list, but the assessment committee confirmed it.

10. On the 31st of May, 1877, the sup-

plemental valuation list now in dispute was made and deposited by the overseers pursuant to section 46 of the said Act, and in it was embodied the provisional valuation list referred to.

11. The company also duly objected to the supplementary valuation list, which objection was, however, disallowed, and the list finally approved by the assessment committee.

12. The company's property, as described in the supplemental valuation list, is as follows:—

Name of Occupier	Name of Owner	Description of property	Name or situation of property	Gross value as estimated by Overseers	Rate of deduction per cent.	Rateable value	Gross value as finally determined by Assessment Committee	Rateable value as finally determined by Assessment Committee
New River Company	New River Company	Water mains, pipes and reservoirs	All through the parish	£23,250		£20,700	£23,250	£20,700

13. These figures shew an increase of 750*l.* upon the gross and of 700*l.* upon the rateable value.

14. A portion of this increase, 112*l.* gross and 100*l.* rateable value, relates to the rating of the land occupied by the new mains, and is not now in dispute.

15. The remainder represents the increased value of the water mains, pipes and reservoirs, derived from the connection of the mains existing prior to the 6th of April, 1876, with houses built between the 6th of April, 1876, and the 6th of April, 1877.

16. It was arranged between the parties that the General Assessment Sessions should not be asked to settle the amount of the assessment to be entered in the supplemental valuation list, but simply to determine the basis upon which such amount should be calculated, as the parties would have no difficulty after the decision of the question of law in agreeing to the amount thereof.

17. The company contend that they are not liable to have their assessment increased by reason of the increase of their gross receipts in the parish arising from the additional water rentals derived from connection of new houses with mains which were in existence prior to the year which the supplemental list of

1877 was made to cover, and that the mains being in existence before the 6th of April, 1876, the assessment of the company could not be increased by reason of such mains being made to supply additional houses between the 6th of April, 1876, and the 6th of April, 1877.

18. The assessment committee contend that the rateable hereditaments of the company had, under the circumstances mentioned, increased in value by reason of the mains being connected with the new houses during the year which the supplemental valuation list in dispute was made to cover, namely, from the 6th of April, 1876, to the 6th of April, 1877; and that a tenant would pay more for the company's property after such connection had been made than before, and further, that there had been a structural alteration in the property during the said year ending the 6th of April, 1877, by tapping the mains in front of the houses for the purpose of connecting the pipes from the house with the mains, that there was both an alteration in the company's property and increase in the value thereof within the meaning of section 47, and that the increase of the assessment was not to be limited to the value of the new mains put in the land since the commencement of the year, 6th of April,



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1876, which the supplemental list in dispute was made to cover.

The Court of General Assessment Sessions decided in favour of the company, and ordered the supplemental valuation list to be reduced as before-mentioned.

The question for the opinion of this honourable Court is whether the increase in the value of the company's property by reason of the increase in the gross receipts derived from the new connections mentioned in paragraph 4, is such an increase as is within the meaning of the sections 46 and 47 of the said Act.

If the Court shall answer the question in the affirmative then the order of sessions is to be quashed and the supplemental valuation list to remain as originally approved by the assessment committee, or to be altered as agreed between the parties.

If the Court shall answer this question in the negative, then the order of sessions is to be confirmed.

A *certiorari* having issued,

A. Wills (*J. F. Clerk* with him), for the assessment committee, moved to quash the order of sessions.—The object of the supplemental list is to enable the correction of gross inequalities occurring during the quinquennial period, and section 46 of the Act says that the supplemental list shall shew all the alterations (1).

(1) 32 & 33 Vict. c. 67. s. 43. "The valuation list as approved by the assessment committee shall come into force at the beginning of the year commencing on the 6th of April succeeding that in which it is made and shall last for five years, subject to any alterations that may be made by any supplemental or provisional list as hereinafter mentioned."

Section 46.—"Every valuation list shall be revised in manner directed by this Act, and such revision in every period of five years shall be conducted as follows:—

"1. In each of the first four years of such period a supplemental list shall, if necessary, be made out in the same form as the valuation list, and shall shew all the alterations which have taken place during the preceding twelve months in any

The Court then called on

*R. B. Webster* (*Russell Griffiths* with him).—The provision for making a quinquennial list is perfectly useless if a fresh one is to be made every year. The intention is that the valuer at the beginning of each quinquennial period should take into account the possible increase in the value of the mains then in the ground. He must calculate what a tenant would give from year to year for five years. The mere fluctuation in money returns was not to be taken into account each year; the mains being the same, the rateable hereditament is not altered. There is nothing new structurally, the mains have always been capable of earning the amount; that being so there is no alteration of any matter in the valuation list within section 46, and there has been no structural addition within section 47.

COCKBURN, L.C.J.—We have listened to an ingenious argument in which certain inconveniences have been pointed out as necessarily following from a literal construction of section 46 of the Valuation of Property Act, but we are not at liberty to speculate on what might have been enacted had such consequences been called to the attention of the Legislature before the Act was passed. Here it is in plain intelligible language, and we are bound to follow it. Having provided for the making of the valuation list which is to last for five years subject to any alterations that may be made by any supplemental or provisional list, the statute then says, in each of the first four years a supplemental list shall, if necessary, be made out. Then what is that supplemental list to do?—"It is to shew all the alterations which have taken place during the preceding twelvemonths

of the matters stated in the valuation list, but shall contain only the hereditaments affected by such alteration."

Section 47.—"If in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value, the following provisions shall have effect."

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in any of the matters stated in the valuation list." Now the matters stated in the valuation list include among other things the gross and rateable value of the property. If, therefore, any alteration has taken place in any year in gross or rateable value, that is to be taken into account in the supplemental list. It is intended to rectify a scheme which might otherwise work unjustly. If the valuation list were made once for all without any power of amending it for five years, it might be very unjust to the ratepayer and to the parish. If the value of property by accidental circumstances has become greatly increased or diminished since the original list was made, then by means of the supplemental list the assessment under the former may be remedied. Probably this will only be done when the alteration is of a substantial character, and doubtless that is what the Legislature intended. Having stated the mode of revising the quinquennial valuation list so plainly in section 46, I think that the Legislature intended that the Assessment Committee should act as they have done in the present case in carrying the revision into effect.

MELLOR, J.—I am constrained to decide simply by the words in section 46, and I cannot attribute any reasonable meaning to them other than that expressed by the Lord Chief Justice. The supplemental list is to shew all alterations, and I cannot see any force in that provision unless, as contended for by the parish, it includes the present case.

*Rule absolute.*

*Order of sessions quashed.*

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Solicitors—Layton & Jaques, for Assessment Committee of St. Mary, Islington; Thompson & Debenhams, for New River Company.

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[IN THE COMMON PLEAS DIVISION.]  
1879. } MORTEO AND ANOTHER (appellants)  
May 2. } v. JULIAN (respondent).

*Shipping—Pilot carried to Sea beyond Limits of Pilotage—Pilotage Dues—Liability of Shipbroker—Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), ss. 357, 363.*

*The compensation to which a pilot is entitled under section 357 of the Merchant Shipping Act, 1854, for being taken without his consent beyond the limits of his pilotage, is not recoverable from the shipbroker as a "pilotage due" under section 363.*

CASE stated by justices for the borough of Cardiff under 20 & 21 Vict. c. 43.

The appellants, Messrs. Morteo and Penco, are a firm of shipbrokers at Cardiff, and the respondent is David Julian, a Bristol Channel licensed pilot.

In the month of December last the master of the Genoese vessel *Voltre* being about to proceed with the vessel from Cardiff to Genoa, employed the respondent to pilot the *Voltre* from Cardiff docks as far as Lundy Island.

The respondent piloted the vessel first from Cardiff to Penarth roads, and thence as far as Lundy Island.

The respondent did not leave the *Voltre* when she arrived off Lundy Island, which is the extremity of the limits of the Bristol Channel pilotage district, but the master of the *Voltre*, against the will of the respondent, took him to sea beyond such limits, and eventually landed him at Genoa in Italy.

At Genoa the master of the *Voltre* paid the respondent the pilotage dues for piloting the *Voltre* from Cardiff outwards to Lundy Island, and also paid him a reasonable sum for his travelling expenses from Genoa back to Cardiff.

The respondent claimed from the master of the *Voltre* when at Genoa compensation for his detention on board the vessel from the time she passed Lundy Island until his arrival back at Cardiff, but this he was not paid.

The appellants acted as brokers for the *Voltre* when the vessel was at Cardiff in December, and they paid the pilotage

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inwards and the vessel's dock dues incurred at Cardiff.

The time which elapsed from the time the vessel left Lundy Island as aforesaid until the respondent returned to Cardiff from Genoa was fifty-two days.

The respondent instituted proceedings before the justices of Cardiff and claimed an allowance for the fifty-two days under the provisions of section 357 (1) of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), 27l. 6s., being at the rate of 10s. 6d. per day.

The respondent claimed the said sum against the appellants under section 363 (2) of the said Act.

The respondent before commencing proceedings against the appellants gave them the notice required to be given by section 363 of the said Act.

It was submitted for the appellants that the allowance claimed by the respondent was in the nature of compensation due to the pilot for the fifty-two days during which he was detained outside the pilotage district not acting as pilot, and that this and his reasonable travelling expenses, though recoverable from the master and owners of the *Voltre*

under section 357 of the said Act, were not recoverable from the appellants (under section 363 of the said Act), and that the appellants were only liable under the provisions of section 363 of the said Act for pilotage outwards from Cardiff to the extremity of the Bristol Channel pilotage district.

We the said parties, looking at the words which occur in the said 357th section, that the pilot should be entitled over and above his pilotage to the allowance for enforced detention, looking also to the general scope of the 357th and 363rd and 364th sections, were of opinion that the said allowance was of the nature of pilotage dues, and that the same remedy was intended by the Act to be given to the pilot for the recovery of both.

An order was accordingly made for the payment by the appellants for the amount claimed by the respondent.

The question for the opinion of the Court is, whether the said allowance for detention is recoverable in the same manner as pilotage dues under section 363 against the agent of the ship.

If the Court should be of opinion that the same is recoverable, then the order made by the justices is to stand; if otherwise, the same is to be quashed.

*Clarkson*, for the appellant.—The question is whether this sum of 27l. 0s. 6d. for compensation is a pilotage due under section 357. A pilotage due is a rate due for pilotage, and this is not in respect of any service rendered.

The Court here called on—

*Milward*, for the respondent.—The sections of the Merchant Shipping Act on which the question turns are in part 5 of that Act which is headed "pilotage," and they are grouped together (sections 356 to 364) under the head "rights, privileges and remuneration of pilots." It is compulsory on the pilot to go on the ship and for his protection section 357 prohibits what has been done here. The broker must know he is liable to the pilot for the uncertain amount which may be payable under section 357; the broker knows his clients and undertakes this risk.

(1) Section 357. "No pilot, except under circumstances of unavoidable necessity, shall, without his consent, be taken to sea or beyond the limits for which he is licensed in any ship whatever; and every pilot so taken under circumstances of unavoidable necessity or without his consent shall be entitled, over and above his pilotage, to the sum of ten shillings and sixpence a day, to be computed from and inclusive of the day on which such ship passes a limit to which he was engaged to pilot her up to and inclusive of the day of his being returned in the said ship to the place where he was taken on board, or up to and inclusive of such day as will allow him, if discharged from the ship, sufficient time to return thereto; and in such last mentioned case, he shall be entitled to his reasonable travelling expenses."

(2) Section 363. "The following persons shall be liable to pay pilotage dues for any ship for which the services of a qualified pilot are obtained; that is to say, the owner or master, or such consignees or agents thereof as have paid or made themselves liable to pay any other charge on account of such ship in the port of her arrival or discharge, as to pilotage inwards, and in the port from which she clears out as to pilotage outwards; and in default of payment such pilotage dues may be recovered in the same manner as penalties of the like amount may be recovered by virtue of this Act."

*Mortco v. Julian, C.P.*

[DENMAN, J.—Could the pilot demand this compensation as a pilotage service under section 358 ?]

It could not be said to be a pilotage service, but it would come under the head "pilotage dues." Pilotage dues amount to more than a rate for pilotage, and include all matters referred to under "remuneration" of pilots; it would be hard on the pilot if this were otherwise. Unless the pilot has a remedy against the broker he is practically without a remedy. Suppose he were turned adrift in a wild country he would be without remedy unless he could recover from the broker.

DENMAN, J.—I am of opinion that the justices have placed too large a construction on the words "pilotage dues" in section 363. The form in which they have stated their judgment would seem to indicate that they hardly thought the compensation claimed by the pilot to be within the words "pilotage dues," but that they thought the compensation was in the nature of a pilotage due, and that they might stretch those words of section 363 so as to include the compensation, but according to the way in which I read the words "pilotage dues" they do not include the compensation payable under section 357. Take the claims one by one. In the first place, the pilot is entitled to his pilotage for piloting the ship to the limits of his pilotage ground, then if he is carried on he is entitled to the compensation under section 357, *not* as a pilotage due, but as over and above his pilotage. Section 358 enacts that any qualified pilot demanding or receiving any other rate in respect of pilotage services than the rate demandable by law shall incur a penalty; and during the argument I asked the respondent's counsel whether this compensation was a pilotage service; the answer was in the negative, and this in my judgment presses strongly against the construction sought to be placed upon the words "pilotage dues." It may well be reasonable that the broker or agent who has made himself liable to pay charges on the ship may be liable to pay the pilotage dues, but it is not probable that the

Act intended to make the broker liable for a payment such as this, a payment which is wholly uncertain and not contemplated, and one that would not often occur. The compensation might be so large as entirely to exceed the sum for which the broker had contemplated liability, and there is no provision for the broker to recover such amount from the shipowner.

There seem to be other reasons why the Act did not intend this compensation to be recoverable under section 363. Sections 380 and 384 in dealing with rates of pilotage treat them as pilotage dues, and though these sections refer to Trinity pilots, yet I think they go far to shew that the Act intended pilotage dues to be limited to pilotage rates. On the whole, therefore, I come to the conclusion that the decision of the justices was wrong, and must be overruled.

LINDLEY, J.—I am of the same opinion. In the first place this Act throws on certain persons the duty of paying certain fees, and it lies on those who say the broker is liable to pay the compensation here claimed to make this out. *Prima facie*, pilotage dues in section 363 would seem to be for services done, and throughout the Act it is used in that sense, as for instance, in section 333, clause 5, section 350, and that group of sections commencing with section 380 which treat pilotage rates and dues as synonymous terms. In the section 357 by which the pilot is entitled to this compensation, it is to be "over and above" his pilotage, and though I feel the force of the argument which was presented to us to shew that pilots who are carried out to sea ought to be allowed to sue for their compensation in this country, yet I fail to see that such compensation can be recovered as a pilotage due within section 363 of this Act.

*Order reversed; leave to appeal given.*

Solicitors—Ingledew, Ince & Greening, agents for Ingledew, Ince & Vachell, Cardiff, for appellants; Williamson, Hill & Co., agents for E. Bernard Reece, Cardiff, for respondent.

[IN THE QUEEN'S BENCH DIVISION.]

1879. { THE QUEEN on the prosecution  
May 7. { OF THE GUARDIANS OF THE TAD-  
CASTER UNION v. THE GUARDIANS  
OF THE LEEDS UNION.

*Poor—Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 34—Settlement by Residence—Illegitimate Child living apart from Mother—11 & 12 Vict. c. 111. s. 1; 9 & 10 Vict. c. 66. s. 1.*

*Where an illegitimate child had when a few weeks old been placed by its mother in the care of another person, with whom it lived from 1871 to 1878, in the A. union, the mother during that period not having exercised any dominion over it, but having virtually abandoned it,—Held, that this constituted a residence of the child in the A. union within the meaning of section 34 of the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61).*

CASE stated by Court of Quarter Sessions confirming on appeal an order of removal of a pauper from the Tadcaster to the Leeds union.

1. The pauper, Beatrice Emily Wright, is the illegitimate child of Caroline Wright, and was born in the parish or township of Roundhay, in the West Riding, in the Leeds union, in May, 1870.

2. When the pauper was about a fortnight old she was placed by her mother in the care of John Oakes and his wife.

3. John Oakes and his wife resided at Seacroft, in the Leeds union, from December, 1871, to February, 1878, and during all the time the pauper lived with them without receiving any relief, except that in September, 1875, the pauper was sent by John Oakes for one week (during the temporary illness of his own daughter) to the house of his son who lived at Cross Gates in the West Riding, within the Tadcaster union.

4. At the time the pauper was so sent to Cross Gates both John Oakes and his wife intended to bring her back to their house at Seacroft within a period of a week or thereabouts.

5. In February, 1878, John Oakes and his wife with the pauper left Seacroft,

and went to reside in Cross Gates, and in September, 1878, the pauper became chargeable to the Tadcaster union.

6. No evidence was given of the settlement by birth or otherwise of Caroline Wright, the mother of the pauper, though evidence was given that the respondents had made unsuccessful enquiries about it.

7. Upon the above facts the Court of Quarter Sessions confirmed the above order.

The case and order of removal having been brought up by *certiorari* and a rule *nisi* to quash the order of sessions obtained,

*Lofthouse*, in support of the order of sessions, shewed cause.—This case is precisely within the words of section 34 of the Divided Parishes and Poor Law Amendment Act, 1876. The child has resided for upwards of three years in the appellant union, so as to become irremovable. She thus acquired a settlement.

*Poland and Lumley*, in support of the rule.—An infant cannot so reside as to gain a settlement. The statute must intend that residence should be in some sort the act of the person. It cannot therefore apply to a child put by its mother out to nurse or sent to school—*The Queen v. The Abingdon Union* (1).

If the mother after three years wished to have the child with her and then became chargeable, there would be the anomaly of the child having one settlement and the mother another.

[COCKBURN, L.C.J.—Unless you can say that the child resided with its mother, the only alternative is that it resided where it was placed.]

The child here does not elect; it is only away from its mother till she can have it back.

[COCKBURN, L.C.J.—There is nothing to shew that the mother intended to resume her maternal rights; the case of a school is quite different, for the parent does not give up the child.]

Then the acquisition of a settlement

(1) 39 Law J. Rep. M.C. 153; s. c. Law Rep. 5 Q.B. 406.

*The Queen v. Guardians of Leeds Union, Q.B.*

under the new Act depends on irremovability under the old Act, and from the proviso in section 1 of 11 & 12 Vict. c. 111 substituted for that in 9 & 10 Vict. c. 66. s. 1, it would seem that the child would be irremovable only if the mother were in the parish and had become irremovable. In *The Queen v. St. Ebbe's* (2), the question was decided to be whether the husband if he were there was or was not removable.

[COCKBURN, L.C.J.—That proviso only refers to cases where a family is all together. It was to prevent a united family from being separated.]

COCKBURN, L.C.J.—I am of opinion that this order should be confirmed. It has been ingeniously argued that the effect of the recent statute must be qualified by a reference to the proviso in 9 & 10 Vict. c. 66. s. 1, as amended by 11 & 12 Vict. c. 111. s. 1, so as to make the test as to the removeability and consequently as to the settlement of the child dependent on the removability of the mother; but I think that the proviso has nothing at all to do with this case. It was simply superadded to prevent the dispersion of a family. No such question arises here, and we have only to consider whether the statutory provision as to residence has been fulfilled. Now this child has undoubtedly lived for three years in Seacroft. Is this a residence within the meaning of the Act of Parliament? I think that it is. It has been argued that the child has a constructive residence where its mother is. This would be so, I think, if the child were still subject to the control of its parent, as occurs in the case of a child being sent to school, where the master is in charge of the child by the order of the parent, and so the child's constructive residence is all the time in the paternal home.

But here the child was completely given up, and in my view of the facts upon which I base my decision in law, there was a virtual abandonment of it and apparently no intention on the part of the mother to resume her maternal rights.

(2) 12 Q.B. Rep. 137; s.c. 18 Law J. Rep. M.C. 11.

But Mr. Poland contends that the child must have exercised some will or shewn some intention in the matter; all I can say is that I do not find anything of that sort in the Act. The word is residence, the child must have "resided"; it is admitted that it lived in Seacroft, and its mother elsewhere. We have then an actual residence in Seacroft, and this satisfies the words of the statute and in my opinion the spirit also.

LOPES, J., concurred.

*Order affirmed. Rule to quash discharged.*

Solicitors—Clarke & Son, Leeds, for appellants; Torr & Co., agents for J. A. Bromet, Tadcaster, for respondents.

## [IN THE QUEEN'S BENCH DIVISION.]

1879. { THE SCHOOL BOARD FOR LONDON  
May 7. { (appellants) v. HARVEY (respondent).

*Elementary Education*—39 & 40 Vict. c. 79. s. 12. sub-sect. 2—*Attendance Order*—*Non-compliance, Second Case of*—*Previous Conviction for Non-compliance*—*Evidence*—34 & 35 Vict. c. 112. s. 18.

Where a parent is summoned under sub-section 2 of 39 & 40 Vict. c. 79. s. 12 (the *Elementary Education Act, 1876*), to answer a charge of a second case of non-compliance with an attendance order made upon him, it is not necessary, in order to prove the previous adjudication of non-compliance, to produce a signed copy of the previous conviction in accordance with 34 & 35 Vict. c. 112. s. 18, but it may, upon the hearing of such charge, be proved by the production by the clerk of the Court of his book containing a memorandum of such adjudication, and by the evidence of the school board officer who heard such previous adjudication made upon the person so summoned.

CASE stated by one of the metropolitan police magistrates under 20 & 21 Vict. c. 43.

1. The respondent was, on the 4th day of September, 1877, brought before me

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on a summons issued on the complaint of the local authority under the 39 & 40 Vict. c. 79. s. 11, in the words following—"For that you on the 15th day of August, 1877, and on other days, being the parent of a certain child, named John or Henry, which child is above the age of five years, to wit, of the age of nine years or thereabouts, and is by the Elementary Education Act, 1876, prohibited from being taken into full time employment, have, notwithstanding due warning already given you by the school board for London, unlawfully, habitually and without reasonable excuse neglected to provide sufficient elementary instruction for your said child contrary to the provisions of the Elementary Education Act, 1876, in such case made and provided," and the respondent was duly ordered by me under the above section to send his child, John Harvey, to Berger Road Board School as often as such school was open for the instruction of children.

2. On the 27th day of March, 1878, the respondent was brought before me on a summons under the 39 & 40 Vict. c. 79. s. 12. sub-sect. 1, in the words following:

"for that on the 13th day of March, 1878, and on other days, you are the parent of a certain child, named John, who is above the age of five years, to wit, of the age of ten years or thereabouts, and who, by an order made by this Court, under the provisions of the Elementary Education Act, 1876, was duly ordered to attend a certain public elementary school, to wit, Berger Road Board School, and that such order has not lawfully been complied with without any reasonable excuse within the meaning of the said Act, contrary to the provisions of the said Act in such case made and provided." The allegations in the summons having been duly proved, and the respondent having failed to satisfy me that he had used all reasonable means to enforce compliance with the said order, I imposed on him a penalty of 3s. and 2s. costs.

3. The following is a copy from the books of the said Court of the only minute or memorandum made at the time of my imposing the said penalty:—

Tuesday, the 27th of March, 1878. Form of note or memorandum kept pursuant to 2 & 3 Vict. c. 71. s. 44.

Name of complainant	Name of defendant	Date of application	Substance of charge	What process	Result
William Hetherington	James Harvey . .	20th March . . .	Education Act . .	Summons .	3s. and 2s. costs or five days

4. On the 15th of June, 1878, the respondent was brought before me on a summons under the 39 & 40 Vict. c. 79. s. 12. sub-sect. 2, charging him with a second case of non-compliance with the order of the 4th of September, 1877.

5. It was proved to my satisfaction that the order of the 4th of September, 1877, had been duly served on the respondent, and that nevertheless his son, the said John Harvey, was not attending the said school in accordance with the said order.

6. To prove that this was a second case of non-compliance with the said order within the meaning of 39 & 40 Vict. c. 79. s. 12. sub-sect. 2, the counsel for the appellant sought to prove the previous case of non-compliance, by calling as a witness the school board officer who proved that he had been in the said

Court and heard me on the 27th of March, 1878, impose the said penalty of 3s. and 2s. costs on the respondent. The counsel further offered to call the clerk of the said Court in whose custody was the book containing the note or memorandum of the 27th of March, 1878, to produce the said book, and for the purposes of this case it is to be taken that the said clerk was called and produced the same accordingly.

7. But considering that under the statute a defendant adjudged guilty of a second non-compliance with such an order as aforesaid, is placed in a worse position than when adjudged guilty of a first non-compliance by being liable both to be fined and to have his child sent to an industrial school, whereas for a first non-compliance he cannot be visited with both these consequences though he may

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with one or the other. Considering further that a second case of non-compliance must mean a second adjudication of non-compliance, and that on the first adjudication the said penalty of 3s. and 2s. costs was imposed, I was of opinion that the first adjudication could only be proved like any other previous summary conviction.

8. It is provided by 34 & 35 Vict. c. 112. s. 18, that a previous summary conviction may be proved by producing "a copy of such conviction purporting to be signed by any justice of the peace having jurisdiction over the offence in respect of which such conviction was made, or to be signed by the proper officer of the Court by which such conviction was made, or by the clerk or other officer of any Court to which such conviction has been returned."

9. By 11 & 12 Vict. c. 43. s. 14, summary convictions are to be drawn up by the convicting justices in proper form "and lodged with the clerk of the peace, to be by him filed among the records of the General Quarter Sessions of the Peace," whence it would seem that immediately on a summary conviction being drawn up, the clerk of the peace is entitled to receive it, and that such copies as are mentioned in 34 & 35 Vict. c. 112. s. 18, cannot be given by the Court which made the conviction.

10. Owing probably to the expense and trouble which would be caused by drawing up and lodging as aforesaid the numerous summary convictions made daily in the Metropolitan Police Courts for offences mostly of a trivial kind, the magistrates of these Courts have, I believe, never drawn up or lodged such convictions unless requested so to do, which seldom or never happens unless proof of a previous conviction is wanted. But although the said conviction of the 27th of March, 1878, was not nor has been drawn up, I informed the appellants on the first hearing that I would draw up the said conviction and lodge it with the said clerk of the peace if they wished, and that in order to complete their case it would be necessary for them to put in evidence a copy of the said conviction duly signed, and that I would adjourn

the case to admit of this being done. The case was adjourned accordingly, but the appellants declined my offer on the ground that it was unnecessary for them to put such copy in evidence and pointed out that whereas under the 18th section of the 34 & 35 Vict. c. 112, they would have to pay a fee not exceeding 5s. to the said clerk of the peace for obtaining such a copy, 2s. having already been paid for the summons in the said Court, the maximum they could recover on a conviction under the summons would be 5s., including costs.

11. I ultimately dismissed the summons on the ground that the previous case of non-compliance had not been proved by the production of a duly signed copy of the said conviction.

12. The question for this honourable Court is, whether in order to prove their case it was necessary for the appellants to give in evidence a copy of the said conviction signed by the said clerk of the peace or other officer of the Court of Quarter Sessions. If aye, my decision to be confirmed; if not, the case to be remitted back to me or otherwise dealt with as the Court may direct.

*Holl (Douglas Walker with him)*, for the appellants.—This is not a conviction but only an order, and the order could be properly proved in the manner proposed.

But even if it were a conviction, it was one in an inferior Court, where there is no record, and in such case a minute of the conviction made by the officer of the Court is sufficient—*The Queen v. Hains* (1), *The Queen v. Newman* (2).

No counsel appeared for the respondent.

PER CURIAM (3).—The case must be remitted, with our opinion that the evidence tendered was sufficient for the purpose for which it was offered.

*Case remitted.*

Solicitors—Gedge, Kirby & Mullett, for appellants.

(1) Comb. 337.

(2) 2 Den. C.C. 390; s.c. 21 Law J. Rep. M.C. 75.

(3) Cockburn, L.C.J.; and Lopes, J.



[IN THE QUEEN'S BENCH DIVISION.]

1879. } LANGDON (appellant) v. HOWELLS  
May 17. } (respondent).

*Railway Company—Passenger travelling without having paid his Fare—Tourist Ticket—Sale by Taker of Ticket—Intent of Purchaser to avoid Payment of his Fare, 8 Vict. c. 20. s. 103.*

The respondent was charged, under 8 Vict. c. 20. s. 103, with travelling in a third-class carriage of the Great Western Railway without having previously paid his fare and with intent to avoid payment thereof. The respondent was found at Neath on the 18th of November, 1878, in a third-class carriage on his way to New Milford, and produced to a ticket examiner at Neath the forward half of a tourist ticket, dated the 28th of September, 1878, and available for two months. The ticket in question, which was not transferable, had been issued from Ludlow to New Milford to A., from whom the respondent had purchased the forward half for a sum considerably less than he would have had to have paid for an ordinary single third-class ticket. There was evidence to shew that the respondent intended to defraud the railway company:—

Held, that there had been a violation of the conditions under which the ticket was issued, and that the respondent was liable under the circumstances to be convicted under 8 & 9 Vict. c. 20. s. 103, for travelling without having paid his fare.

CASE stated by two justices for the borough of Neath, in the county of Glamorgan, under 20 & 21 Vict. c. 43.

1. Upon the hearing of a complaint preferred by the appellant against the respondent under 8 Vict. c. 20. s. 103, for having on the 18th of November, 1878, at the parish of Neath, unlawfully travelled in a third-class carriage belonging to the Great Western Railway Company without having previously paid his fare and with intent to avoid payment thereof, the justices dismissed the complaint.

2. Section 103 of the 8 Vict. c. 20.

enacts as follows:—"If any person travel, or attempt to travel, in any carriage of the company, or of any other company or party using the railway, without having previously paid his fare and with intent to avoid payment thereof, or if any person, having paid his fare a certain distance, knowingly and wilfully proceed in any such carriage beyond such distance without previously paying the additional fare for the additional distance and with intent to avoid payment thereof, or if any person knowingly and wilfully refuse or neglect, on arriving at the point to which he has paid his fare, to quit such carriage, every such person shall for every such offence forfeit to the company a sum not exceeding forty shillings."

It was proved, at the hearing of the complaint, that the respondent was found, at Neath, on the 18th of November, 1878, in a third-class carriage in a down train from London, and on his way to New Milford. When asked by the ticket examiner for his ticket, respondent produced one dated the 28th of September, 1878, which turned out to be the forward half of a tourist ticket from Ludlow to New Milford, endorsed "not transferable," and available for two months. The respondent explained having only the half and the interval from the date by saying, "I took it at New Milford, but they collected the wrong half at Ludlow." No tourist tickets were in fact issued at New Milford, and the appellants called evidence to shew that the ticket in question was originally issued at Ludlow, but not to the respondent, so that the return journey would be from New Milford to Ludlow. The third-class fare from Ludlow to New Milford is 15s. 7d., and from Ludlow to Neath 7s. 7d. The respondent subsequently explained that he bought the ticket from a Mr. Aaron, a commercial traveller, who had used it only from Ludlow to Hereford; that Aaron had offered to give him the ticket, but that he declined to take it for nothing, and gave 3s. for it. It was admitted on behalf of the appellants that tourist tickets are available for two months, and that the holders thereof are

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allowed to break their journeys at places mentioned in the tourist programme.

One of the justices was of opinion that the facts disclosed by the whole evidence shewed that the respondent had travelled in a carriage of the Great Western Railway Company without having previously paid his fare and with intent to avoid payment thereof, and ought therefore to be convicted of the offence charged in the complaint; the other was, however, of a different opinion, and considered that it was not necessary for a railway traveller personally to pay his fare, and that as it was proved, first, that the proper fare had been paid in the first instance for the ticket with which the respondent was found travelling (though not by the respondent himself); second, that travellers holding tourist tickets are allowed to break their journeys; third, that as the respondent was still travelling on a part of the line for which the half ticket he held was at all events available for the use of the person to whom it was issued (it having been issued on the 28th of September, and in force for two months), he was not liable to be convicted of an offence under the section above referred to; and that although the words "not transferable" were printed on the back of the railway ticket, the holder of a transferred ticket ought not to be treated as guilty of "fraud" under the Act of Parliament, but should either have been proceeded against by a civil action, or, at most, for a breach of some bye-law of the company, under which possibly the endorsement of the words "not transferable" was made. In the result, therefore, the complaint was dismissed.

The question of law was whether upon the foregoing evidence the justices ought to have convicted the respondent of the offence charged in the complaint.

*O. Bowen*, for the appellants.—The question here is whether, under the circumstances, the respondent ought to have been convicted for travelling in a third-class carriage without a ticket. The evidence here clearly shews that there was an intent to defraud the company on the part of the respondent; had it been other-

wise it is admitted that the justices would have no power to convict. The fact that a ticket was issued to somebody by no means clears the respondent from the complaint preferred against him of travelling without "having paid his fare." [He cited *Bentham v. Hoyle* (1) and *Dearden v. Townsend* (2), and was then stopped by the Court.]

No counsel appeared on behalf of the respondent.

COCKBURN, L.C.J.—I think that the offence stated in this case comes within the terms of the statute, and that the defendant was liable to be convicted. It is not the case of a ticket taken by A., who for some reason is prevented from making any use of it and therefore hands it over to B. Where in the case of a tourist return ticket, which, as is well known, is issued by a railway company at a cheaper rate because the person who takes it is to return the same journey by the same route, and so the company can afford to issue the ticket for both journeys at a cheaper rate, upon the understanding that the return ticket shall be used by the man to whom the ticket was originally issued; if the ticket is given over at the end of the single journey by the person who originally took it to somebody else who is to have the advantage of it for the single return journey, and is enabled to travel at the cheaper rate at which the return ticket was issued, it is manifest that the condition on which the ticket was issued is violated, and that the party who thus gets the advantage of the return ticket does not pay his proper fare, inasmuch as the company thereby lose the difference between the return fare for the journey and the proper fare for the single journey. So it is, therefore, if the transfer takes place at an earlier part of the journey. Here the evidence shews that the defendant was travelling without having

(1) 47 Law J. Rep. M.C. 51; s. c. Law Rep. 3 Q.B. D. 289.

(2) 35 Law J. Rep. M.C. 50; s. c. Law Rep. 1 Q.B. 10.

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paid his fare and with intent to defraud the company of it; he was therefore liable to be convicted under this enactment.

MANISTY, J.—I am of the same opinion.

*Case remitted.*

Solicitor—R. R. Nelson, for appellants.

[IN THE QUEEN'S BENCH DIVISION.]

1879. { THE QUEEN v. THE GUARDIANS  
May 17. { OF THE POOR OF CLUTTON  
UNION.

*Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 35, 36—Owner re-building Cottages—Meaning of Words "Sufficient Privy."*

*By the Public Health Act, 1875, section 35, it shall not be lawful to re-build any house pulled down to or below the ground floor without a sufficient water-closet, earth closet or privy. P. pulled down and re-built two cottages and provided one privy common to both, which afforded sufficient accommodation to the respective occupiers of both cottages:—Held, that the requirements of the 35th section had been complied with, and that it was not necessary to provide a separate privy for each cottage.*

This was a Special Case stated by the Court of Quarter Sessions for the county of Somerset.

1. The appellants are the guardians of the poor of the Clutton Union, being the rural authority for the said union.

2. The respondent is a person who has caused two cottages within the district, which have been pulled down to the ground floor, to be rebuilt.

3. The said two cottages are in the same ownership, and are rebuilt adjoining one another, and are semi-detached.

4. When the respondent rebuilt the said cottages an old privy in a garden at the back of the said cottages was dis-

carded; such privy had hitherto been used in common by the occupiers of the said cottages.

5. The respondent on rebuilding the cottages built a new privy, to be used in common by the occupiers of both cottages.

6. The two cottages are let to and are occupied by different tenants, and each tenant has the right to use in common with the other tenant the new privy.

7. The new privy afforded and is capable of affording sufficient accommodation to the occupiers of the cottages using the same in common as aforesaid.

8. The appellants summoned the respondent before the justices, at petty sessions, on the complaint that he, being owner, did cause to be rebuilt from the ground floor a certain house without a sufficient water-closet, earth closet or privy, contrary to the provisions in that behalf of the Public Health Act, 1875.

9. The complaint was dismissed by such justices, and thereupon an appeal was brought to the Quarter Sessions.

10. The appellants contended, *inter alia*, that section 35 of the Public Health Act, 1875, requires that every house pulled down to or below the ground floor, shall have a sufficient separate water-closet, earth closet or privy.

11. The respondent contended that the above section did not require him on rebuilding as aforesaid to provide a separate water-closet, earth closet or privy for each house, but that the requirements of the section had been met by providing sufficient accommodation in one privy for the use of the occupiers of the two houses.

The Court of Quarter Sessions dismissed the appeal, subject to the opinion of this Court upon the above contentions.

The case and conviction having been brought up by *certiorari* and a rule *nisi* to quash the order of sessions having been obtained by the appellants,

*Poole*, for the respondent in the appeal, shewed cause.—The sessions were right in dismissing this appeal. The two cottages together have sufficient water-closet accommodation, which was all that the

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Public Health Act intended should be provided under section 35 (1).

Arthur Charles (*Vigor* with him), for the appellants, supported the rule.—The local authority alone can by virtue of the powers contained in section 36 authorise the use in common of one water-closet for more than one house, and unless such authority is obtained a separate closet must in all cases be made. The only discretion which a magistrate has is to determine whether one closet for each house is sufficient; otherwise there might be a conflict of authority between the local authority acting under the provisions of the 36th section and the justices or magistrate acting under the 35th section.

COCKBURN, L.C.J.—I think that the order of sessions which rejected this appeal ought to be affirmed. The 35th and 36th sections are in my judgment entirely separate and distinct, with specific objects of a different character. The 35th section relates to the erection or rebuilding of houses without a sufficient water-closet or privy, and a penalty attaches to persons who fail to comply with its requirements. If, therefore, two justices or a stipendiary magistrate find on a com-

(1) By 38 & 39 Vict. c. 55. s. 35, "it shall not be lawful newly to erect any house or rebuild any house pulled down to or below the ground floor, without a sufficient water-closet, earth closet or privy and an ashpit, furnished with proper doors and coverings. Any person who causes any house to be erected or rebuilt in contravention of this enactment shall be liable to a penalty not exceeding twenty shillings." By section 36, "If a house within the district of a local authority appears to such authority by the report of their surveyor or inspector of nuisances to be without a sufficient water-closet . . . the local authority shall by written notice require the owner or occupier of the house, within a reasonable time therein specified, to provide a sufficient water-closet . . . If such notice is not complied with, the local authority may at the expiration of the time specified in the notice, do the work thereby required to be done, and may recover in a summary manner from the owner the expenses incurred . . . provided that where a water-closet . . . has been and is used in common by the inmates of two or more houses, or, if in the opinion of the local authority a water-closet . . . may be so used, they need not require the same to be provided for each house." By section 251 the penalties may be recovered before two justices or a stipendiary magistrate.

plaint being brought before them or him that sufficient water-closet or privy accommodation has not been provided, it becomes their or his duty to inflict a penalty, and so the matter ends. The 36th section has no reference to any penalty, but to sanitary considerations only. It provides that if a house is found to be without a sufficient water-closet or privy, the local authority may require the occupier to provide one, and if their order is not complied with such local authority may do the work itself at the owner's cost; provided that where a water-closet has been used in common by inmates of two or more houses and may in the opinion of the local authority be so used, the latter need not require a separate closet to be provided for each house. The two sections seem to me to be entirely distinct; the one has reference only to the building of houses, the other to the sanitary condition of houses already built. I think, therefore, that the 36th section has no relation to the matter before us; and as regards the 35th section I am of opinion that the Legislature did not intend that in all cases to which the section applies there should be a separate water-closet or privy for each individual house. Had the Legislature so intended the word "separate" could surely have been used, and the absence of such a word leads me to the conclusion that the construction contended for by the appellants is not correct. Accordingly I am of opinion that the meaning of the words "sufficient water-closet, earth closet or privy," may be satisfied by the provision of a privy common to one or more houses, and as the clause is a penal one it should be construed with a certain degree of strictness.

MANISTY, J.—I am of the same opinion.

*Rule discharged. Order of Sessions affirmed.*

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Solicitors—Nutt & Savery, agents for E. H. Perrin, Temple Cloud, for appellants; Darley & Cumberland, agents for Clifton, Bristol, for respondents.

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[IN THE QUEEN'S BENCH DIVISION.]

1879. { THE QUEEN (on the prosecution  
May 23. { of GEORGE TUCK) v. THE JUSTICES OF BERKSHIRE.

*Appeal—Quarter Sessions—Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 52, sub-sec. 3—Conviction—Time for entering into Recognisance—“Immediately”—Question of Fact.*

By the Licensing Act, 1872, s. 52, an appeal is given to a person aggrieved by an order or conviction made by a Court of summary jurisdiction, and by sub-sec. 3 the appellant is required “immediately after” giving notice of appeal to the sessions against the order or conviction to enter into a recognisance to try the appeal, &c. :—

Held, that the question whether an appellant has duly complied with the requirements of the section was one of fact to be determined by the sessions, having regard to all the circumstances of the case.

The word “immediately” means the same thing as “forthwith,” and implies prompt action and as speedy as the circumstances reasonably admit of.

This was a rule calling upon the justices of Berks to shew cause why a writ of mandamus should not issue, directing them to hear and determine an appeal to the Quarter Sessions by George Tuck, a publican carrying on business near Faringdon, against a conviction by justices under 35 & 36 Vict. c. 94. s. 17, for suffering gaming to be carried on on his premises on the 14th of February.

The conviction took place on Tuesday, the 4th of March, 1879. Notice of appeal to the sessions, to be holden on the 8th of April, was given on Monday, the 10th of March, that is to say within seven days from the date of the conviction. At the time the notice of appeal was given the justices' clerk told the person who gave it that the justices would hold a petty sessions at Faringdon the following day, the 11th of March, when the appellant ought to enter into the necessary recognisances. The appellant did not attend on the 11th of March, but on the evening of Friday, the 14th of March, he entered into the recognisance, &c., required by

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35 & 36 Vict. c. 94. s. 52, before a justice (1).

On the appeal coming on for hearing at the quarter sessions holden at Reading, on April 8th, 1879, the justices required an explanation of the delay that had taken place, and, it being stated that none could be given, determined that the recognisance had not been entered into in proper time, and dismissed the appeal.

Affidavits were now filed with the object of shewing that the appellant was not in a position to carry on the appeal himself, and that the delay which had taken place was caused by his having to communicate with certain brewers, who were interested in the license, and who had enabled him to take the necessary steps for prosecuting the appeal.

A rule nisi was granted on the 8th of May, against which

H. D. Greene shewed cause.—The justices were right in deciding that the recognisance was not, under the circumstances, entered into in sufficient time. The words of sub-section 3 are “immediately after such notice,” not “within a reasonable time” or “forthwith,” which latter word is not, according to the dictum of Coleridge, J., in *The Queen v. The Justices of Worcester* (2), to receive so strict a construction as the word “immediately.”

[COCKBURN, L.C.J.—The meaning of

(1) By the Licensing Act, 1872, s. 52.—“If any person feels aggrieved by any order or conviction made by a Court of summary jurisdiction, the person so aggrieved may appeal therefrom; subject to the conditions and regulations following: First, The appeal shall be made to the next Court of Quarter Sessions for the county or place in which the cause of appeal has arisen, holden not less than fifteen days after the decision of the Court from which the appeal is made; Second, The appellant shall, within seven days after the cause of appeal has arisen, give notice to the other party and to the Court of summary jurisdiction of his intention to appeal, and of the ground thereof; Third, The appellant, immediately after such notice, shall enter into a recognisance before a justice of the peace, with two sufficient sureties conditioned personally to try such appeal, and to abide the judgment of the Court thereon, and to pay such costs as may be awarded by the Court, or shall give such other security by deposit of money or otherwise as the justice may allow.”

(2) 7 Dowl. at p. 790.

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*The Queen v. The Justices of Berkshire, Q.B.*

the words "immediately" and "forthwith" is really identical, notwithstanding what Coleridge, J., is reported to have said in *The Queen v. The Justices of Worcester* (2).]

At all events the question involved was one of fact for the justices, and this Court will not review their decision, and certainly not upon materials not before the justices. He also cited *The Queen v. Aston* (3), *Toms v. Wilson* (4), and *The King v. The Justices of Huntingdonshire* (5).

A. T. Lawrence appeared in support of the rule.—The word "immediately" must be construed to mean "within a reasonable time"—See *Re Blues*—per Lord Campbell—(6). Here the recognisance was entered into within four days after the notice of appeal was given, and that was, under the circumstances, a reasonable time. He also cited *The Queen v. The Justices of Essex* (7).

COCKBURN, L.C.J.—I think that this rule must be discharged. The 52nd section of the Licensing Act, 1872, gives an appeal from any order or conviction, provided that the appellant gives notice of his intention to appeal and of the grounds thereof, and also "immediately after such notice" enters into a recognisance to try such appeal. Now comes the question what is meant by the words "immediately after such notice" in sub-section 3? The party here, having complied with the requirements of the 2nd sub-section, did not enter into a recognisance until four days after giving notice and grounds of appeal, and the question raised now is whether such recognisance was given "immediately after" the notice of appeal. Now the conclusion I have come to is, that the question is one of fact for the justices to determine, having regard to all the circumstances of each particular case, and that it is impossible to lay down

a hard and fast line, as to the exact amount of time which ought to be allowed under the terms of the sub-section. I think that the words "immediately" and "forthwith" mean the same thing; they are stronger than the words "within a reasonable time," and imply speedy and prompt action, and an omission of all delay, in other words, that the thing to be done should be done as quickly as is reasonably possible. That raises a question of fact which, it seems to me, the sessions are the proper tribunal to determine, having regard to all the circumstances of the case. The justices might perhaps, if the facts now stated were before them, have properly come to a different conclusion, but that is no reason why their finding should be disturbed, otherwise the practical result would be to allow, in the form of a mandamus, an appeal on a question of fact which has already been determined.

MELLOR, J.—I agree in thinking that the question was one for the justices to decide, and that we ought not to interfere.

MANISTY, J.—I also think that this rule should be discharged. Under the 52nd section, sub-section 1, the appeal may come on for hearing at the sessions fifteen days after the decision of the Court from which the appeal is made. Seven of these days are allowed to the appellant to give his notice and grounds of appeal, there are then only seven clear days left before the appeal may come on for hearing; so that it is incumbent on the respondent to get up his case without further delay. The 3rd sub-section provides for a recognisance being entered into, and security given for costs immediately after the notice, and if we are to lay down the rule that four days may elapse before this is done, the costs may already have been necessarily incurred by the other side by reason of the notice of appeal, without their having any security for their repayment if the appellant alters his mind as to prosecuting his appeal. The question is one which the justices must decide having regard to the facts before them, nor can I see that their decision here was erroneous. It seems to me that the object of the sub-section was to pro-

(3) 19 Law J. Rep. M.C. 236.

(4) 4 B. & S. 464; s. c. 32 Law J. Rep. Q.B. 38.

(5) 5 Dowl. & Ry. 588.

(6) 5 E. & B. 291; s. c. 24 Law J. Rep. M.C. 138.

(7) 34 Law J. Rep. M.C. 41.

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vide for proper security being given as soon as practicable after notice of appeal, and bearing that in view I think that this rule should be discharged.

*Rule discharged.*

Solicitors—T. & G. Mallam, Oxford, for appellant; James Crowdy & Son, agents for Crowdy & Son, Faringdon, for defendants.

*Queen v. White & Sons, 21.*

[IN THE QUEEN'S BENCH DIVISION.]

1879. } THE QUEEN v. THE JUSTICES  
May 15. } OF WEYMOUTH.

*Queen v. White & Sons, 21.*  
*Summary Order—Justices; Disqualification of—Public Health Act, 1875 (38 & 39 Vict. c. 55), section 258—Local Authority, Prosecution by, for Nuisance—Urban Authority, Members of acting as Justices.*

Section 258 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), which enacts, "No justice of the peace shall be deemed incapable of acting in cases arising under this Act by reason of his being a member of any local authority," does not extend to enable a justice, being a member of an urban sanitary authority, to adjudicate upon a prosecution, which in the latter capacity he has been a party to instituting.

In this case a rule *nisi* for a certiorari had been obtained to bring up, for the purpose of quashing it, an order for the abatement of a nuisance, under the Public Health Act, 1875, which had been made by justices for the borough of Weymouth.

The facts were, that complaints had been made of the foul state of certain timber pounds within the borough, and the local government board had sent down an officer to inspect them and report upon the alleged nuisance. Consequent upon such inspection and report the local government board required the urban sanitary authority to abate the nuisance complained of. The town council, who were the urban sanitary authority, thereupon held a meeting, and after inquiry, unanimously resolved to institute a prosecution against the owners of the timber pounds. A summons was accordingly taken out against

the prosecutors of this *certiorari*, and upon the hearing, the order now in question was made. Seven justices adjudicated upon such summons, three of whom were members of the town council, and had been present at the meeting when the resolution to prosecute was passed.

*Pitt Lewis* shewed cause.—The 258th section of the Public Health Act, 1875, cures any absolute disqualification, by expressly providing that "No justice of the peace shall be deemed to be incapable of acting in cases arising under this Act by reason of his being a member of any local authority." It is obvious that it might be very difficult to carry out the Act in small boroughs, where the justices are almost all of them members of the town council, if they were prevented from acting in the two capacities. In neither capacity is there any personal interest; and it is established that a mere possibility of interest or bias will not alone disqualify—*The Queen v. Rand* (1).

[MELLOR, J.—But here they were parties to the resolution to prosecute; they would seem to be Judges in their own cause.]

The statute is intended to meet such a case as this; previously, no doubt, there would have been a disqualification—*The Queen v. Meyer* (2), a decision before this Act came into operation.

[COCKBURN, L.C.J.—If they had not taken part in determining the prosecution they would not have been disqualified as being part of the local authority; but the section does not go beyond this.]

*Channell*, in support of his rule, was not called on.

PER CURIAM (3). The rule must be made absolute.

*Order quashed.*

Solicitors—Combe & Wainwright, agents for R. N. Howard, Weymouth, for applicants; F. J. & G. J. Brackenridge, agents for Stiggall & Hooper, Weymouth, for respondents.

(1) 35 Law J. Rep. M.C. 157; s. c. Law Rep. 1 Q.B. 280.

(2) Law Rep. 1 Q.B. D. 173.

(3) Cockburn, L.C.J.; Mellor, J., and Lush, J.

[IN THE COMMON PLEAS DIVISION.]

1879. } WYNN (appellant) v. FOR-  
May 23. } REXTER (respondent).

*Mines—Coal Mine—Neglect of General Rules under 35 & 36 Vict. c. 76. s. 51—Liability of Agent as well as Manager.*

The Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), s. 51, enacts certain general rules which are to be observed in every mine to which that Act applies, and that every person who contravenes or does not comply with such rules shall be guilty of an offence against the Act, and that in the event of any contravention of or non-compliance with any of the rules "by any person whosoever being proved, the owner, agent and manager shall each be guilty of an offence against the Act, unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the said rules," to prevent such contravention or non-compliance.

The manager of a coal mine in Staffordshire and the respondent, the agent of the same mine, were summoned for non-compliance with the first general rule for procuring adequate ventilation in the mine. The magistrate convicted the manager, under whose directions the mine was being worked, but declined to convict the agent also of the same offence.

Held, that the agent as well as the manager of a mine to which the said Act applies was liable to be convicted of an offence against the Act, in not complying with the said rules as to ventilation in the mine, unless he gives evidence to shew that he had to the best of his power enforced the said rules.

CASE stated under 20 & 21 Vict. c. 43, by the stipendiary magistrate for the Potteries.

At a Petty Session holden at Longton, in Staffordshire, on the 27th of November, 1878, a complaint was preferred by the appellant, one of the chief inspectors of mines, against the respondent, charging that the respondent being the agent of a certain colliery called the Western Coyney colliery in the parish of Caverswall, in the county of Stafford, did not cause an adequate amount of ventilation to be constantly produced in the mine of the said colliery to dilute and render harmless

noxious gases to such an extent that the working places of the shafts, levels, stables and workings of such mine and the travelling roads to and from such working places, should be in a fit state for working and passing therein, contrary to the provision of the statute.

The statute under which the said proceedings were instituted was the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), s. 51 of which enacts, "The following general rules shall be observed so far as is reasonably practicable in every mine to which this Act applies.

(1). "An adequate amount of ventilation shall be constantly produced in every mine to dilute and render harmless noxious gases to such an extent that the working places of the shafts, levels, stables and workings of such mine and the travelling roads to and from such working places shall be in a fit state for working and passing therein."

(31). "Every person who contravenes or does not comply with any of the general rules in this section shall be guilty of an offence against the Act, and in the event of any contravention of or non-compliance with any of the said general rules in the case of any mine to which this Act applies, by any person whosoever being proved, the owner, agent and manager, shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means by publishing and to the best of his power enforcing the said rules and regulations for the working of the mine to prevent such contravention or non-compliance."

Every person who is guilty of an offence against this Act is by the 60th section of such Act made liable to a penalty not exceeding, if he is an owner, agent or manager, 20l.

The said mine was a mine to which the said Act applies.

The respondent was the agent of the said mine.

One George Hollins was at the date of the proceedings the duly appointed manager of the said mine, and he held a certificate of the said Coal Mines Regulation Act.

On the 12th of October, 1878, Mr. S. B. Gilroy, the assistant inspector of mines for the district, visited the said colliery



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and found that the ventilation of the said mine was defective and inadequate, the defect being caused by a fall in the roof of the said mine, and he thereupon gave directions to the respondent, who accompanied the said S. B. Gilroy in the absence of the manager to have the same remedied, which the respondent promised should be done.

On the 1st of November the said S. B. Gilroy as such assistant inspector examined the said mine again, and still found the ventilation defective and inadequate for the safe working of the said mine, and that nothing had been done for the purpose of removing the said fall or improving the ventilation, and thereupon the said appellant instituted proceedings both against the respondent and the said George Hollins, the certificated manager, for such offence.

It was proved by the evidence that the ventilation in the said mine was defective and inadequate, and that in consequence thereof the working places in the said mine were not in a fit state for working and passing therein.

It was also proved by the evidence that the said George Hollins was a duly certificated manager of the said mine, and that the said mine was worked under his directions. It was also proved that the said respondent was the agent of the said mine, and that occasionally in the temporary absence of the said George Hollins, which was about two days per week, he gave certain directions for the management of the said mine.

The magistrate convicted the said George Hollins as the certified manager of the said mine, who, in his judgment, was responsible for the said offence, and fined him the sum of 15*l.* and costs for the said offence, which the said George Hollins duly paid, and the magistrate dismissed the summons against the respondent.

It was contended on the part of the appellant that upon the above facts having been proved, the magistrate was bound under the provisions of the 51st section of the said Act to convict the respondent as the agent of the said mine as well as George Hollins, the certified manager, but the magistrate held that as the said George Hollins had already been fined for the offence, he had no right to convict

the respondent as such agent as aforesaid for the same offence.

*Gorst*, for appellant.—The magistrate seems to have considered that there must be a *mens rea* to convict a person of an offence against this Act. That is not so and by this 51st section of the Act it is expressly enacted that in the event of contravention of or non-compliance with any of the said general rules, "by any person whomsoever being proved, the owner, agent and manager shall each be guilty of an offence against this Act." Here it was proved that there had been a contravention of one of these rules by some one, for the magistrate has so found, and he has in consequence convicted the manager. Then the respondent, as the agent of the mine, is by the statute made guilty unless, as the section goes on to enact, "he proves that he had taken all reasonable means by publishing and to the best of his power enforcing the said rules."

[LORD COLERIDGE, C.J.—Even in the case of special rules where *prima facie* the person who broke them would be the person and the only person liable, I see by the 52nd section the owner, agent and manager is each also to be deemed guilty unless he proves that he took all reasonable means to enforce the said rules.]

In *Dickinson v. Fletcher* (1) which was a case on the Mine Regulation Act, 23 & 24 Vict. c. 151, it was sought to make the owner of a mine liable for the violation of the rules by a person employed by him, but the Court held that he was not so liable in the absence of any personal default on his part, and the Court were induced very much to come to that decision in consequence of the present Act shewing that the Legislature had not by the former Act intended to make a person liable for a penalty in the absence of *mens rea*. In the conclusion of his judgment Keating, J., there stated—"I may say that I think the subsequent legislation on the subject fortifies the view that I take of the construction of the former Act. It is provided by the 35th and 36th Vict. c. 76 in several of its sections that in the event of any

(1) 43 Law J. Rep. M.U. 25; s. c. Law Rep. 9 Q.P. 1.

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contravention of the provisions of the Act the owner, agent and manager of the mine shall each be guilty of an offence against the Act, unless he proves that he had taken all reasonable means to prevent such contravention. This is an explicit enactment *in pari materia*, and it appears to me to support the view which the Court takes of the intention of the Legislature in 23 & 24 Vict. c. 151."

No counsel appeared for the respondent.

LORD COLERIDGE, C.J.—Our decision must be in favour of the appellant. Parliament has passed the 51st section in the shape in which it is now enacted, and by it plainly intended to compel observance of the rules which are there enacted. The agent of the mine as well as the manager has to enforce those rules, and the Act makes him guilty of an offence against the Act, if he has not at least taken means to the best of his power to enforce them. That section enacts that, *prima facie*, the owner, agent and manager, are each responsible for the rules being enforced, and it lies on each of them to shew that they have in this respect discharged such duty to the best of their power.

LINDLEY, J.—I am of the same opinion. There might be a separate duty on the manager from that which the agent has to discharge with respect to these rules, but here that is not so. What we have to do is simply to construe this enactment according to its language, which is very plain. The 51st section makes it an offence against the Act, that there has been an offence by some one else. That would seem, *prima facie*, to be a very unjust thing, but the Legislature remedies that by saying that if you can shew you have taken means to the best of your power to enforce the rules you shall not be liable. It appears to me that the language of the enactment is too strong to be got over. The case must, therefore, be remitted to the magistrate to be dealt with by him accordingly.

*Case remitted to the Justices.*

Solicitors to the Treasury, for appellants.

[IN THE QUEEN'S BENCH DIVISION.]

1879. } THE QUEEN v. THE JUSTICES OF  
May 8. } WILTSHIRE.

*Poor Rate—Valuation List—Appeal—Union Assessment Committee Amendment Act, 1862 (27 & 28 Vict. c. 39), s. 1—Objection to Valuation List before Rate made—Refusal of Relief by Committee—Publication of Rate—Necessity of Second Appearance before Committee after making of Rate—Next practicable Sessions—Statute 17 Geo. 2. c. 38. s. 4.*

*By the Union Assessment Committee Amendment Act (27 & 28 Vict. c. 39), s. 1, it is enacted that no person shall appeal to sessions against a poor rate, made in conformity with the valuation list approved by the assessment committee, unless he shall have given to such committee notice of objection against the list, and shall have failed to obtain such relief in the matter as he deems just:—*

*Held, that a person who has given notice of objection to a valuation list, and failed to obtain relief from the assessment committee, before a poor rate is actually made in conformity with the list, need not, under 27 & 28 Vict. c. 39. s. 1, make fresh application for relief to the assessment committee after the rate is made, as a condition precedent to an appeal against the rate.*

This was an application for a writ of mandamus directed to the justices of Wiltshire, commanding them to enter and respite an appeal at sessions against a poor rate made on the 23rd of May, 1878.

The appellants were the Great Western Railway Company, and the respondents the overseers of the parish of Stratton St. Margaret, in the county of Wilts, and the assessment committee of the Highworth and Swindon Union. The respondents on the 13th of April, 1878, deposited a valuation list of certain hereditaments in the parish, in which list certain property of the appellants was rated. On the 11th of May, 1878, notice of objection was given by the appellants to the assessment committee to the amount at which the property was valued in the list. On the 15th and the 22nd of May the assessment committee held meetings, and refused to grant the appellants any relief. On the

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23d of May the respondents made a poor rate, and assessed the appellants to the same according to the rateable value of their property appearing in the valuation list. The rate was duly published on the 26th of May, and demand made upon the appellants on the 28th of May. The next meeting of the assessment committee after the making and publication of the rate was held on the 12th of June, 1878, and the next Quarter Sessions for the county of Wilts was held on the 2nd of July, 1878. Twenty-one days' notice of appeal to the assessment committee is required, so that if it was necessary to give the assessment committee fresh notice of objection after the making of the rate, the appellants could not have given the proper notice in order to appeal to the sessions held on the 2nd of July. On the 31st of July, 1878, the appellants gave a second notice of objection to the valuation list to the assessment committee, who, on the 4th of September, refused to grant any relief to the appellants. The appellants, on the 17th of September, gave notice of appeal to the Michaelmas Sessions; and, in pursuance of such notice, application was made at the Wilts Quarter Sessions held on the 16th of October to enter and respite the appeal.

The sessions decided, after argument, that they had no jurisdiction to enter and respite the appeal, on the ground that the appellants should have appealed to the sessions held on the 2nd of July.

*Webster (Lopes with him)* moved for a rule *nisi* for a mandamus.—The question turns on the construction of 27 & 28 Vict. c. 39. s. 1 (1). The fact of the appellants

having stated their objection to the valuation list to the assessment committee before the approval of the list by such committee did not relieve them from the necessity of objecting to the list after the making of the rate on the basis of it, as a condition precedent to an appeal against the rate. The case is governed by the decision in *The Queen v. The Great Western Railway Company* (2). It was then decided that the object of 27 & 28 Vict. c. 39. s. 1, was to give an assessment committee the opportunity of considering the validity of the objections to the rate before they incur the expense of making themselves respondents to an appeal at sessions. Here, inasmuch as the rate was published on the 26th of May, and the next meeting of the committee was held on the 12th of June, it was impracticable to appeal to the July Sessions, because a decision could not be obtained in time to enable the appellants to give the requisite twenty-one days' notice of appeal to the sessions. He also cited *The Queen v. The Justices of Derbyshire* (3) and *The Queen v. Biggleswade* (4).

*Arthur Charles (Ravenhill with him)*, for the respondents, shewed cause in the first instance.—The July Sessions were the next practicable sessions under 17 Geo. 2. c. 38. s. 4. A fresh application to the committee on the part of the appellants after the making of the rate was

grounds thereof, to the assessment committee of such union; provided that after the 1st of August next no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved of by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just; and which objection, after notice given at any time in the manner prescribed by the said Act with respect to objections, the committee shall hear, with full power to call for and amend such list, although the same has been approved of and no subsequent list has been transmitted to them, and if they amend the same shall give notice of such amendment to the overseers, who shall thereupon alter their then current rate accordingly."

(2) 38 Law J. Rep. M.C. 89; s. c. Law Rep. 4 Q.B. 323.

(3) 25 Law Times, N.S. 43.

(4) 21 Law Times, N.S. 494.

(1) By the Union Assessment Committee Amendment Act (27 & 28 Vict. c. 39), after reciting that it is expedient to amend the Union Assessment Committee Act, 1862, in regard to appeals against poor rates, and to make further provisions for securing correct and uniform valuations of the property liable to be assessed to the relief of the poor, it is enacted that "Before any appeal shall be heard by any Special or Quarter Sessions against a poor rate made for any parish contained in any union to which the Union Assessment Committee Act, 1862, applies, the appellant shall give twenty-one days' notice in writing previous to the Special or Quarter Sessions to which such appeal is to be made of the intention to appeal, and the

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quite unnecessary under the circumstances, and the appellants should therefore have given their notice of appeal to the July Sessions. Having failed to do this they lost the right of appeal. *The Queen v. The Great Western Railway Company* (2) is distinguishable. There a second rate was made while an appeal was pending against the first rate, and it was held that, inasmuch as an entirely new state of things might have arisen since the making of the first rate, a fresh notice of objection to the list ought to have been given. Here there was only one rate in question, the valuation remained unaltered, and any further application to the committee was quite unnecessary.

Webster replied.

COCKBURN, L.C.J.—I am of opinion that this rule must be discharged. The question turns on the 1st section of the Union Assessment Committee Amendment Act. Under the Union Assessment Committee Act, 1862, a person could appeal against a rate founded upon a valuation list approved by the assessment committee, without having taken objection before the assessment committee to the list. The later Act says that no appeal shall be made against a poor rate made in conformity with the list unless notice of objection to the list shall have been given to the assessment committee and the party shall have failed to obtain such relief in the matter as he deems just. That was a salutary provision, intended to provide a summary remedy in place of the more expensive process of having to go to Quarter Sessions to appeal against a valuation list. Under the older Act it was competent to the party objecting to the assessment to appeal to the sessions without going before the assessment committee; but by the 27 & 28 Vict. c. 39, the Legislature provided that it should be a condition precedent to the right of appeal to the sessions that a party has been before the assessment committee and has failed to get the relief which he required. Mr. Webster contended that though the party may have gone before the assessment committee in the first instance and sought relief once, he is bound to go again through the same process as soon as the

rate is made before he has a right to appeal. It seems to me that the Legislature could never have intended anything so absurd, and I should struggle to the uttermost before arriving at a conclusion so unjust. It is said, however, that we are bound by the decision in *The Queen v. The Great Western Railway Company* (2). It was there held that though the list stands good until a fresh one is made, with respect to each rate made upon such list a party intending to appeal must challenge the valuation list afresh. I own that the discussion which has taken place during the argument has somewhat shaken my confidence in the correctness of the decision in that case, but it is distinguishable from the present one. I think it possible that the Legislature, though they meant the list to be permanent until a new one is made, may have provided that, before a party can appeal against each successive rate, he must, in respect of each such rate, have endeavoured to obtain relief by taking objection to the list upon which such rate is based before the assessment committee. It seems to me, therefore, that, without overruling *The Queen v. The Great Western Railway Company* (2), we may give effect to the intention of the Legislature by saying that, when a second rate is not in question, a party who has been once before the assessment committee and failed to obtain relief is in a position to appeal to the next practicable sessions. Here, therefore, the appellants ought to have appealed to the July Sessions, and consequently the present application cannot be entertained.

LOPES, J.—I have nothing to add to what has been said by my Lord.

*Rule refused.*

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Solicitors—R. Nelson, for appellants; Few & Co., agents for Bradford & Foote, Swindon, for respondents.

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[IN THE COMMON PLEAS DIVISION.]

1879. { THE COMPANY OF THE PROPRIETORS OF THE SHEFFIELD WATERWORKS (*appellants*)  
Mar. 14, 18. { v. WILKINSON (*respondent*).  
THE SAME v. CORBRIDGE (*respondent*).

*Water—Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17)—Supply of Water to Houses—Supply after Water had been stopped for Arrears of Water-rate.*

*Where in consequence of a neglect to pay the water-rate due to a waterworks company, the company, in exercise of the power given them by section 74 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), have cut off the communication pipe between their pipes and the house in respect of which the rate was payable, the owner or occupier of such house is not entitled to receive a supply of water (although he pays or tenders the water-rate for the same), nor are the company liable to the penalty imposed by section 43 for neglecting or refusing to furnish such owner or occupier with a supply of water, until the communication pipe has been restored, and there is nothing in that Act to compel the company to restore the same.*

*Semble, the company have no right to refuse to allow the restoration of the connecting pipe and the supply of water until bygone rates have been paid.*

The following are the material facts of the case in the first of the above appeals stated for the opinion of the Court by the police magistrate for the borough of Sheffield.

By an information laid on the 26th of November, 1878, the above-named Walter Wilkinson complained that on the 9th of November, 1878, he being the owner of a dwelling-house, No. 12, Kaye Place, Barber Road, in the said borough, and then having laid communication pipes and done the necessary works and tendered the water-rate payable in respect thereof as required by law, did demand from the water company a sufficient supply of water for domestic purposes for the said dwelling-house, and that the water company had neglected and refused to give such supply contrary to the statute.

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The water company were thereupon summoned to appear at the Town Hall, Sheffield, to answer the information.

On the hearing of the summons it appeared that the annual value of this No. 12, Kaye Place, does not exceed 10*l*. That it is one of a group of houses, and that by about October, 1877, the communication pipes for bringing the water from the company's main pipes in the street into the house were laid down to it with the rest of the group under an arrangement nearly answering to a full carrying out of the provisions of sections 44 and 47 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), and so long as the water-rates payable therefor should be duly paid the occupier of the house was, in the language of section 44, entitled to have a sufficient supply of water for his domestic purposes.

At Lady-day, 1878, David Kaye was owner of this house, and as such liable in respect of it to the provisions of section 72 of the Waterworks Clauses Act, 1847. The water-rate for the then past quarter year, which had ended on the 25th of March, was paid in accordance with an accustomed practice of the Sheffield Waterworks Company.

When Midsummer-day, 1878, came, no payment was made of water-rate either for the then past quarter year, or for the quarter then commencing or for any other period. In the quarter year from Midsummer-day to Michaelmas-day, 1878, these further events took place. On the 6th of August David Kaye filed a petition in the County Court for liquidation of his affairs, and Mr. Pearson was appointed by the Court receiver of property, &c., under the Bankruptcy Act, 1869. It then appeared that this house (with eight others) had been mortgaged by David Kaye to the Alliance Benefit Building Society by deed dated the 21st of June, 1878, under which the mortgagor was to remain in occupation of one of the other houses, and a tenant of his in occupation of this No. 12, but the mortgagees had power to enter and sell in the event of proceedings in liquidation taking place. The result was that the mortgagees intervened on or immediately after the 6th of August, made Mr. Pearson their agent,

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and gave the tenants notice to pay their rents to him as such agent for them. Meanwhile the water-rate for the past quarter year remained unpaid, and also a portion of the then current quarter year had run out, that is, the time from the 24th of June to the 6th of August. No water-rate had been paid for it, much less for the whole current quarter year.

On the 14th of August, 1878, the water company stopped the water from flowing into the house by cutting the communication pipe.

At Michaelmas, 1878, a fresh quarter year began, but no water-rate was paid or tendered by any one, and on the 6th of November the mortgagees sold the house with other property to Mr. Wilkinson, the respondent.

The case set out a correspondence which had taken place between the manager of the water company and the solicitors for the mortgagees, and after the sale to Mr. Wilkinson, between him and the company and between his solicitors and the company, with reference to reconnecting the pipe and furnishing a supply of water to the house; the result of which was that the company refused to reconnect the pipe and allow the water to flow into the premises until not only the current quarter's rate, but the rates in arrear were paid, but they agreed to dispense with a formal tender of the quarter's rate in respect of the supply of water to the house which the respondent asked for.

The water company never laid the water on to the house again, and no one paid any water-rate for the quarter year from Lady-day to Midsummer-day or for any subsequent time.

On the hearing of the information, it was contended by counsel for the appellants that upon the above facts Mr. Wilkinson was not entitled to have the water put on again without paying the water company their claims for arrears of rates. He also contended that the case was not one for a complaint under section 43 of the Act. It was contended for the respondent that Mr. Wilkinson was not bound to pay the arrears of rates, and that the complaint was properly made under section 43 of the Act.

The magistrate was of opinion that the company had no right to stop the supply of water for arrears of past quarters' rates as against any other person than the actual defaulter, whether taking title through him or not, and that the respondent, on the 12th of November upon tender of the whole of the rate for the current quarter from Michaelmas to Christmas, 1878, became entitled to be supplied with water for the rest of the current quarter, without paying the rates for either of the past quarters, and that on the company neglecting or refusing to furnish him with the supply of water, his cause of complaint against them came within section 43.

The magistrate accordingly decided that the company had incurred a penalty of 10*l.* under section 43 of the Act, and had also forfeited under section 43 the sum of 40*s.* to Mr. Wilkinson for each of the fourteen days between the 12th and 26th of November, 1878, and he ordered that the company should pay these sums, making altogether 38*l.*, and certain costs.

In the second of the above appeals it appeared from the case that the respondent, Corbridge, was the occupier of a dwelling-house in 92 Division Street, of a greater annual value than 10*l.* One Biggs, who had been the former occupier, filed his petition for liquidation, and left in September, 1878, owing 14*s.* 4*d.* for two quarters' water-rate. Corbridge was appointed receiver of Biggs's estate, and he took possession of the house, and was accepted as tenant in the place of Biggs. On the 23rd of October, 1878, the company cut off the connecting pipes and stopped the supply of water to the house. On the 8th of November following Corbridge tendered the current quarter's rate in advance, and required the company to supply him with water, but he did not offer to pay the expense of restoring the connecting pipe. In other respects the case was similar to that of the case of Wilkinson.

The magistrate decided that Corbridge was an occupier within the meaning of the Act, and that under section 43 the company were liable to a penalty of 10*l.*, and to forfeit 40*s.* a day for ten days, and

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ordered them to pay these sums, amounting together to 80l.

The two appeals in each case were argued by

*Oave* (*Cyril Dodd* with him), for the appellants.

*Tennant* argued for the respondent, *Wilkinson*, but no one appeared for the respondent *Corbridge*.

*Our. adv. vult.*

BRAMWELL, L.J., (on March 18).—I have come to the conclusion that these convictions cannot be sustained. The information is founded upon the 43rd section of 10 & 11 Vict. c. 17, which says (leaving out words not important for the present question) that if the undertakers "neglect or refuse to furnish to any owner or occupier entitled under this or the special Act to receive a supply of water during any part of the time for which the rates for such supply have been paid or tendered," then they are liable to the penalty which the learned magistrate has awarded against them.

The question here is whether they have so refused to supply a person entitled. In one sense they have refused, no doubt, that is to say, they have not supplied the water, but whether it is a refusal under the statute may be, to my mind, a matter of some doubt, because as matters stood when they were called upon to supply it, they could not supply it inasmuch as the connecting pipe was cut off. However, I will treat it as a refusal, and the question then is, was the respondent a person entitled under the Act to receive a supply of water? Now it appears to me that persons entitled under the Act come under two classes described in the succeeding sections. The first of those is given in the 44th section, which enacts that where a house is of less value than 10l., upon a certain requisition being made, the undertakers, that is to say the company, shall lay down communication pipes, and it proceeds to say that upon such pipes being laid down and other things taking place as therein described, "the occupier of such house shall be entitled to have a sufficient supply of water." The next class of persons is that described by

section 48 which says "any owner or occupier of any dwelling-house" who shall wish to have the water may lay down the pipes himself and make the communication; and after a variety of details which I need not mention, the 53rd section says, "every owner and occupier of any dwelling-house or part of a dwelling-house within the limits of the special Act shall when he has laid such communication pipes as aforesaid and paid or tendered the water-rate payable in respect thereof," "be entitled to demand and receive from the undertakers a sufficient supply of water." Within section 43 there are, therefore, two classes of persons who are entitled to have water, that is to say, the under 10l. householder, where the pipes have been laid down by the company and certain arrangements have been made, and the rates tendered, and the over 10l. house owners or occupiers, where they themselves have laid down the pipes. The respondents in these two cases are within these two classes. The pipes were laid down by the company (the undertakers) in the case of *Wilkinson*, and they were laid down by the owner or occupier of the house in the case of *Corbridge* and the rates have been tendered.

Well, if the matter had stood there it is quite clear that the respondents would have been entitled to a supply of water within section 43, and the appellants would have been liable to the penalty. Now comes another section of the Act of Parliament. Section 74 is this—"If any person supplied with water by the undertakers or liable as herein or in the special Act provided, to pay the water-rate neglect to pay such water-rate" (that was the case here) "at any of the times of payment thereof, the undertakers may stop the water from flowing into the premises in respect of which such rate is payable by cutting off the pipe to such premises, or by such means as the undertakers shall think fit." Well, under the power given by that section, the company did cut off such pipe in the present case. The consequence is that the communication contemplated by section 44 and the three following sections, and by section 48 and the five following sections does not exist,

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and the company are unable to supply water without restoring the communication,—without what we may call “undoing the cutting off,”—without joining the service pipes to the main, and I find nothing in the Act of Parliament which compels them to do so, and that seems to me to dispose of the case.

I do not think one can say as a matter of right that they are bound to restore the communication, which could only be done at some expense (I have no notion at what, it may be a shilling or it may be 10s. or 20s.), and I find nothing in the Act of Parliament which should make them liable to that outlay without any means of getting it repaid. That seems to me to make an end of the case.

Now an argument that might be used, and no doubt a forcible one, is this—that in that view any occupier of a house who omits to pay the quarter's rate of 2s. may deprive the owner of that house of the right to a supply of water because the company may avail themselves of their power to cut off the pipes. I should say if that consequence followed it might be a very hard one, and I think the hardship may be looked at, not for the purpose of averting the effect of the statute, but for the purpose of construing it, upon the principle that the Legislature must not be supposed to pass harsh and unreasonable Acts of Parliament. But the answer to that argument, even if it were well founded, would be this—it may be hard upon the owner of the house to lose his supply of water, but it would be hard also upon the company if they were bound to be at the expense of restoring the communication between the service pipes and the mains, without any compensation for doing so. However, although it is not necessary to decide it, I really do not think that that consequence follows, and for this reason—Take the case first of the house above 10l. where the communication is laid down by the owner himself. I see nothing to prevent his doing it a second time. There is nothing in the Act which says if the pipes be removed altogether, they may not be laid down again, and if the communication were interrupted in any way, the owner of the pipes I should think

would have a right to restore that communication, but I am not expressing a legal opinion upon a matter which is not really before me. In case, then, the owner should restore the communication, the loss would fall upon the man who more naturally ought to bear it, namely, upon the owner of the premises, the occupier of which brought upon them the inconvenience of being without water by not paying his water-rate. In like manner as to the house under the value of 10l. where the communication has been laid down by undertakers by section 47, the owner or reputed owner of any such house where it has been so laid down may purchase the pipes, and then he no longer pays the rent for the use of them, but he simply pays the water-rate. When such owner has purchased the pipes, which it appears to me he might, he would then be in the same situation as the owner under section 48 and following sections, and would be at liberty to make the communication himself; and I cannot help thinking that some countenance is given to this by section 46, which is as follows—“If the occupier for the time being of the house in which any such communication pipes or other works and engines shall have been laid down by the undertakers, refuse to pay for a supply of water, or if such house be unoccupied for twelve months, the undertakers may demand from the owner thereof payment of the amount of the principal money invested by them in providing and laying down such communication pipes and other works and engines; and if such owner after ten days' notice given to him by the undertakers neglect or refuse to pay such principal money the undertakers may enter the house and remove such pipes and other work,” &c., the result of which is this, that they cannot in the case of a house under 10l. where they have laid down the pipes, not only cut off, but at once remove their pipes—they must wait for some time. Whether it was in the contemplation of the Legislature, or whether as, frequently happens, general provisions are put in, with what one may call a general object, I do not know, but it does seem to me under these various sections



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of the Act, that when the communication is cut off it is in the power of the persons interested in the house to restore that communication by laying down fresh pipes or by simply restoring the communication. The conclusion I have come to is this—that the company may cut off the communication under circumstances such as stated in this case, and that they are not bound to restore that communication. If that is a hardship upon the owners and the occupiers of the property, it would have to be set against the hardship of making the company be at the expense of restoring the communication which they have lawfully interrupted under their powers under the Act of Parliament.

Now my judgment does not proceed upon the ground that the appellants have a right to insist upon their being no communication until the bygone rates are paid. I do not think so. That was their notion undoubtedly, but I do not think that it is sustainable. The learned magistrate who has stated this case before us has really taken a great deal of pains about it, and has argued it very well indeed; and I agree with him in thinking it was not the intention of the Legislature that the company should be at liberty to withhold the communication and the supply of water until the arrears of rates were paid. I quite agree with him in his reasoning that ample provision is made in the statute for their not being any money out of pocket, for the rates are to be paid in advance and really the day after the rate in advance is due, they might stop the communication if they thought fit to do it, and in that case they would only have one or two days' supply of water upon credit, and they would be entitled to recover the rate. They would have quite sufficient remedies therefore as it seems to me without having what one may call something in the nature of a lien upon the property for the payment of bygone rates. My decision does not therefore proceed upon that ground, but upon the point adverted to by the learned magistrate as creating a doubt in his mind, namely, whether the appellants were bound to restore the communication, and he seems to have

been of opinion that they were. In that I cannot agree with him, and for the reasons I have given I think that they were not.

There is another matter I wish to speak about. Wilkinson offered the expense of restoring the communication, and the appellants dispensed with any formal tender of it. In my opinion, they ought to have accepted that offer, because they would have thereby got all that they were really entitled to; but they were not bound to accept it in point of law. Wilkinson might have a right to restore the communication as I have suggested, but the company were not bound to take the price of it, and to do the work themselves. Therefore for the reasons I have already given, I think in both cases the appellants were not liable to the penalty which has been imposed. The only difference between the two cases is, that in Corbidge's case there was no tender of or offer to pay the expense of restoring the communication.

It will be understood I trust that I do not hold that the company have any lien for arrears of rates. If before they had cut off this supply the current rate had been tendered to them, they would have had no right to cut it off, and would have been bound to supply the water although there might have been anterior rates still due to them.

As to the costs, since the appellants were substantially wrong, I should have doubted whether the respondents should have been made to pay the costs, had they been each content with a single penalty of 40s. or some smaller sum, but as they chose to try the question by inflicting penalties to a large amount and in such a harsh way as they have done, they must take the consequences, and having failed, must pay the costs. Therefore in each case the appeal must be allowed with costs.

LOPES, J.—These two cases raise questions of some importance, and I may say, some difficulty under the Water Works Clauses Act, 1847. The facts may be shortly stated thus—Wilkinson was the owner of a house under the annual value of 10*l*. The house had belonged to a

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man named Kaye; it was mortgaged by him. The mortgagees sold to Wilkinson on the 6th of November, 1878. At this time rates for several quarters were in arrears, and on the 14th of August, 1878, the company, in exercise of the power given to them under the 74th section of the Act, had cut off the pipe to the house in question, and the pipe was so cut off when Wilkinson purchased. On the 12th of November Wilkinson tendered the then current quarter's rate, and offered to pay for the reconnecting of the pipe. The company refused to furnish a supply of water until the arrears were paid. Wilkinson then summoned the company before the magistrates, and the company were convicted under section 43 of the Act, and were subjected to the penalties which appear in the conviction.

In Corbidge's case the house was of more than the annual value of 10l. One Biggs occupied the house until the 27th of September, 1878, when he filed his petition for liquidation. Corbidge was then appointed receiver and lived in the house, and was accepted as tenant of the house by the owner. On the 23rd of October, 1878, several water-rates were in arrear, and the company cut off the pipe and stopped the supply. On the 8th of November Corbidge tendered the current quarter's rate in advance. The company, however, did not supply water, and Corbidge then summoned them, and they were convicted under this 43rd section, and were subjected to the penalties which appear in that conviction.

Now, if these convictions are right, it is perfectly clear to me that they can only be maintained by the combined effect of sections 43 and 74, but I do not think that they can be so maintained. Section 70, which is not an immaterial section, provides that the rates shall be paid quarterly in advance. Now this was done for the protection of the undertakers, and, as I think, the Legislature did not intend that any liability should be attached to the property, but that it should be a personal liability. I think, therefore, that there was no lien in respect of any arrears of rates. Section 74 relates to the recovery of rates, and

enacts that if any person supplied with water or liable to pay the water-rate, neglects to pay such water-rate, the undertakers may stop the water from flowing into the premises in respect of which such rate is payable, by cutting off the pipe to such premises. Then follow certain words which are not necessary for me to cite, and section 43 provides that, "If the undertakers" "neglect or refuse to furnish to any owner or occupier entitled" (those are material words) "under this or the special Act to receive a supply of water during any part of the time for which the rates for such supply have been paid or tendered," they shall then be liable to certain penalties. Now the important question in this case is this, what is the meaning of a person "entitled to receive a supply of water"? Is it a person whose supply of water has been cut off for non-payment of rates? I do not think that is the meaning. I believe that section 43 refers to a case of improper refusal and neglect, when the communication is intact and has not been interrupted on account of any misfeasance by a party entitled to a water supply. Such a person may be properly enough said to be entitled, and in case of the neglect or refusal of the company being then established, the penalty which is spoken of in that section would not be an unreasonable one. It is not immaterial to consider what the effect would be if a different construction were adopted. The occupiers might contemptuously neglect to pay rates—they might oblige the company to cut off their supply of water, and then directly that was done they might tender the rate, and thereby put the company to the expense of reconnecting the pipe; and if the company did not furnish a supply of water, they might subject them to the penalty provided in this 43rd section. No doubt it may be said that a hardship is imposed upon the owner and occupier if the construction which we think this section ought to receive is the true one, because there are it appears no means in the Act by which the owner or occupier can compel a supply of the water which has been cut off. I cannot help thinking that the mode by which the re-supply was to be ob-

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tained was overlooked by the Legislature when this Act of Parliament was passed. It is not, however, to be forgotten, that the position of the owner and occupier is not altogether irremediable, and the pipe may be re-connected by them in the way suggested by the Lord Justice. I agree, therefore, in the result that both these appeals must be allowed.

*Appeals allowed.*

Solicitors—Pitman & Lane, agents for R. Blake-lock Smith, for appellants; J. W. Hickin, agent for W. J. Clegg & Sons, for respondents.

*Re Malby 572562 + 21.*

[CROWN CASE RESERVED.]

1878.	} THE QUEEN v. OWEN HUGHES.*
Nov. 16, 24.	
Dec. 6.	
1879.	
March 8, 11.	
June 21.	

*Perjury—Petty Sessions—Warrant improperly issued—Want of Written Information or Oath—Jurisdiction of Justices.*

*S. was arrested on an illegal warrant and taken before the justices in petty sessions, who, having heard the charge and taken evidence in support of it, convicted him. No objection was taken by S. to the jurisdiction of the justices.*

*H. was afterwards indicted for perjury committed by him at the hearing of the case at petty sessions, and convicted, subject to the opinion of the Court for Crown Cases Reserved as to the jurisdiction of the justices in petty sessions, the objection thereto being that S. was arrested on a warrant which had been issued without any information in writing or on oath:—*

*Held (KELLY, C.B., dissentiente), that the charge having been made in the presence of S., who was then and there called upon*

*to answer it, it was immaterial, so far as the jurisdiction of the justices to hear that charge was concerned, whether the accused was before them voluntarily or otherwise, or on legal or illegal process, and therefore that H. was rightly convicted of perjury.*

CASE reserved by Bramwell, L.J.

Owen Hughes was convicted before me of perjury. He swore falsely and corruptly on the hearing of a charge against John Stanley at petty sessions for an assault on him, Owen Hughes, and for obstructing him, being a police constable, in the discharge of his duty. But it was objected that the defendant, Owen Hughes, should be acquitted on the ground that the proceedings were informal and without jurisdiction in the magistrates who heard the case. Hughes went to the office of the clerk to the justices, saw there a clerk of the clerk, and told him he wanted a warrant against John Stanley for assaulting him and obstructing him in the discharge of his duty. The clerk gave him a form of a warrant to that effect, which Hughes took to a magistrate, who signed it. There was no written information nor oath by Hughes or any other person to found or justify the issuing of the warrant. Stanley, however, was arrested on the warrant by Hughes, and brought before the magistrates. The case was gone into of assault and obstruction. No objection was taken by Stanley, who defended himself, and called a witness to shew he was not guilty. I overruled the objection, and, as I have said, the defendant Hughes was convicted.

I have now to ask the Court for the consideration of Crown Cases Reserved whether, because there was no written information nor oath, I ought to have directed an acquittal? If I ought, the conviction should be quashed, otherwise not.

Bramwell, L.J., further stated to the Court that there was no evidence at the trial before him that the warrant on which Stanley was arrested was produced before the justices who convicted him; that no one then thought it necessary to enquire into such a matter; that the case at the trial was conducted on the footing

\* *Coram* Lord Coleridge, O.J.; Kelly, C.B.; Denman, J.; Pollock, B.; Huddleston, B.; Field, J.; Lindley, J.; Manisty, J.; Hawkins, J.; and Lopes, J.

*The Queen v. Hughes, C.C.R.*

that the case before the justices was conducted in the same way that it would have been if the warrant had been issued on a written information duly sworn to.

(The case was twice argued, the first time before five Judges, who, differing in opinion, ordered a fresh argument.)

*O. S. O. Bowen (M. Mackenzie with him)*, for the prisoner.—The prisoner is not guilty of perjury, because the proceedings in which he was sworn were *coram non iudice*. Justices have no power to convict summarily except by express statutory enactment, and there is some difficulty in ascertaining under what statute Stanley was convicted. Probably it was under 34 & 35 Vict. c. 112. s. 12 (1), which enables justices to inflict a term of imprisonment not exceeding six months with hard labour for assaults on constables in the execution of their duty. It is not stated in the case what the sentence was, but it is suggested to have been one of six months' imprisonment with hard labour. If the conviction was not under that statute, it must be supposed by the justices that they were convicting under 24 & 25 Vict. c. 100. s. 38 (2). If so, they were convicting summarily under a statute which did not authorise them to do so. Assuming the justices to have convicted under 34 & 35 Vict. c. 112, the procedure was regulated by s. 17, which enacts "that any offence against that Act may be prosecuted before a court of summary jurisdiction in England in man-

ner directed by the 11 & 12 Vict. c. 43, and any Act amending the same." Therefore a person who is convicted under the former Act must have been prosecuted according to the procedure prescribed by 11 & 12 Vict. c. 43, and the justices had no jurisdiction if the proceedings were not in conformity with the provisions of that Act. The object of 11 & 12 Vict. c. 43, as appears from the preamble thereto, was to consolidate the law with regard to the duties of justices in respect of summary convictions and orders, and to define such duties clearly by positive enactment, as well as to amend the procedure.

The information is the foundation of the jurisdiction of justices in summary proceedings. Without an information there is no charge, and without a charge there is no issue between the prisoner and the Crown. The necessity for an information appears from *Paley on Convictions* (p. 64, 5th ed., by H. Macnamara). The learned editor, whose name is honoured in the profession, and adds weight to the authority, says: "It is requisite in all summary proceedings of a penal nature that there should be an information or complaint, which is the basis of all the subsequent proceedings, and without which the justice is not authorised in intermeddling, except when he is empowered by statute to convict on view. . . . A sufficient information by competent persons, relating to a matter within the magistrate's cognisance, gives him jurisdiction, irrespective of the truth of the facts contained in it . . . as on the one hand the information is not invalidated by reason of the statements being false, so, on the other, it cannot be rendered valid by the testimony offered in support of it, for the office of the evidence is to prove, not to supply, a legal charge." These words are also to be found in judgments of the highest authority. They shew that an information is the basis of the whole proceedings, and that justices cannot wade through a case to collect a charge, but that the charge must be made in the first instance, and then evidence offered in support of that charge. The point to be decided in this case is therefore no smaller one than whether, in the administration of Jervis's Act (11 & 12 Vict. c.

(1) By 34 and 35 Vict. c. 112. s. 12, where "any person is convicted of an assault on any constable when in the execution of his duty, such person shall be guilty of an offence against this Act, and shall, in the discretion of the Court, be liable either to pay a penalty not exceeding 20*l.*, and in default of payment to be imprisoned, with or without hard labour, for a term not exceeding six months, or to be imprisoned for any term not exceeding six, or in case such person has been convicted of a similar assault within two years, nine months, with or without hard labour."

(2) By 24 & 25 Vict. c. 100. s. 38, whosoever shall assault any person with intent to commit a felony, or shall assault any peace officer in the due execution of his duty, or any person acting in aid of such officer, or shall assault any person with intent to resist or prevent the lawful apprehension or detainer of himself or of any other person for any offence, shall be guilty of a misdemeanour.

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43), it is lawful for justices to dispense altogether with a written information.

Under 11 & 12 Vict. c. 43, the information is required to be in writing. Section 1 of that statute enacts that in all cases where an information shall be laid or complaint made the justices may issue a summons requiring the person summoned to answer the information or complaint. Then section 2 enables justices, if they think fit, upon oath or affirmation substantiating the matter of such information or complaint, to issue their warrant to arrest the party charged or complained against, if he does not appear to the summons. Sections 4, 7, 8, and 9 shew that it was intended that the information should be in writing. Section 10 enacts that every information for any offence punishable upon summary conviction, unless some particular Act shall otherwise require, may be made or laid without any oath or affirmation being made of the truth thereof, except where the justices shall issue their warrant in the first instance, and in every such case the matter of such information shall be substantiated upon oath before any such warrant shall be issued. Here the warrant was issued without any such information. The information, which is the basis of all subsequent proceedings, was absent. The language of section 10 is imperative, and not directory merely. The justices have to deal with the hearing of the information; that is all they have jurisdiction to do. The submission or consent of Stanley could not give jurisdiction. Consent gives no jurisdiction in criminal matters, and with regard to procedure there can be no waiver in a criminal case.

[KELLY, C.B.—If there is no charge, how can what is sworn be material to a charge?]

It cannot. What a witness says on the trial is not the charge. In order to constitute perjury there must be wilful and corrupt false swearing, or affirmation, upon a legally made charge. In *The Queen v. Carr* (3) it was held that it should be proved distinctly, on the trial of an indictment for perjury, what the charge was on the hearing of which the

false evidence was given. In that case Kelly, C.B., said: "The perjury arises on the hearing of a charge against Lambe before certain justices, and the jurisdiction on their parts to entertain it is the point in question. We must see whether the case distinctly shews that the charge was made to and in the presence and in the hearing of the accused in order to ascertain whether what was sworn was material to the issue. The charge must be collected from the statement in the case, and looking at that, it appears that Lambe was in some way or other made personally to appear before the magistrates, when certain evidence on some charge or other was given. We find, first, that a summons seems to have been made out, but whether that was ever served, or left the magistrate's office, or was delivered to the police officer, or, if so, whether he ever shewed it to the accused, does not appear. It is further stated that Lambe appeared before the magistrates, and evidence was heard which there is reason to believe was in relation to a charge of selling beer without a license; but whatever may have been the charge, we look in vain for any charge distinctly stated, whether written or oral, on which the defendant gave evidence, and in relation to which such evidence is said to have amounted to perjury. Perjury is assigned in the indictment by alleging that the prisoner swore falsely on the hearing of the charge. To sustain that, the charge should distinctly be proved, and I nowhere find any statement which distinctly shews the charge against Lambe. How can we say that Lambe may not have been before the magistrates without any summons or information, or any real charge having been made known to him? Under these circumstances, and without reference to the authorities cited, I think the conviction should be quashed." In *The Queen v. Scotton* (4), where there was an information laid under the Game Act (6 & 7 Will. 4. c. 65) without an oath, it was held that the information alone was not sufficient to give justices jurisdiction

(3) 10 Cox, C.C. p. 564.

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(4) 5 Q.B. Rep. 498; s. c. 13 Law J. Rep. M.C. 58.

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to entertain the charge. There is no substantial difference between the provisions of that Act and Jervis's Act as to the necessity of making an information, and as to its being made upon oath as preliminaries to giving justices jurisdiction. In *Caudle v. Seymour* (5) it was held that a justice's warrant was bad which did not shew any information on oath on which the warrant was issued; and, further, that a deposition on oath taken by the justice's clerk, the justice not being present, nor at any time seeing, examining or hearing the deponent, was irregular and no justification for the proceedings founded upon it. That this is not mere procedure is shewn by the judgment of Patteson, J., in which he says, "The every day practice is to state an information on oath; if the magistrate omits that, he must take the consequence. As to the other point, magistrates should be careful not to commit this part of their duty to a clerk. Depositions of this kind are not like affidavits here, which are made to be used or not, by a party in a cause, as he sees fit. It is a matter of some discretion to determine how depositions are to be acted upon; and they ought, therefore, to have the magistrates' full consideration."

Coleridge, J., also remarks, "That it is true that a magistrate here has jurisdiction over the offence in the abstract; but, to give him jurisdiction in any particular case, it must be shewn that there was a proper charge upon oath in that case. A man has no right, because he is a magistrate, to order another to be taken for an offence over which he has jurisdiction without a charge regularly made." So in the present case it is conceded that the justices had jurisdiction in the abstract over the offence, but it is contended that they had no jurisdiction in the charge against Stanley for want of a written information on oath. It must always be shewn that justices have jurisdiction in the particular charge—*The Queen v. Pearce* (6).

(5) 1 Q.B. Rep. 889; s. c. 10 Law J. Rep. M.C. 130.

(6) 3 B. & S. 531; s. c. 32 Law J. Rep. M.C. 76.

[DENMAN, J.—In *The Queen v. Millard* (7) the information was in writing, and it was held that it was not necessary that there should be an information on oath to give the justices jurisdiction to hear the case where the party charged with an offence under the Malicious Trespass Act appeared before them.]

That was a charge under a special statute which makes a sworn information unnecessary. The case of *Turner v. The Postmaster-General* (8) will be relied on by the prosecution as shewing that the want of an information and summons may be cured by appearing before justices so as to give them jurisdiction to convict. But that case only decides that an information and summons under a particular statute (not Jervis's Act) does not go to the root of the jurisdiction of the justices. Under Jervis's Act the information in writing is essential to the jurisdiction of the justices, and the want of it cannot be waived. The information is not mere process but procedure. By process is meant the means taken to bring a man before a justice, and by procedure that which takes place when he is there. Where the procedure is laid down by statute, as in this case by section 17 of 34 & 35 Vict. c. 112, the mode prescribed is a condition precedent to the jurisdiction of the justices which must arise at the commencement of the hearing. See note to *Orepps v. Durdon* (9). "The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature; it is determinable on the commencement, not at the conclusion of the inquiry" per Lord Denman, C.J., in *The Queen v. Bolton* (10). The information must be looked at to see whether the justices have jurisdiction or not. There is no power to alter the charge in the course of the enquiry. If Stanley was brought before the justices for an offence under 24 & 25 Vict. c. 100 he could not be convicted under the 34 &

(7) 1 Dears. C.C. 116; s. c. 22 Law J. Rep. M.C. 108.

(8) 5 B. & S. 756; s. c. 34 Law J. Rep. M.C. 10.

(9) 1 Smith's L. C. (7th ed.) p. 682.

(10) 1 Q.B. Rep. 66; s. c. 10 Law J. Rep. M.C. 49.

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35 Vict. c. 112—*Martin v. Pridgeon* (11); and *The Queen v. Brickhall* (12).

*Poland (the Attorney-General (Sir J. Holker) and Dicey with him).*—The conviction was right. The justices who heard the case against Stanley had jurisdiction, and the false swearing of the defendant at such hearing amounted to perjury. The question is, whether the hearing was *coram non judice*. To arrest a man lawfully on a warrant there must be an oath. The warrant here was improperly issued, and Stanley was illegally arrested and brought before the justices, but he was before them, and his case had to be dealt with by them in some way. The warrant being bad, Stanley had a right of action against the constable who arrested him, but that does not affect the jurisdiction of the justices to deal with the case. A charge was made in the hearing of Stanley, and no objection taken by him to the jurisdiction of the justices. No question arises now as to the illegality of the arrest, or of the conviction of Stanley; the only question is whether what took place at the hearing was *coram non judice*. The warrant was not the charge, it was merely the authority to the constable to arrest Stanley, and when Stanley was before the justices the charge was made. All that preceded the verbal charge before the justices could be dispensed with. It is sufficient that the charge was made orally, and that upon the hearing of that charge the defendant swore falsely and corruptly. The case is governed by authority. In *The Queen v. Millard* (7), Wightman, J., ruled on the trial of an indictment for perjury "that the magistrates had jurisdiction to hear a charge under the Malicious Trespass Act, although the information was not on oath, and that the omission to lay the information on oath was an error in procedure only." This Court held that Wightman, J., was right in saying that the information on oath was a matter of procedure only, and not necessary to found the jurisdiction of the justices.

(11) 1 E. & E. 778; s. c. 28 Law J. Rep. M.C. 179.

(12) 33 Law J. Rep. M.C. 156.

In *Turner v. The Postmaster-General* (8), the passage which has been read from *Paley on Convictions* was relied on, yet the Court held, that the want of an information and a summons was cured by the appearance of the accused before the justices, and that the accused had waived the objection that they were not legally in custody on the charge, and therefore that the justices had jurisdiction to deal with the case. If a person is before the justices and is informed of the charge made against him, the means by which he has been brought there are immaterial. The jurisdiction of justices cannot be affected by a mere matter of process. A person may waive anything in the nature of process or procedure—*Blake v. Beech* (13), *The Queen v. Berry* (14), *The Queen v. Fletcher* (15), *The Queen v. Hurrell* (16).

*Bowen*, in reply.—It is conceded that there may be a waiver of process, but not of procedure. Where the procedure is laid down by statute, as in this case by section 17 of 34 & 35 Vict. c. 112, the mode prescribed is a condition precedent to the jurisdiction of the justices to enter upon the hearing of the charge. The question is not whether the case was conducted according to the rules of substantial justice, but whether it was conducted according to the requirements of the law. In *The Queen v. Fearshire* (17) Lord Mansfield said that it was the indispensable duty of every justice of the peace to take all charges in writing, of whatsoever nature or kind they might be.

LOPES, J.—The facts of the case, and the Acts of Parliament and authorities which bear upon it, have been fully gone into by the judgments of the other members of the Court, which I have read. I agree in substance with the judgments which will be delivered, but do not de-

(13) 45 Law J. Rep. M.C. 111; s. c. Law Rep. 1 Ex. D. 320.

(14) 8 Cox, C.C. 121; s. c. 28 Law J. Rep. M.C. 86.

(15) 40 Law J. Rep. M.C. 123; s. c. Law Rep. 1 C.O.R. 320.

(16) 3 Falc. & F. 271.

(17) 1 Leach, C.C. 240.

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sire to commit myself to any opinions which have been expressed collateral to the question before us. I think the warrant in this case was mere process, for the purpose of bringing the party complained of before the justices, and had nothing whatever to do with the jurisdiction of the justices. I am of opinion that, whether Stanley was summoned, brought by warrant, came voluntarily, was brought by force or under an illegal warrant, is immaterial. Being before the justices, however brought there, the justices, if they had jurisdiction in respect of time and place over the offence, were competent to entertain the charge, and being so competent, a false oath wilfully taken in respect of something material, would be perjury.

HAWKINS, J.—I am of opinion that the conviction was right, and ought to be affirmed. In arriving at this opinion I have assumed as a fact, from the case as stated, that Stanley was arrested and brought before the justices upon an illegal warrant as ever was issued, a warrant signed by a magistrate not only without any written information, or oath to justify it, but without any information at all.

It follows that the magistrate who issued the warrant, and the defendant who, with knowledge of the illegality, executed it, were liable to an action for false imprisonment. If authority were wanting for this I need but refer to *Caudle v. Seymour* (5), *Morgan v. Hughes* (18) and *Stevens v. Clark* (19). Wrongful, however, as were the proceedings by which Stanley was brought into the presence of the magistrates to answer a charge, which up to that moment had never been legally preferred against him, before those magistrates and in his presence a charge was made, over which, if duly made, they had jurisdiction. Upon that charge it was that the hearing proceeded, and in support of that charge it was that the defendant was sworn, and in giving his evidence swore corruptly and falsely. The case expressly finds that the

alleged perjury was committed "on the hearing of a charge against John Stanley, at Petty Sessions, for an assault on him Owen Hughes, and for obstructing him, being a police constable, in the discharge of his duty."

Comparing this finding with the language of the 24 & 25 Vict. c. 100. s. 38, which enacts that, "Whosoever shall assault resist or wilfully obstruct any peace officer in the due execution of his duty shall be guilty of a misdemeanour," I come without hesitation to the conclusion that the charge was that of the indictable offence created by that statute, and I do not think a doubt could have been suggested as to this, had we not been informed in the course of the argument that the justices in the result dealt summarily with the case, and convicted Stanley under section 12 of 34 & 35 Vict. c. 112, of an assault upon Hughes, being a constable in the "execution" of his duty, and sentenced him to six months' imprisonment with hard labour. The case does not find in what form the charge was made, whether in writing or otherwise. In my opinion, writing was unnecessary, but, if even writing were necessary, I would, in the absence of evidence to the contrary, assume the charge to have been properly made, as did Crompton, J., in *Turner v. The Postmaster-General* (8). Now, a charge having been made before the justices of an indictable offence, committed within their jurisdiction, by a person then bodily present, it seems to me that they were bound to take cognizance of it. The 17th section of 11 & 12 Vict. c. 42, expressly recognises the legality of depositions of witnesses taken in cases in which persons charged with indictable offences are "brought" before justices "with or without warrant." Had the justices proceeded, upon the defendant's deposition, to commit Stanley for trial instead of convicting him summarily, it is difficult to see what possible objection could have been made to the legality of their proceedings. They did not, however, think fit to adopt that course. They took, it is true, the evidence on oath of the defendant upon the charge for the indictable misdemeanour created by 24 & 25 Vict.

(18) 2 Term Rep. 225.

(19) Car. & M. 509.



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c. 100, but having done so, they proceeded to convict summarily under a different statute, 34 & 35 Vict. c. 112, without, as I collect, any new information or charge of the latter offence. In short, they convicted him of an offence with which he had never been legally charged. In this I am of opinion they were wrong, and upon this ground I am strongly inclined to think that the conviction of Stanley may be quashed. *Martin v. Pridgeon* (11), *The Queen v. Brickhall* (12), more particularly referred to hereafter, are strong authorities in favour of this view.

It does not, however, seem to me to be necessary to decide that point, for in the case before us we have only to determine whether the justices, at the moment when they swore the defendant in support of the charge which was made, had jurisdiction to hear that charge. Whether they afterwards pronounced a legal or an illegal judgment is immaterial to the present inquiry.

Assuming, however—contrary to the view I have taken—that the charge upon which the defendant was sworn was of an offence punishable upon summary conviction, under 34 & 35 Vict. c. 112, and that verbal information of that offence was made before the magistrate, who, without written information or oath, illegally issued the warrant under which Stanley was brought before the Petty Sessions, I should still be of opinion that the justices in hearing that charge, and taking evidence in support of it, were acting within their jurisdiction. There is a marked distinction between the jurisdiction to take cognizance of an offence and the jurisdiction to issue a particular process to compel the accused to answer it: the former may exist, the latter may be wanting. To found jurisdiction to take cognizance of an offence, notwithstanding the dictum of Lord Mansfield in *The King v. Fearshire* (17), it has been constantly held that a written information is not necessary—*The King v. Thompson* (20); *The Queen v. Millard* (7); *The Queen v. Shaw* (21); and *Turner v. The Postmaster-*

*General* (8). See also old forms of conviction, in which the information is set out thus: "A. B. giveth me to understand, and he informed," &c.

The information, which is in the nature of an indictment, of necessity precedes the process, and it is only after the information is laid that the question as to the particular form and nature of the process can properly arise. Process is not essential to the jurisdiction of the justices to hear and adjudicate. It is but the proceeding adopted to compel the appearance of the accused to answer the information already duly laid, without which no hearing in the nature of a trial could take place (unless under special statutory enactment). If a mere summons is required no writing or oath is necessary; a bare verbal information is sufficient. If a warrant is required, then, and for that purpose only, an oath substantiating the information is requisite, not only by the provisions in Jervis's Acts so often referred to, but by the common law, of which it was always a doctrine that a warrant which deprives a man of liberty ought not to issue without oath of the truth of the information—*The Queen v. Heber* (22). To justify a warrant I am also of opinion that a written information is necessary. In the case of indictable offences, it is expressly made so by section 8 of 11 & 12 Vict. c. 42. The illegality of the warrant and of the arrest did not, however, affect the jurisdiction of the justices to hear the charge, whether that hearing proceeded upon a valid verbal information followed by an illegal process, or upon an information for the first time laid in the presence of Stanley, upon which he was then and there instantly charged. The doctrine of Holt, C.J. (23), is an express authority recognising the legality of a conviction upon an information *instante*. Stanley might, it is true, had he known of the illegality of his arrest, have demanded his release from it, and prayed for an adjournment to a future day, to enable him to prepare his defence. This, I think, it would have been the duty of

(20) Per Grose, J., 2 Term Rep. 23.

(21) Per Erle, C.J., 34 Law J. Rep. M.C. 173.

(22) 2 Barnar. 101.

(23) 1 Ld. Raym. 509.

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the magistrates to grant—*Turner v. The Postmaster-General* (8), and *The Queen v. Shaw* (21). A refusal to do this, however, would not have destroyed their jurisdiction, though it might possibly have afforded good ground for setting aside the conviction on the ground that they had not allowed the accused sufficient opportunity to answer the charge. Another course might have been pursued, namely, to commence to hear, and, if necessary, adjourn the further hearing to a future day—a power expressly given by 11 & 12 Vict. c. 43. s. 16.

It so happens, however, in the case before us, that neither the magistrates nor Stanley were aware of the illegality of the warrant, and so the hearing proceeded without objection, and as if all things were in order.

To use the language of the case—"The case was gone into of assault and obstruction. Stanley defended himself, and called a witness to shew that he was not guilty;" and in the result was convicted, as I have above mentioned. Possibly that conviction may be open to the objections that the justices had no jurisdiction to convict of the offence created by statute 34 & 35 Vict. c. 112, when the only charge made against him was of the misdemeanor created by 24 & 25 Vict. c. 100—on the authority of *The Queen v. Brickhall* (12), or upon the ground that, under the circumstances, Stanley had not such opportunity of answering and time to answer as he was in common justice entitled to—*Blake v. Beech* (13). The case of *The Queen v. Gillyard* (24) is a strong authority to shew that the Queen's Bench have jurisdiction to quash a conviction upon other grounds than want of jurisdiction in the magistrates, e.g., on the ground of fraud, conspiracy or perjury in obtaining it. If the contention on the part of the defendant be correct, then Stanley, even though he had suffered the whole imprisonment to which he was sentenced, would be liable to be tried again, and could not plead *autrefois convict*, and if he had been acquitted, would have been

in no condition to plead *autrefois acquit*—two very startling consequences.

A flood of authorities might be cited in support of the proposition that no process at all is necessary when, the accused being bodily before the justices, the charge is made in his presence, and he appears and answers to it. In 2 *Hawk.* 281 it is said—"It seemeth plain, from the nature of the thing, that there can be no need of process where the defendant is present in Court, but only where he is absent." In *The King v. Stone* (25) Lord Kenyon said—"Justice requires that a party should be duly summoned and fully heard before he is condemned; but if he be stated to be present at the time of the proceeding, and to have heard all the witnesses, and not to have asked for any further time to bring forward his defence, if he had any, this at all times has been deemed sufficient." *The Queen v. Shaw* (21) is to the same effect, and appears to me to be decisive of the present case. The defendant in that case was convicted of perjury, committed upon the hearing of a charge, punishable on summary conviction, against one Kilshaw, a beershop keeper, under 18 & 19 Vict. c. 118. The proceedings not being prescribed by that Act, were regulated, as are proceedings for the offence of which Stanley was convicted, by Jervis's Act, 11 & 12 Vict. c. 43. At the trial no proof was given of any written information warranting a summons; indeed, the evidence shewed that the summons was filled up by the magistrate's clerk, handed to a superintendent of police, who took it to a magistrate, who read and signed it without making any inquiry or requiring any statement of fact (very like the circumstances of the present case). It was proved, however, that Kilshaw appeared before the justices, that the charge was then made against him, that he answered it, and that the defendant committed perjury in evidence which he gave on his behalf. It was objected that the justices had no jurisdiction to hear the charge against Kilshaw, because there was no information to justify the

(24) 12 Q.B. Rep. 527; s. c. 17 Law J. Rep. M.C. 153.

(25) 1 East 649.

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issuing of a summons. Erle, C.J., said—  
 “In my opinion, if a party is before a magistrate, and he is then charged with the commission of an offence within the jurisdiction of that magistrate, the latter has jurisdiction to proceed with that charge without any information or summons having been previously issued, unless the statute creating the offence imposes the necessity of taking some such step.” See also per Blackburn, J.:—  
 “I think when a man appears before justices, and a charge is then made against him, if he has not been summoned he has a good ground for asking for an adjournment; if he waives that, and answers the charge, a conviction would be perfectly good against him, and the witnesses, if they swore falsely, would be liable to indictment for perjury.” To the same effect are *The Queen v. Millard* (7); *The Queen v. Berry* (14); *The Queen v. Simmons* (26); *The Queen v. Smith* (27); *The Queen v. Fletcher* (15); and *Turner v. The Postmaster-General* (8); in which latter case the defendants were in custody upon a charge of felony which could not be sustained, but before the magistrates were charged with and convicted of a different offence, for which they could not be legally arrested without warrant on information on oath. The Court upheld the conviction. I do not look upon *Blake v. Beech* (13) as deciding that the magistrates in the case then before them had no jurisdiction, but only that the conviction ought to be quashed for irregularity, under the peculiar circumstances of that case.

*The Queen v. Pearce* (6) only decides that perjury cannot be committed by a witness who is sworn in a non-existing cause, which is undeniable. That case would have been a strong authority for the defendant if no charge had been made against Stanley before the defendant was sworn. *The Queen v. Scotton* (4) was the strongest authority cited in favour of the defendant. That case, however, turned upon the peculiar language of 6 & 7 Will. 4. c. 65. s. 9:—

(26) 28 Law J. Rep. M.C. 183.

(27) 37 Law J. Rep. M.C. 6; s. c. Law Rep. 1 C.C.R. 110.

“Provided that, before any proceedings shall be had or taken upon such information,” the charge shall be deposed to on oath. It does not become necessary, therefore, to consider how far that case has been affected by more recent decisions.

In the course of the argument there was some discussion as to whether the warrant was produced before the justices. In my opinion, whether it was or not is immaterial; had it been so it would have proved nothing, for it could not in any sense be treated as the information. It was the act and process of the magistrate alone, not the information of the informer, and the recital of an information would be no evidence that there was such an information in fact—see *Stevenson v. Clark* (28). I have carefully considered the provisions of Jervis's Acts, 11 & 12 Vict. cc. 42, 43, but I find in them nothing at all militating against the view I have expressed. The sections of those statutes to which our attention was called, which regulate the formalities to be observed when a charge is made against an absent person whose presence it is desired to procure, do not seem to me to have any bearing upon a case like the present, where the charge is made in the presence of the accused, who is then and there called upon to answer it, as he lawfully may be, according to the dictum of Holt, C.J., to which I have referred. In such a case it is, in my opinion, altogether immaterial, so far as the jurisdiction of the justices to hear that charge is concerned, whether the accused was before them voluntarily or otherwise, or on legal or illegal process. I have already pointed out that Stanley may have good grounds for asking that his conviction may be quashed, irrespective of the invalid objection raised by the defendant. This conviction, in my opinion, ought to be affirmed.

POLLOCK, B., and LINDLEY, J., concurred in the judgment delivered by Hawkins, J.

MANISTY, J.—I am of opinion that this conviction should be affirmed. The case finds that Hughes swore falsely and

(28) Per Cresswell, J., 1 Car. &amp; M. 509.

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corruptly on the hearing of a charge against Stanley at Petty Sessions for an assault on him (Hughes), and for obstructing him being a police constable in the execution of his duty, and the question is, whether the justices had jurisdiction to hear that charge, Hughes having been brought before them by means of a warrant signed by a magistrate, but which warrant had been issued without any information in writing, or on oath. By virtue of the provisions in several statutes, which it is unnecessary for me to refer to, justices of the peace assembled in petty sessions have a jurisdiction to hear a charge of an assault upon a constable in the execution of his duty, but it is only by the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112) (1), that they can summarily convict and punish for that offence. The charge made against Stanley might have been lawfully made and heard without any previous summons or warrant. Hughes might have apprehended Stanley in the act of committing the alleged assault, a magistrate seeing the alleged assault committed might have then and there ordered Stanley into custody, or Stanley, knowing or believing that he would be apprehended if he did not appear, might have appeared voluntarily before the justices to answer the charge; in any of which cases I cannot doubt but that the justices not only might but must have heard the case and disposed of it somehow. It would be very strange, to say the least of it, if the law be that, notwithstanding the justices would have had a jurisdiction to hear the charge if there had not been a warrant, they had no such jurisdiction in consequence of there being a warrant unsupported by a sworn information. Nothing short of a clear statutory enactment would justify such a conclusion. That there is no such statutory enactment I think is clear; but it is said there are decisions which govern the case. The decision most relied upon on behalf of the prisoner Hughes is *The Queen v. Scotton* (4), but it will be seen by examining that case that the very ground upon which it was decided is wanting in the present case. The indictment was for perjury on the hearing

before justices of an information laid under 1 & 2 Will. 4. c. 32. ss. 30, 41, and the Court held that the justices had no jurisdiction to hear it, because by section 9 of 6 & 7 Will. 4. c. 65 it was expressly made a condition precedent to any further step beyond the information that the matter of the information should be deposed to by the oath of the informant or some other credible witness, and no such deposition had been made. Whether that case was rightly decided may, I think, admit of considerable doubt, having regard to the qualified language of the proviso at the end of section 9, but assuming the right construction to have been put upon it there is no such enactment in the present case, or anything like it. I think it unnecessary to review all the cases which were cited in the course of the argument, partly because I do not think any of them are conclusive either way; but mainly because I found my judgment upon this, that the provisions contained in the 17th section of the 34 & 35 Vict. c. 112 (which incorporated 11 & 12 Vict. c. 43) relative to process or proceedings for the purpose of bringing accused persons before justices, are, in my opinion, directory only, and do not in any way affect the jurisdiction of justices to hear charges made against persons who are before them and who are accused of offences over which they have jurisdiction. The proviso at the end of section 1 of 11 & 12 Vict. c. 43 strongly supports this view. We are not told by the learned Judge who has stated this case how the justices dealt with Stanley, but we are informed by counsel at the bar that they convicted him summarily, and sentenced him to imprisonment. In my opinion it is immaterial for the present purpose how justices disposed of the charge, the only question before us being, whether the justices had jurisdiction to hear it and to receive evidence upon oath in support of it. I think they had, and that the question put to us should be answered in the affirmative.

FIELD, J.—I also am of opinion that this conviction should be affirmed. I have nothing to add to the judgments

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already delivered, but only desire to say, as I differed from my brothers Cleasby and Grove in *Blake v. Beech* (13), that I have carefully reconsidered my judgment in that case, and am unable to alter the view I then entertained.

HUDDLESTON, B.—The question in this case is, whether a conviction for perjury committed by the prisoner Hughes before justices should be quashed, because there was no information on oath for the warrant upon which Stanley, the party charged, was brought before the justices. The charge against Stanley before the justices was for obstructing Hughes, a police constable, in the discharge and execution of his duty. It is not stated in the case under what statute the charge was made against Stanley. It might therefore have been under 34 & 35 Vict. c. 112. s. 12, by which Stanley might be convicted summarily, or it might have been under 24 & 25 Vict. c. 100. s. 38, by which he might have been sent for trial to the assizes or sessions. If the charge be for an offence under the former Act it may by section 17 be prosecuted in manner directed by Jervis's Act, 11 & 12 Vict. c. 43—section 1 of that Act provides that "where an information shall be laid that any person has committed any offence for which he is liable by law on summary conviction, the justice may issue his summons." This is the process by which the person to be charged is called on to appear. By section 2, if "being served, the party does not appear, a warrant may issue, or a warrant may issue in the first instance if the justice shall think fit, but in both these cases the matter of the information must be substantiated to the satisfaction of the justice by oath or affirmation, and if the summons is not obeyed the justice may proceed *ex parte* on proof of due service." By section 10 it is declared (that is declaratory of the common law) and enacted that the complaint in case of an order, and the information in case of a summary conviction, be made or laid without any oath or affirmation except where warrants are issued in the first instance to apprehend, and then the matter of the information must be sub-

stantiated by the oath or affirmation of the informant. Section 13 deals with the appearance or default of the party charged, and provides that the case may be heard in his absence on due proof of the service of the summons, or a warrant for his apprehension issued. It also deals with his committal, and with the dismissal of complaint or information, if the complainant or informant does not appear by himself, counsel or attorney, and with the adjournment of the hearing, and concludes thus: "But if both parties appear, either personally or by their respective counsel or attorneys, before the justice, or justices, who are to hear and determine such complaint or information, then such justice or justices shall proceed to hear and determine the same." The object of all these provisions is to bring the party accused before the justices, to enforce his presence and to enable them to deal with him in his absence, but when he is before them, the justices are required and shall proceed to hear and determine. The information on oath is not necessary to give the justices jurisdiction to try, though it is necessary to give them jurisdiction to issue a warrant to apprehend. The jurisdiction to try arises on the appearance of the party charged, the nature of the charges and the charging of the defendant. Section 14 shews what is to take place at the hearing, "when such defendant shall be present at such hearing, the substance of the information shall be stated to him" (this is the charging). The word "state" is important, as pointing out that no summons, information or other document is to be read or shewn to him. An information is nothing more than what the word imports, namely, the statement by which the magistrate is informed of the offence for which the summons or warrant is required, and it need not be in writing unless the statute requires it. The magistrate to whom it is made is not necessarily, and very often never is, one of the magistrates by whom the case is subsequently heard. In practice an information is never produced before the justices, if in writing it remains with the magistrate granting the summons or

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warrant, as the warrant remains in the custody of the constable. The clerk to the justices, or the police officer present, states the substance of the information, that is the nature of the charge, sometimes where there is a charge sheet, as in the metropolitan district, reading from it, otherwise not. The charge sheet is merely the statement drawn up by the inspector at the station of the charge preferred before him. He states, in fact, the substance of the charge or information, and the prisoner is called on to plead. He may admit the truth and plead guilty, or he may not admit the truth and desire to be tried for it, or he may apply for an adjournment, or object to the jurisdiction; but if he make no objection (and here it is found that Stanley made no objection) the case must proceed. Principle and the authorities seem to shew that objections and defects in the form of procuring the appearance of a party charged will be cured by appearance. The principle is that a party charged should have an opportunity of knowing the charge against him and be fully heard before being condemned. If he has the opportunity, the method by which he is brought before the justices cannot take away the jurisdiction to hear and determine when he is before them. The arrest of Stanley was no doubt illegal, there had been no information on oath to justify the warrant, and it might be that if the objection had been taken the magistrates might have entertained it, but they could then and there have issued their summons for Stanley's apprehension at once on a verbal information which would be good—*The King v. Fuller* (29), and have proceeded to hear and determine, though if the defendant objected they ought to adjourn, so that he might know the charge, and be prepared to meet it.

*The King v. Stone* (30) was a conviction on the Game Laws. The objection that there had been no summons was abandoned on argument, and Lord Kenyon, at p. 649, and Le Blanc, J., at p. 654, point out that "justice requires that a party should be duly summoned and fully heard before he is condemned,

but if he were present at the time of the proceeding and heard the charge and all the witnesses, and did not ask for any further time to bring forward his defence, if he had any, this at all times has been held sufficient." This was the case in which the objection was made to the conviction that it did not appear on the face of it that the defendant was duly summoned, but the principle is the same.

In *The Queen v. Shaw* (21), where there was no information of any kind, Chief Justice Erle points out that where the parties are before a magistrate who has jurisdiction in respect of time and place (as the magistrates had here), no summons or information is necessary to complete his jurisdiction unless the obligation is imposed by the statute which constitutes the offence (and certainly that is not imposed by the 34 & 35 Vict. c. 112). Blackburn, J., says no information was required. It is material to know what the charge is (and here the case finds Stanley was charged with obstructing the police constable in the discharge of his duty). Sometimes a summons or other writing may be required, but no antecedent information is necessary. In the absence of one, the party to be tried may, if he pleases, ask for an adjournment, but if he does not do so the adjudication is good, and Montague Smith, J., says no information or summons is necessary where the parties appear voluntarily (and I do not think it makes any difference if he be there compulsorily). It is to be observed that this decision was in 1865, and long after Jervis's Act came into operation. Indeed Jervis's Act (11 & 12 Vict. c. 43) is referred to by prisoner's counsel. Mr. Bowen's argument in this case for the necessity of an information is entirely based on Jervis's Act (11 & 12 Vict. c. 43). This case is therefore a distinct authority that the absence of such an information is not fatal to the jurisdiction of the justices. In *Turner v. The Postmaster-General* (8) it was held that, although there was no information on oath (the 62nd section of 24 & 25 Vict. c. 97, the statute on which the defendant was convicted requiring one), after appearance and no objection made no objection to the jurisdiction of the justices

(29) 1 Lord Raym. 509.

(30) 1 East, 649.

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to commit summarily could be taken, that any defect in bringing the parties before the justices was cured by appearance and the merits of the case being gone into, and that the justices had jurisdiction. *Blake v. Beech* (13) is to the same effect. I wish to say that I subscribe to every word in my brother Field's judgment in that case. The judgments of Cleasby, B., and Grove, J., are based on the ground that the objection to the want of an information was distinctly taken before the magistrates—*The Queen v. Berry* (14), and *The Queen v. Fletcher* (15) support the same principle, though they were sought to be distinguished in argument by suggesting that the enquiry on which the perjury was committed was of a *quasi* civil nature. The decision in *The Queen v. Scotton* (4) was on the ground that by the words of the statute 6 & 7 Will. 4. c. 65. s. 9, it was a condition precedent to any further steps that the matter of the information should be deposed on the oath of the informer or some other credible witness. I think, therefore, that, Stanley being before the justices and no adjournment having been asked for, and he being charged with an offence punishable by summary conviction, though there had been no information on oath for the warrant, false swearing in a material point would be perjury. The passages quoted in the arguments from *Palcy on Convictions* and *Smith's Leading Cases* have reference to the statement of the information in the old form of conviction, where, of course, it became necessary to shew in that part of the conviction all the ingredients to give jurisdiction. The form of conviction in Jervis's Act omits the information, but if the offence with which Stanley was charged was one under 24 & 25 Vict. c. 100. s. 38, for which he might be committed for trial at the assizes or quarter sessions, I entertain no doubt that there need not have been an information on oath or warrant to give the justices jurisdiction to hear and commit or discharge.

The practice of justices with regard to indictable offences is regulated by Jervis's Act (11 & 12 Vict. c. 42). Section 8 provides that where a warrant is to be issued there must be an information in

writing on oath, but not where a summons only is issued. There is no section pointing out what is to be done at the hearing, as in Jervis's Act (11 & 12 Vict. c. 48); but section 17, which applies to the examination of witnesses, provides "that where any person shall appear or be brought before any justice charged with any indictable offence, whether such person appear voluntarily upon summons or have been apprehended with or without warrant, or be in custody for the same or any other offence, depositions shall be taken and the oath administered before the witness is examined." The justice here, therefore, has expressly jurisdiction to administer the oath to the witness when the party charged is before him, whether he appear or be brought there, and whether there be or be not a warrant, and therefore having jurisdiction to administer an oath, false swearing on a material point would be perjury. But apart from either statute, I don't think it can be doubted that a police constable would be justified in taking into custody without summons or warrant any person who was assaulting and obstructing him in the execution of his duty, and subsequently charging him with that offence. Upon such a charge being made (although it was entirely false), the magistrate before whom it was made must enquire into its truth, and to do so must have jurisdiction to administer an oath, and false swearing in that enquiry on a material point would be perjury. In any view, therefore, I am of opinion that the conviction must be affirmed.

DENMAN, J.—I conceive the true meaning and effect of the case submitted to us by the learned Lord Justice to be as follows. John Stanley was improperly arrested by the defendant Owen Hughes, a constable, who had obtained a form of warrant from the clerk to the clerk to the justices, which was filled up by the clerk, or by Hughes, in the usual form as for a charge of assaulting and obstructing Hughes, being a constable, in the execution of his duty. This warrant was improperly signed by the magistrate without requiring any information either in writing or upon oath. The magistrates at petty sessions finding Stanley before them, and

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having been verbally informed either by Hughes or their own clerk, that Hughes charged Stanley with assaulting him and obstructing him in the execution of his duty, and without enquiring how Stanley had been brought there, administered an oath to Hughes and took evidence, in the course of which Hughes committed perjury, if perjury, in law, could be committed in such a case; the only point raised for our consideration being that the absence of a written information or of an information upon oath was fatal to a conviction for perjury. No question was raised at the petty sessions as to the existence of an information, or as to the existence or legality of the warrant or arrest. These objections were first suggested upon the trial of Hughes for perjury. Stanley made no objection to the charge being heard, and called a witness on his own behalf. He was in fact, as was admitted upon the argument, though not stated in the case, convicted and sentenced to six months' imprisonment with hard labour, a sentence which could only have been passed upon summary conviction under the powers of 34 & 35 Vict. c. 112. s. 12.

The case has been twice most ably and elaborately argued, and for some time I doubted whether the conviction could be sustained, but upon full consideration I am satisfied that it ought to stand. The main argument for the defendant was based upon the ground that the offence of which he was convicted was one under the statute 34 & 35 Vict. c. 112. s. 12, and that by virtue of section 17 of that Act, coupled with the provisions of 11 & 12 Vict. c. 43, thereby incorporated, the whole proceeding was void and without jurisdiction for want of an information upon oath. I am of opinion, however, that we ought not to have regard to the conviction in considering whether perjury was committed, but to look to the moment at which the false evidence was given, and consider whether at that moment the magistrates had jurisdiction to hear that evidence judicially. And I think that they had jurisdiction to hear that evidence judicially if, at the time at which it was given, it was evidence which, in any possible event, they might

have acted upon judicially in a matter within their jurisdiction; whether the result of their acting upon it might have been to convict, or to acquit, or to adjourn, or to send for trial, or to take bail, or to do any other judicial act within their competency. At the moment at which the false evidence in question was given, it appears to me that there was nothing to compel the magistrates to enquire into the mode in which Stanley had been brought before them. If, as I suppose (and here I am putting the case as favourably as it can be put for the defendant), nothing more happened than that the magistrates enquired "what is the charge against that man?" and Hughes said in answer, "I charge him with assaulting me and obstructing me in the execution of my duty," I apprehend that the magistrates would at once have had jurisdiction to put Hughes upon his oath, and enquire into several matters, upon any one of which the perjury might have been committed, wholly without reference to what they might in the result feel themselves bound to do or not to do. For example, they might have enquired into the name and number of Hughes, and whether he was really a member of the police, and actually on duty at the time of the alleged assault, whether Stanley was really the person who had assaulted him or not, how he was dressed, whether he was alone or with others; &c., and indeed even if the jurisdiction of the magistrates to convict depended upon whether Hughes had arrested Stanley in the act, or brought him up upon a legal warrant afterwards obtained, this very question might have been a legitimate subject of enquiry. Considering that this was a case in which Hughes complained of an assault upon himself, it need not have occurred to the magistrates in the first instance that any warrant at all would have been necessary, for there is nothing in any of the statutes to repeal the common law, which would have enabled Hughes, if the charge were a true one, to bring Stanley at once before the magistrates without any warrant at all. The charge actually made, as stated in the case according to my understanding of it, is much more nearly in



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accordance with the provisions of 24 & 25 Vict. c. 100. s. 38, than with those of 34 & 35 Vict. c. 112. s. 12. It included a breach of the peace, and I can see no reason why the magistrates, at all events in the absence of any objection on the ground of the illegality of the arrest or the want of an information, should not have administered an oath, and enquired into the charge, at all events until any doubt arose as to their jurisdiction to deal with it finally by conviction. It was contended that even under 11 & 12 Vict. c. 42, relating to indictable offences, the right of the magistrates to enquire would not be well founded in the absence of an information in writing or upon oath; but I am of opinion that there is nothing in that Act to destroy the jurisdiction of the magistrates to enquire into a charge of an indictable offence where the person in charge is actually in custody before them. The 1st section of that Act shews that the provisions relating to warrants and informations are not intended to apply to such a case, but are merely provisions for the purpose of bringing people not already in custody before the justices. Their jurisdiction to convict appears to me to be a totally different question from the question whether they had jurisdiction to take evidence in such a case, but it is not necessary to consider further the question whether the conviction was good or bad, and I express no opinion upon it. I cannot hold that the magistrates who tried and convicted Stanley (even if the conviction be one that cannot be supported) had no jurisdiction to administer an oath to Hughes, or that any evidence he gave relevant to a verbal charge of assault and obstruction was *coram non judice*. The case of *The Queen v. Scotton* (4), which at first seemed to me to be in favour of the defendant's contention, is, I think, clearly distinguishable on the ground that there the Court thought that the only possible foundation of the magistrates' jurisdiction was an information; whereas within the present case there was nothing to prevent the magistrates from proceeding to enquire into a charge which, in at least one other lawful manner, might have been brought before them without any information at

all, and either adjudicated upon by them or sent for trial.

In the view I take of this case it is unnecessary to discuss more fully the contention of the defendant's learned counsel as to the applicability of Jervis's Act to the case, upon the supposition that because the conviction was one under 34 & 35 Vict. c. 112, no evidence given upon the hearing could be the subject of an indictment for perjury in the absence of an information on oath or in writing. In my view all that was necessary to give the magistrates jurisdiction to hear evidence was that there should be before them a person charged with an offence within their general jurisdiction, under such circumstances as to call upon them to take evidence before they could decide whether they should exercise or abstain from exercising some legal power which they possessed. For the reasons above given I think that such was the case here, and that the evidence falsely and corruptly given upon oath, and which must be taken to have been held by the learned Lord Justice to have been relevant and material to the subject-matter of enquiry before the justice, cannot be said to have been *coram non judice*. The indictment, on being referred to, appears to have contained an allegation that the perjury was committed upon the hearing of a "complaint or information," and this is no doubt language which would at first sight lead one to expect that proof would have been given of a charge made otherwise than in the way in which it appears to me that the case states the charge in this case to have been made. But I do not think that the words "complaint or information" are inconsistent with a verbal charge made under the circumstances suggested above. The statute 14 & 15 Vict. c. 100. s. 20, which is applicable to the case, provides that—"in every indictment for perjury it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what Court or before whom the oath was taken, without setting forth the full answer, information, indictment, declaration or any part of any proceeding either in law or equity, and without setting forth the commission or authority of the

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Court or person before whom such offence was committed." All that is necessary since that statute is that the indictment should shew that there was a proceeding pending before the Court over which the Court had jurisdiction, and I think this does sufficiently appear in the present case and that it is not necessary to tie down the meaning of the words to any particular form of information or complaint. For these reasons I am of opinion that the conviction ought to be affirmed.

LORD COLERIDGE, C.J.—I am desired to say that the Lord Chief Baron dissents from the judgment of the majority of the Court. I have myself prepared a judgment, but after having had the advantage of reading the judgment of my brother Hawkins, I should only be expressing, were I to read it, in less forcible language, the conclusions at which he has arrived. Without binding myself to every single expression, I concur in the results and in the train of reasoning in his judgment. And this being the view of the majority of the Judges who have heard the case, the conviction will be affirmed.

*Conviction affirmed.*

Solicitors—Simpson, Hammond & Co., agents for J. W. Hughes, Bangor, for appellant; the Solicitor to the Treasury, for the Crown.

[IN THE HOUSE OF LORDS.]

*Madeley Union* 1879.  
*Bischoff* June 27, 80,  
 52 L.R. 672 July 21.

THE OVERSEERS OF THE TOWNSHIP OF THE FOREIGN OF WALSALL v. THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Rate—Sanitary Purposes in a Borough—District or Borough Rate—Exemption conferred by Local Act—Vested Interest—Public Health Act, 1872, 35 & 36 Vict. c. 79. ss. 3, 4, 7, 16—Sanitary Law Amendment Act, 1874 (37 & 38 Vict. c. 89), s. 3—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 10, 207, 211.

By a local Act passed in 1848 commis-

sioners were appointed for sanitary purposes over a district lying partly within the borough of W. The commissioners had power to levy a rate, and railways were liable to be assessed for such rate on one-fourth only of their rateable value.

By the Public Health Act, 1872, the borough of W. was made an urban sanitary district, and the town council the sanitary authority; and it was enacted that all expenses incurred by a town council under the sanitary Acts should be paid out of the borough rate, "provided that where an urban sanitary authority had before the passing of this Act power to levy within its district a rate for sanitary purposes," the expenses should be charged on such rate.

By the Public Health Act, 1875, all expenses incurred under that Act by an urban sanitary authority are to be defrayed out of a district rate subject to the exception that "if in any district the expenses incurred by an urban authority (being the council of a borough) in the execution of the Sanitary Acts were at the time of the passing of this Act payable out of the borough rate," the expenses were to be defrayed out of the borough rate. Railways were entitled in respect of a district rate under this Act to a partial exemption as under the Act of 1848.

By a local Act passed in 1876 the commissioners and their district were abolished, the borough of W. was extended so as to include the whole of the commissioners' district, and the town council was made the sanitary authority for the whole of the extended borough, and succeeded to all the powers of the commissioners.

In November, 1876, the town council of W. levied a borough rate for sanitary purposes, assessing the respondents on the full value of their railway.

Held, that the expenses for sanitary purposes ought to be defrayed out of a district rate, and that the respondents were entitled to exemption as to three-fourths of the rateable value of their railway.

It is a rule of construction of Acts of Parliament that, "when a person or a class of persons are entitled to a benefit, it is presumed that the vested interest is respected; it is not to be taken away by a subsequent statute by general words, or unless the intention so to do clearly appears."

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The overseers of the Foreign of Walsall appealed from the decision reported *supra*, p. 57.

*Herschell* and *Anstie* appeared for the appellants.

*Bosanquet* and *N. Neville*, for the respondents.

*Cur. adv. vult.*

LORD HATHERLEY.—The substantial question in this appeal is, whether or not the respondents as owners and occupiers of land within that part of the Foreign of Walsall which is situate within the borough of Walsall, part of which is used for a railway, and other part for railway accommodation, are liable to be assessed at a rate purporting to be made under the provisions of the Public Health Acts, afterwards referred to, or any of them, at more than one quarter of the value at which their property is assessed for the rate.

It is not necessary to state the course of procedure in this case beyond saying that an order of the Court of Quarter Sessions, which was made in favour of the present respondents, was affirmed by the Court of Queen's Bench, and the order of that Court was affirmed by the Lords Justices. From the order made on the last occasion the present appeal is brought.

The case depends upon the construction of several Acts of Parliament, which I think we may concur with the Court below in treating as "perplexed and difficult."

By an Act of Parliament called "The Walsall Improvement and Market Act, 1848," commissioners were appointed for carrying into effect certain improvements and sanitary arrangements over a district consisting of the whole township of the borough of Walsall, and of part of the foreign lying within the borough, and part of the adjoining parish of Rushall, then lying without the borough, but since added thereto. For the purpose of paying the expenses of the commissioners and making the improvements specified in the Act, they were authorised to levy an "improvement rate," but railways and certain other property therein described

were not to be assessed at more than one-quarter of their net value. The commissioners had a jurisdiction extending to property outside the borough, and again their jurisdiction did not embrace the whole of the borough.

If the rate before us for consideration was rightly levied on the respondents as a borough rate, it will not be subject to the deduction of three-quarters of the amount assessed on the respondents, but the respondents contend that the rate should have been levied as a district rate under powers vested originally in local commissioners, although these powers are now exercised by the urban authority of Walsall.

Several local Acts were passed between the years 1842 and 1872, which dealt with matters of sanitary regulation, and contained the same or similar directions as to levying rates on one quarter only of the assessed value of the railway property.

The Public Health Act of 1872 constituted urban authorities throughout the kingdom, and defined the several urban sanitary districts, that of Walsall being one. The more important sections of this Act as regards the question in dispute are the 7th and 16th. By the Public Health Act, 1872, section 4, the borough of Walsall, including so much of the Improvement Act district as lay within the borough, became an urban sanitary district, and the mayor, aldermen and burgesses acting by the town council became the urban sanitary authority for the said district, but the remainder of the Improvement Act district continued to be under the jurisdiction of the improvement commissioners.

By the 7th section it is provided that, "Subject to the provisions of this Act, the Local Government Acts shall be deemed to be in force within the district of every urban sanitary authority, and from and after the first meeting of an urban sanitary authority in pursuance of this Act there shall be transferred and attached to an urban sanitary authority, to the exclusion of any other authority which may have previously exercised or been subject to the same, all powers, rights, duties, capacities, liabilities and

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obligations within such district, exercisable or attaching by and to a local board under the Local Government Acts, and by and to the sewer authority under the Sewage Utilization Acts, and by and to the nuisance authority under the Nuisances Removal Acts, and by and to the local authority under the Common Lodging Houses Acts, the Artisans and Labourers Dwellings Act, and the Bakehouse Regulation Act; or by and to any of the said authorities under any of such Acts, or any Acts amending such Acts." By the 16th section it is provided as follows: "All expenses incurred or payable by an urban sanitary authority under the Sanitary Acts shall, if the Local Government Acts or the provisions of those Acts, with respect to rating, were at or immediately before the passing of this Act in force throughout the district of such authority, or within a local government district wholly within such district, be defrayed in manner provided by those Acts; and if the Local Government Acts were not so in force at or immediately before the passing of this Act, be defrayed as follows, that is to say—First, In the case of the council of a borough, out of the borough fund or borough rate. Second, In the case of Improvement Commissioners, out of any rate in the nature of a general district rate leviable by them as such commissioners throughout the whole of their district, provided that where an urban sanitary authority had, before the passing of this Act, power to levy within its district a rate or rates for paving, sewerage or other sanitary purposes, all expenses incurred by such authority in the performance of its duties under the Sanitary Acts shall be defrayed out of such rate or rates, except where at the time of the passing of this Act any such expenses were chargeable upon the borough fund or borough rate, in which case such expenses shall continue so chargeable."

I think that the 7th section transferred all the powers of the special commissioners under the Acts there specified to the urban authority constituted by the 3rd section of the Act, and in particular the Walsall Corporation as an urban authority acquired the powers so trans-

ferred from the district commissioners to the exclusion of these commissioners.

The 16th section of the Act, as it seems to me, directs all expenses to be paid as follows: If the Local Government Acts or their provisions as to rating were in force throughout the district of the urban authority (which was not the case at Walsall), then in manner provided by the Local Acts, but if not, then, in case of the council of a borough being the authority, out of the borough fund; and in case of commissioners by a rate to be levied by them.

There is a proviso at the end of the clause, which, I think, is intended to express that when any urban authority reconstituted by the Act had, before the passing of the Act, been invested with powers of rating for special purposes and for expenses, they shall still, as reconstructed by the Act of 1872, have the same powers after the passing of that Act, and the expenses shall be paid out of the rate so levied, unless where they were then chargeable on the borough fund, in which case they should continue so to be. It seems to me that the powers, though transferred by section 7 to the new "urban authority" were yet intended to be kept distinct, and were to be exercised in each district according to the local Act of the district by a new body.

I next come to the Act of 1874. By the Sanitary Law Amendment Act, 1874, section 3, it is provided, "Whereas doubts have arisen as to the extent and meaning of the 7th section of the principal Act, be it therefore declared and enacted that the provisions of the said section shall be deemed to have applied to every authority acting at the time of the passing of the principal Act under the powers conferred upon them by a local Act with respect to any sanitary purposes, and that all the powers, rights, duties, capacities, liabilities and obligations of any authority having jurisdiction under a local Act in the district of an urban sanitary authority at the time of the passing of the principal Act, so far as they or any of them related to such purposes, were transferred to and became attached to the urban sanitary authority therein referred to." The difficulty arose

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partly from the expression "urban sanitary authority" being used in the Act of 1872 with regard to their having exercised powers of levying expenses before the passing of that Act, and yet the urban sanitary authorities were only constituted by the Act of 1872. By this Act of 1874 it seems to have been intended to explain what the Legislature meant by "urban sanitary authority" in the Act of 1872. The result in the case before us would be, that the powers given by the Act of 1872, to be exercised by the urban authority, would be exercised according to the manner in which they would have been exercised by the commissioners whom the urban authority replaced, if those commissioners had been constituted a new board, called the urban sanitary authority. In this case the authority was not in the Corporation of Walsall, but was in special commissioners appointed under the special Act, which was referred to in the argument of this case.

This Act makes it clear that all the powers of the Special Local Act were intended to be preserved, and is favourable in this respect to the respondents. I think the whole scheme in 1872 was to preserve the powers of levying expenses exactly as they stood, and merely to transfer the powers from one set of officials to another. We then come to an Act, which was much relied upon in the Court below, and which has been, I think, deservedly relied upon in the argument in this House, the Act of 1875. The 207th section of that Act says, "All expenses incurred or payable by an urban authority in the execution of this Act, and not otherwise provided for, shall be charged on and defrayed out of the district fund and general district rate leviable by them under this Act, subject to the following exceptions—namely: That if in any district the expenses incurred by an urban authority (being the council of a borough) in the execution of the sanitary Acts were at the time of the passing of this Act payable out of the borough fund or borough rate, then the expenses incurred by that authority in the execution of this Act shall be charged on and defrayed out of the borough fund

or borough rate; and that if in any district the expenses incurred by an urban authority (being improvement commissioners) in the execution of the sanitary Acts were at the time of the passing of this Act payable out of any rate in the nature of a general district rate leviable by them as such commissioners throughout the whole of their district, then the expenses incurred by that authority in the execution of this Act shall be charged on and defrayed out of such rate; and for the purposes of this section the council of the borough of Walsall shall be deemed to be improvement commissioners; and that where at the time of the passing of this Act the expenses incurred by an urban authority in the execution of certain purposes of the sanitary Acts were payable out of the borough fund and borough rates, and the expenses incurred by such authority in the execution of the other purposes of the said Acts were payable out of a rate or rates leviable by that authority throughout the whole of their district for paving, sewerage or other sanitary purposes, then the expenses incurred by that authority in execution of the same or similar purposes respectively under this Act shall respectively be charged on and defrayed out of the borough fund and borough rate, and out of the rate or rates leviable as aforesaid."

Section 10 of the same Act transfers the powers and obligations, but does no more. Section 207 directs that all expenses shall be paid out of the district fund and general district rate leviable under the Act, subject to three exceptions. Unless then the appellants can make out that the expenses in question on this appeal fall within one of such exceptions, the rate should be levied as the respondents desire it, namely, not out of the borough rate, but out of the fund raised under the powers of the Special Act, which provides that one-fourth only of the assessment of the railway property shall be raised.

The exceptions are, first, when at the time of passing the Act of 1875 the expenses were payable out of the borough fund. This must depend then on the view taken of the 16th section of the

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Act of 1872, and I have already said that it appears to me that under the previous Acts the expenses since 1872 were payable out of the district fund, and not out of the borough fund.

The other two exceptions manifestly are not such as to sanction the appellants' contention.

I think Lord Justice Cotton's remarks very just—namely, that one should not so construe an Act as to take away a privilege granted by a former Act without any direct repeal of that Act, or inference so strong of intention as to authorise us to say that the two Acts could not stand together unless one of them is so construed. I see no such inference from the course that the legislature has taken; it has carefully preserved the existing powers as regards the area of the rate, and has only changed the instruments which are to exercise the powers.

For these reasons, I think, the contention of the appellants is wrong, and the decision of the Court below is right, and I advise your Lordships, and move your Lordships, to affirm the order of the Court below, and to dismiss the appeal with costs.

LORD BLACKBURN.—I agree with the motion of the noble and learned Lord now on the woolsack (Lord Hatherley). Under the 207th section of the Act of 1875 the expenses are to be paid out of the district fund raised by a district rate, unless the appellants can shew that the case comes within one of the exceptions. It is contended that it comes within the first exception, in which case they are to be paid for out of the borough fund, and raised by a borough rate. The respondents' property is of that class which is to be rated at a lower value to a district rate, and at its full value to a borough rate, and it is that which makes the question of practical importance; and the parties, when before the quarter sessions, agreed what was to be done when the question was decided; but the question of law to be decided is, whether the expenses should be raised by one rate or the other. And this depends on whether in the borough of Walsall "the expenses incurred by the urban authority

in the execution of the sanitary acts were at the time of the passing of that Act"—that is, on the 11th of August, 1875—payable out of the borough fund or borough rate? And the answer to that question depends on whether on the true construction of the 7th and 16th sections of the Act of 1872, coupled with the declaratory enactments of the Act of 1874, the expenses were on the 11th of August, 1875, payable in part out of a rate to be imposed under the rating powers of the local Act of 1848, on the portion of the district subject to the powers of the commissioners appointed under that Act, which was by the Act of 1874 brought within the urban district. If so, the expenses, which, I think, means the whole expenses, were not payable out of the borough fund, and the case is not within the first exception.

I have endeavoured in vain to find out what those who framed the enactments in the Acts of 1872 and 1874 meant to be done in this respect. The powers conferred by the local Act are not put an end to; they are transferred to the urban authority; and one would say that the intention must have been that those powers thus transferred, not put an end to, should be exercised within the portion of the district transferred to the urban authority, so as to preserve unaffected the vested rights of those holding the class of property which, under a rate levied under the local Act, were to be assessed at a lower value. And a great many good arguments may be and were urged in favour of that view, but then they are to exercise the powers transferred to them "to the exclusion of any other authority which may have exercised the same." The rating power given by the Act of 1848 was a power to the commissioners to make a rate over the whole of the district subject to that Act, and it is excessively difficult to understand how that power could be exercised by the urban authority to the exclusion of the commissioners, and over only a part of that district, unless by implication a power was given to the urban authority to make a new rate over that part only, which is violent implication. I am glad that the new legislation is such as to

*Overseers of Walsall v. London and North Western Rail. Co., H.L.*

render it unnecessary ever to impose such a rate, which it would be very difficult to make, and the proviso to section 16, especially as explained by the Act of 1874, further perplexes the question. But I agree with Lord Justice Cotton's observation, that it is a rule of construction, that when a person or class of persons are entitled to a benefit, it is to be presumed that the vested interest is respected, and it is not to be taken away by a subsequent statute by general words, or unless the intention so to do clearly appears. And I may add that in section 16 of the Act of 1872 it is provided that when the Local Government Acts were in force in a local government district absorbed in an urban district consisting of a borough, so as to give the owners of the class of property within that smaller district a vested interest in its being rated at the lower rate, the expenses throughout the whole urban district are to be defrayed by a district rate. This, to my mind, shews that the general intention was to respect these vested rights where they had come into operation in a part of the urban district; and the exceptions in section 207 of the Act of 1875 are all framed with a view to give effect to the same general principle.

I do not wish to disguise that I have not been able to understand the enactments as they originally stood in sections 7 and 16 of the Act of 1872, and that the declaratory enactments in the Act of 1874 have to my mind made darker what was dark enough without. But I think there is no sufficient indication of an intention to depart from the general principle, and, consequently, I agree that the appeal should be dismissed with costs.

LORD GORDON concurred.

*Order appealed from confirmed and appeal dismissed with costs.*

Solicitors—Sharpe, Parkers, Pritchard & Sharpe, agents for Wilkinson & Gillespie, Walsall, for appellants; R. F. Roberts, for respondents.

[IN THE COMMON PLEAS DIVISION.]

1879. { THE GUARDIANS OF THE POOR OF  
June 25. { NOTTINGHAM UNION (appellants) v. TOMKINSON (respondent).

*Evidence—Evidence further Amendment Act, 1869—Proceedings “in Consequence of Adultery”—Evidence of Husband to prove Non-access.*

*Proceedings were instituted by a board of guardians to compel a husband to support a child born of his wife during marriage. The husband opposed the proceedings on the ground that the child was illegitimate by reason of the adultery of the wife:—*

*Held, not to be “a proceeding instituted in consequence of adultery,” within the meaning of the Evidence Further Amendment Act, 1869 (s. 3), so as to make the husband competent to give evidence tending to prove the fact of non-access.*

*In re Rideout's Trusts (39 Law J. Rep. Chanc. 192; s. c. Law Rep. 10 Eq. 41); and In re Yearwood's Trusts (46 Law J. Rep. Chanc. 478; s. c. Law Rep. 5 Ch. D. 545), considered.*

*CASE stated by justices under 20 & 21 Vict. c. 43.*

The respondent appeared before the justices in Petty Sessions to answer a complaint which had been duly made by the guardians of the poor of the Nottingham Union, the appellants, under the 43 Eliz. c. 2. s. 6, and 31 & 32 Vict. c. 122. s. 36, and to shew cause why an order should not be made upon him ordering him to maintain his child Ernest, born of the body of his wife Mary, and who was then chargeable to the appellants' union.

The respondent was married to his wife Mary on the 10th of March, 1863, and she had five children born after such marriage. The first four children, it was admitted, were their legitimate children, but the respondent denied that the fifth child, Ernest, the subject of the present case, was his lawful child. That child was born on the 6th of October, 1873. Up to October, 1872, the respondent and his wife had lived together, but at that time he ceased to live continually with

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her. She was then living at No. 1, Paradise Road, Lambeth, and the respondent was living at Conduit Street, Regent Street, at a distance of about four miles apart.

Evidence was given that the respondent, in December, 1872, and January, 1873, had a key of No. 1, Paradise Road, where his wife was then living, and was seen on several occasions to open the door with such key, and to go into the house, and a particular occasion in December, 1872, was mentioned on which the respondent was seen to go into this house as late as one o'clock in the morning. The respondent was tenant of No. 1, Paradise Road, and maintained his wife and children there.

The respondent's wife was called on behalf of the appellants, who proved that the child Ernest was her husband's lawful child.

Proof was given on the part of the respondent that in November, 1878, he had obtained a decree *nisi* for a dissolution of marriage with his wife, on the ground of her adultery with a man of the name of Martin, and the transcript of the shorthand writers' notes was given in evidence to shew that the decree *nisi* was based upon evidence which was tendered in the Divorce Court to prove that the adultery was committed on or about the 26th of December, 1872, but no evidence was given, other than the production of the shorthand writers' notes, to prove that fact, or to prove that she had at any time committed adultery.

The respondent was called, and proved that he had never had intercourse with his wife after the 20th of October, 1872, but he admitted that he slept in the same house as his wife (but not with her) at Whitsuntide, 1873, and that he was a tenant of the house where his wife lived at No. 1, Paradise Road, and paid the rent and supported her and the child in question, and his other children there, until about the middle of November, 1873.

No evidence was given to prove that the respondent did not have access to his wife at a time when the child may have been begotten, except the evidence of the respondent himself and his sister, Mary Thorkell, who swore that, after October,

1872, with the exception of going to Calais to take his child to school, the respondent never was out of their house at night later than eleven o'clock from October, 1872, to July, 1874.

It was contended on behalf of the appellants that the child, being born in wedlock, must be taken to be the legitimate child of the respondent, that the decree *nisi* and the shorthand writers' notes of the proceedings of the Divorce Court were not evidence to prove the adultery of the wife in December, 1872 (although it was arranged by the appellants' solicitor and the respondent's solicitor that such notes should be admitted as evidence of adultery and separation of the respondent and his wife, to save any order being sought by the guardians against the respondent for maintenance of his wife), and that even if the adultery at that date was proved, it did not follow that the child was not the lawful child of the respondent.

It was objected on behalf of the appellants that the respondent was not entitled to be examined on his own behalf, and that if he was a competent witness he was not by law entitled to prove that he had not access to his wife, and thereby to prove that the child Ernest was not his lawful child.

The justices overruled these objections, and decided that, although there was no evidence to prove that the respondent was not the father of the child, except the evidence aforesaid, they were entitled to take into consideration such evidence to prove that he was not the father of the child. They further decided that the evidence, as given in the divorce suit, proved that she had committed adultery in December, 1872, and that, even rejecting the respondent's evidence, there was evidence which they might take into consideration to prove that the child was not the respondent's child. They accordingly declined to make any order.

The question for the opinion of the Court was whether the justices were right in admitting the evidence objected to by the appellants, and whether there was evidence upon which they were entitled to find that the respondent was not the father of the said child.



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If the Court should answer these questions in the affirmative the decision was to be affirmed, but if in the negative the case was to be sent back to the justices, with the opinion of the Court thereupon, so that they might make an order upon the respondent for the maintenance of the child, as required by the statute 43 Eliz. c. 42. s. 6, and 31 & 32 Vict. c. 122. s. 36, he having sufficient means to maintain the said child.

*Wills and Poland*, for the appellants.—It is a well-established rule that a husband may not give evidence to bastardise his children born during marriage. But a doubt has been raised whether the Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), s. 3 (1), has not altered the law. The proceedings contemplated by that section are proceedings in the Divorce Court; moreover, this is not a "proceeding instituted in consequence of adultery." The doubt has been raised by two cases decided in Chancery. In *In re Rideout's Trusts* (2), James, V.C., seems to have admitted evidence of the husband to bastardise his own child, but from the report of the case in the *Law Journal*, it would appear that the Vice-Chancellor really thought the evidence was not admissible. In *In re Yearwood* (3), Hall, V.C., examining *In re Rideout's Trusts* (2), from the report in the *Law Reports*, considered that that case had altered the law to a certain extent, and he admitted the evidence of a father to bastardise his children, but he did so under a mistaken idea that James, V.C., had ruled such evidence to be admissible.

*Reginald Brown*, for the respondent.

—The question is whether there was not evidence upon which the justices could find that the appellant was not the father of the child. The evidence of *Mary Thorkell* and the fact of the adultery

was sufficient even without the evidence of the respondent. But his evidence was admissible. The Act 14 & 15 Vict. c. 99 enabled parties on the record to give evidence, and 16 & 17 Vict. c. 83 enabled the husbands and wives of parties able to do so, except in criminal proceedings, and "any proceedings instituted in consequence of adultery." Then 32 & 33 Vict. c. 68. s. 3 makes the evidence in the present case admissible by removing the disability as to "proceedings instituted in consequence of adultery." The learned author of *Taylor on Evidence* suggests that the old rule is superseded partly by section 3 of the Act 32 & 33 Vict. c. 68, and partly by the two decisions in Chancery.

It is clear that in *In re Rideout's Trusts* (2), James, V.C., admitted the evidence, and in *In re Yearwood's Trusts* (3) Hall, V.C., expressly decided that a husband might give such evidence as would bastardise his own child.

GROVE, J.—In my opinion this case turns on the question whether the respondent's evidence was admissible or not. The respondent's counsel has contended that the question is whether the evidence tendered and admitted was sufficient to satisfy the justices that there had been non-access to the wife, that is to say, non-intercourse between the husband and wife; but I do not think that was the point intended to be raised.

In order to find out the real point we must look at the whole case. The evidence as to legitimacy is, first, cohabitation up to October, 1872, when continual cohabitation ceased; then there is evidence that the husband had a key of his wife's house, and that he had gone there on one occasion at one o'clock in the morning; and there is also evidence that the respondent was tenant of the house wherein his wife lived, and that, up to a certain time, he supported his wife and children while they lived there. The wife was called, and she said that the child was the child of her husband. Now the evidence of the husband and wife was either admissible or inadmissible. In answer there is the evidence of the respondent that he had ceased to have

(1) 32 & 33 Vict. s. 3 enacts—"The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding. . . ."

(2) 39 Law J. Rep. Chanc. 192; s. c. Law Rep. 10 Eq. 41.

(3) 46 Law J. Rep. Chanc. 478; s. c. Law Rep. 5 Ch. D. 545.

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intercourse with his wife a year before the birth of the child, and the evidence of Mary Thorkell—and very singular evidence it is—to the effect that for twenty months the respondent was not out of her house after eleven o'clock at night. How could she possibly know? The only other evidence was the Divorce Court proceedings, which were put in to shew adultery on the part of the wife in 1872. This was proved by the shorthand writers' notes. It was objected that these notes were not evidence, but it was agreed by the solicitors on both sides that, with the view of saving expense, they should be admitted, merely to prove that a divorce was granted on the ground of adultery, and not to prove the date of the adultery. I am of opinion those notes were not admissible to prove the adultery.

The justices overruled these objections, and decided that although there was no evidence to prove that the respondent was not the father of the child, except the evidence aforesaid, they were entitled to take into consideration such evidence to prove that he was not the father of the child. The only evidence therefore on which the justices could decide that the respondent was not the father of the child was the evidence of the respondent and Mary Thorkell. Mary Thorkell's evidence in reality proves nothing. The real question therefore is, Was the evidence of the husband admissible?

It has been already decided positively, or, where such evidence has not been tendered, negatively, that before the passing of the Evidence Acts the evidence of husband and wife was not admissible to prove access or non-access—see *Goodright v. Moss* (4). But it is said that 32 & 33 Vict. c. 68. s. 3, by which “the parties to any proceedings instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceedings,” allows the respondent to give evidence to bastardize his issue. It is necessary to consider whether this was a proceeding “instituted in consequence of adultery.” My own opinion is that the statute applies only to proceedings instituted on the

ground of adultery in the Divorce Court. *In re Rideout's Trusts* (2), as reported in the *Law Reports*, gives colour to the idea that James, V.C., admitted the evidence of a husband to bastardize his child; but the *Law Journal* report of the case leads one to arrive at the opposite conclusion, and contrary therefore to the opinion entertained by Hall, V.C., in *In re Yearwood* (3), in which he seems to have imagined he was following James, V.C., in admitting similar evidence. But from the examination of these cases it would appear that the report in the *Law Journal* of *In re Rideout's Trusts* (2) is correct, and that James, V.C., really thought the evidence inadmissible. We have come to the same conclusion.

I do not think, therefore, that proceedings like these can be said to be instituted in consequence of adultery, and in thus deciding I do not think I am in conflict with the judgment of James, V.C., in *In re Rideout's Trusts* (2). My judgment therefore is for the appellants.

LOPES, J.—We have to consider two points—first, was the husband's evidence admissible to prove non-access? secondly, if that evidence was inadmissible, was there any further evidence on which the justices were justified in finding as they did? As to the first point, the head-note to *The Queen v. The Inhabitants of Swinton* (5) which says that “neither husband nor wife can be examined for the purpose of proving non-access during marriage,” is an accurate statement of the law before the passing of the Evidence Acts. The first Evidence Amendment Act, 14 & 15 Vict. c. 99, enabled plaintiffs and defendants in actions to give evidence, but by section 4 the Act is not to apply to proceedings “instituted in consequence of adultery.” 16 & 17 Vict. supplemented the preceding Act by allowing the husbands and wives of plaintiffs and defendants to give evidence, but still not in proceedings “instituted in consequence of adultery.” Then came the Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), by which (section 3) “the parties to any proceeding instituted in consequence of adultery, and the husbands

(4) Cowp. 591.

(5) 5 Ad. & E. 180.

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and wives of such parties, shall be competent to give evidence in such proceeding." On this Act the respondent relies, but, as I understand it, it only makes husbands and wives competent witnesses in suits in the Divorce Court, and repeals the exception in the two former Acts as to proceedings "instituted in consequence of adultery." In this case the parish asked the justices to compel the respondent to support his child. Surely this is not a proceeding "instituted in consequence of adultery."

The point, however, has been raised in two cases in the Court of Chancery, to which reference has been made. In *re Rideout's Trusts* (2), even as reported in the *Law Reports*, cannot be considered an authority for holding that the old law has been altered, and that non-access may be proved by husband or wife; for James, V.C., says: "I do not like to say that the effect of the statute is to supersede the old rule." It seems to me that in *In re Rideout's Trusts* (2) the Vice-Chancellor did not decide one way or the other. In *In re Yearwood* (3) the decision is based on the supposition that James, V.C., decided that the evidence of the parents was admissible to prove the illegitimacy of their child. Neither of the above cases are to my mind direct authority on the point.

Secondly, putting aside the respondent's evidence, I do not think there was any evidence on which the magistrates were justified in acting. It was a bold assertion for Mary Thorkell to say that the respondent was never out of her house later than eleven p.m. He might still have gone to his wife's house before eleven p.m., having a key to her dwelling, and therefore Mary Thorkell's evidence does not disprove access to the wife.

*Case remitted to the justices.*

Solicitors—Taylor, Hoare & Co., agents for J. Black, Nottingham, for appellants; Crosse, Sons & Riley, for respondent.

[IN THE COURT OF APPEAL.]

(Appeal from the Queen's Bench Division.)

1879.

June 17, 19, 23. } THE QUEEN v. FRENCH.\*

*Highway—Turnpike Act—Roads authorised to be made by Trustees under Private Act—Tolls—Completion of Part of Roads—Insufficiency of Tolls to keep completed Part in Repair—Statute 4 & 5 Vict. c. 59—Application for Contribution towards Maintenance out of Highway Rate—Jurisdiction of Justices.*

A private Act of Parliament (5 Geo. 4. c. xciv.) after authorising certain trustees to establish a ferry and make roads in communication therewith, provided that the roads when made, as well as the ferry, should be maintained and repaired out of certain tolls thereby authorised to be taken. The Act specified no limit of time for the expiration of the trust, but it was provided that if the execution of the authorised works should not be completed within the space of ten years, all the powers and authorities thereby given should cease and determine, save only as to so much of the work as should have been completed within that time. The ferry was established and all the roads made with one exception, but the funds derived from the tolls being insufficient to keep one of the roads so made in repair, an order was made by justices in Special Sessions under the provisions of 4 & 5 Vict. c. 59. s. 1, for contribution out of the highway rates towards the repair of such road:—

Held, that the road in question was a turnpike road within the meaning of 4 & 5 Vict. c. 59, and that as the funds of the trust were inadequate to keep it in repair, the justices had a discretion to appropriate a portion of the highway rate towards its maintenance.

Held also, that the completion by the trustees of the whole system of roads specified in the Act of 5 Geo. 4. c. xciv. was not a condition precedent to the right to call upon the parish to contribute towards the repair of the roads that had been made.

The King v. Cumberworth (3 B. & Ad. 108; s. c. 1 Law J. Rep. M.C. 86) overruled.

\* *Coram* Bramwell, L.J.; Brett, L.J.; and Cotton, L.J.

*The Queen v. French (App.), Q.B.*

This was an appeal from an order of the Queen's Bench Division quashing an order of Quarter Sessions made upon an appeal by Robert Botting, surveyor of highways for the parish of Rustington, in the county of Sussex, against an order made by two justices in special sessions on the 13th of November, 1876, for contribution of a sum of 150*l.* out of the highway rate for the parish of Rustington towards the repairs of a road there in front of the sea, leading from Littlehampton to Rustington. By the order of the Court of Quarter Sessions the order of the two justices was quashed, subject to a case, of which the material parts are fully set out in the report of the case in the Queen's Bench Division (47 Law J. Rep. M.C. 74). The facts therein disclosed were shortly as follows:—The respondent was clerk to the trustees under the Act 5 Geo. 4. c. xciv. for establishing a ferry over the River Arun at Littlehampton, in the county of Sussex.

By section 16 of the Act the trustees were empowered to make certain roads connected with such ferry, including a road from the ferry to Rustington village and a branch road from Littlehampton to Rustington.

The Act further provided for the taking of tolls, and by section 72 it was enacted that "in case the works should not be completed within the space of ten years . . . all the powers and authorities thereby given should cease and determine save only as to so much of the work as should have been completed within the time."

The ferry was established and all the roads were completed by the trustees with the exception of the road from the ferry to Rustington village and a portion of the branch road between Rustington and Littlehampton, which was made by and at the expense of the parish of Rustington; and the trustees had taken the full amount of the tolls specified in the Act, and had expended them in the maintenance of the roads in addition to the other purposes authorised by the Act. The branch road from Littlehampton to Rustington being out of repair the respondent obtained an order

under 4 & 5 Vict. c. 59, that 150*l.* should be paid by the appellant, as surveyor of highways for Rustington, out of the highway rates for that parish towards the repair of the road, on the ground that the funds of the ferry undertaking were insufficient for the repair of the roads comprised therein. The Court of Quarter Sessions quashed the order of the two justices. The Queen's Bench Division quashed the order of Quarter Sessions, and the surveyor of highways for Rustington appealed.

*Cave and Gore*, for the appellant.

*Willoughby and Lumley Smith*, for the respondent.

The arguments sufficiently appear from the judgments of the Court.

*Our. adv. vult.*

The following judgments were delivered on the 23rd of June:—

BRAMWELL, L.J.—I think this judgment should be affirmed. The question really is, what are the rights of the public under a statute passed for the benefit of the public, and not for the benefit of trustees of turnpike roads. The public are interested in having this road repaired, and my opinion is that which is expressed by Blackburn, J., in *The Trustees of Sunk Island Turnpike Road v. Patrington* (1). He says: "A turnpike road is a highway, and therefore by common law the parish were, and I apprehend still are, liable to repair it, and liable to an indictment if they neglect to do so. Statute duty had been imposed by several statutes, with remedies to enforce it; but at the time of the passing of the statute in question those statutes had been repealed and those remedies were gone. It being found that there were turnpike roads, being highways, the funds of which failed, and the public suffered in consequence of their being out of repair, that Act was passed. It is an enactment for the benefit of the public, which, inasmuch as turnpike trusts are apt to be insolvent, gives a new remedy by enabling the trustees to go before

(1) 1 B. & S. 747; s. c. 31 Law J. Rep. M.C. 18.

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justices of the peace to obtain funds from the highway rate to keep them in repair." In my opinion the road in question is a turnpike road within 4 & 5 Vict. c. 59; and if an indictment would lie against the parish in which it is when it is out of repair, then it comes within the statute, so that the justices can order a payment out of the rate; and the converse is true, that where a payment could be ordered by the justices out of the highway rate, an indictment would lie. The remedy by indictment against the parish is an indirect mode of obtaining redress. The parish is prosecuted in point of form for not keeping the highway in repair. What practically happens is, that a nominal fine is imposed if the parish should put it into repair. I should think a very much better arrangement would be, as was thought by the Legislature, that where there is a fund in the hands of trustees for that purpose, although insufficient, instead of the parish being indicted, it should pay a sum of money to be added to the fund, so that those intrusted with the repair might put the road into repair. There is this obvious consideration, if the roads wanted repair to the amount of 500*l.*, and the trustees had 400*l.*, it was much better the parish should pay 100*l.* than be proceeded against by indictment. If an indictment would lie, it is within 4 & 5 Vict. c. 59, so that a contribution could be enforced under the Act.

The question then is, is it a turnpike road? It seems to me that a road is within 4 & 5 Vict. c. 59, when it is made under the authority of an Act of Parliament, for I do not know any authority except an Act of Parliament which can enforce it to be made. I think that a road is a turnpike road within 4 & 5 Vict. c. 59, when it is made under the authority of an Act of Parliament with that intention, and in contemplation that it should be repaired by tolls to be taken at a turnpike. The words of 4 & 5 Vict. c. 59, are, "that it shall be lawful for the justices, at any special sessions for the highways holden after the passing of this Act, upon information exhibited before them by the clerk or treasurer of any turnpike trust, that the funds of the

said trust are insufficient for the repairs of the turnpike roads within any parish." I think that shews the Legislature intended, as I say, a road made under the authority of an Act of Parliament by trustees, which it was contemplated would be maintained and repaired by the trustees out of tolls taken by the turnpike trustees. Suppose in this case nothing but this particular bit of road had been made, upon which the trustees had no right to put a toll-gate. Suppose that trustees could not have put a toll gate upon that bit of road, they could have got no other funds; therefore I think that bit of road so made would have been a turnpike road within the parish, although there was no turnpike upon it or in any way connected with it. It seems to me the Legislature, as I say, meant any road which it was contemplated should be repaired by tolls taken at a turnpike. I am not at all sure we need go as far as that in this case, but it seems to me that is the definition. As I say, I think, if this bit only had been made, it would have been within 4 & 5 Vict. c. 59. It was said that there was no statutory duty. There are two answers to that: first, there is some statutory duty, which the trustees were entitled to enforce; and in the next place, the enacting part of the statute is not limited. The enacting part is not limited in any way, and it may very well be it is more extensive than the recital might have made one think it would be in the first instance. After all, I cannot help thinking, when the Legislature was legislating upon the subject, they thought it would be a much better arrangement for the parties and for the public that this should be done than that there should be an indictment. Then next it was said that this was a private speculation, and that a ferry was connected with the road. If it is a turnpike road, it is none the less so because there is a ferry. There is great authority, apart from reasoning, upon that.

Then it was said that this was an enterprise for profit, and that a very large dividend might have been got out of the road. Certainly it would be very singular if they could divide their funds and leave the road out of repair, and

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then get the parish to contribute to the maintenance of it. Of course that would be a breach of trust, and they would not be permitted to do it; but the fact, that there was a possible gain out of it, does not make it the less a turnpike road.

Then another argument against the respondents was this, that the general Turnpike Clauses Act does not apply where the trust is a perpetual one; but this objection cannot prevail.

Then there was another objection taken on behalf of the appellant. This is not a public road, because the trustees have no right to take tolls till they have made the entire road, and therefore the case is in this difficulty; inasmuch as the trustees have not made the whole of the road which they were to make and have no right to take tolls, but have taken tolls (that is to say, they have not permitted people to go along a part of it unless they paid tolls), the case is not within the statute, they not having made the whole road but having taken the tolls; and there is no dedication to the public, because they have not allowed people to pass except on the term of their paying toll. And it was said there was nothing in the Act of Parliament which said the road when made should be a public road. I think one of several answers to the argument is this. In the first place I think I ought to say it is impossible to read that statute without seeing that when the roads were made the public were to have the use of them, and to my mind it is impossible to read the statute without saying that if this bit of road had been made first and before the others had been made, it would have been a public road as soon as it was made and the public could go along it. I think if this bit of road had been made first and had been in a fit state for use, the trustees could not have said to anybody, "You shall not go along there except upon our terms, and our terms are these, inasmuch as we have not made the whole of the road we are entitled to ask what toll we like, and we charge double the toll." It was pointed out, and the argument was forcible, that if that were so this would follow, they might make a choice bit of road upon which they could

put a toll-house, they might take the toll there and not make the rest of the road, and so they would receive a large profit from the toll-house although a very small portion of the road had been made. That is a legitimate argument, though in this case it turned out I think nine-tenths or more of the road had been made. However, it is a legitimate argument, and is rather a striking thing.

Then it was said the trustees cannot be compelled by mandamus and other proceedings to make this road, and that was decided in the case of *The York and North Midland Railway Company v. The Queen* (2). Whether that decision would govern a case like the present it is not necessary to determine. Probably there is this distinction, in that case it was merely a thing for the private benefit, and there was a *pro rata* toll imposed, whereas that is not so here. It may be the Legislature would have confided to the honest proper feeling of the trustees and supposed they would make the road if they had the means, or the Legislature may have supposed they would make all the road, because the making of all the road would be for their benefit, although they could only get paid a toll on one part of the road. But let these things be decided as they may, whether they can be compelled to make the road if they have funds, or whether they cannot, as I have said, it seems to me clear, upon the Act of Parliament that when the roads were made the public had a right to use them subject to paying a toll when they went through that particular turnpike where the trustees had a right to take it, and that it was not a condition precedent to their being roads that the whole should be made, nor was it a condition precedent to their right to take toll that they should make the whole of the road; and I think the difficulty suggested may be retorted upon the appellant in this way, that, if the argument is well founded, the trustees could at this moment insist upon any toll they thought fit to ask if that toll-gate was in existence. It seems to me therefore these

(2) 1 E. & B. 858; s. c. 22 Law J. Rep. Q.B. 225.

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are public roads and turnpike roads for reasons I have given.

Then it was said the case of *The King v. Cumberworth* (3), followed by two others, shews that where a turnpike trust is to make a road, it must make the whole road, at all events before the parish, in which any part of it is, would be subject to an indictment for not repairing that part. In answer to that, it was said the judgments in the Court below in those cases are overruled by *The York and North Midland Railway Company v. The Queen* (2). With great submission, I cannot see they are so overruled. What that case decided was that a railway company having power to make a line, had power, but no duty to do it, and could not be compelled by mandamus to do it. *The King v. Cumberworth* (3) and the following cases had decided not that the trustees of a turnpike road were compellable to make the whole of the road—but as I understand that case, that they must do it before they get any rights under it—that is my interpretation of it. However, if *The King v. Cumberworth* (3) did decide that the trustees were compellable, I suppose to some extent, except that a railway company may be subject to different considerations, it may be said *The York and North Midland Railway Company v. The Queen* (2) did overrule *The King v. Cumberworth* (3). But at all events it did not overrule *The King v. Cumberworth* (3) upon the vital point in this case, because the vital point whether the trustees can be compelled to complete the road or not, is not the question, but if they have not completed it, says *The King v. Cumberworth* (3), no indictment will lie against the parish for non-repair. That was not overruled in *The York and North Midland Railway Company v. The Queen* (2). Therefore, with all submission to the Queen's Bench Division, we must see for ourselves how far *The King v. Cumberworth* (3) bears upon this case. In my judgment, with very great respect, it cannot be supported. It is not necessary to express one's high opinion of

Lord Tenterden and the other learned Judges who sat with him—but I think the great mistake was in looking upon it as a case in which the merits or deserts of the trustees were concerned, and not the rights of the public. I cannot help thinking they were partially led into that by what is now admitted to be an erroneous consideration, namely, that a parish is not liable for the repair of a road until it has in some way or other adopted it. That certainly is not the law, and it is a very singular thing that *The King v. Cumberworth* (3) should have been decided as it was, because it comes to this, that any man at that time might have passed upon the parish the burden of repairing a highway by simply laying it open to the public, if the public used it, as no doubt they would. Therefore, with great deference to the Queen's Bench Division, I do not agree with what they say about *The King v. Cumberworth* (3), and with great deference also to those who decided *The King v. Cumberworth* (3), I do not think that case was well decided. I think it was decided upon the two erroneous considerations I have mentioned. It seems to me, therefore, that this is, as I have said, the case of a turnpike road, that is to say, a road made under statutory authority by trustees, which the Legislature contemplated would be maintained by tolls to be taken on a part of the road or roads which were to be made under that statutory power.

Then there is only one other observation I should like to make, which is this, really if it were necessary to make a distinction between this case and *The King v. Cumberworth* (3) a fact might be relied on which existed also in *Roberts v. Roberts* (4), where the road was to be made from Llanwrst to a village, and from that village to Abergelge. The Court there held they were two distinct roads, because the Legislature contemplated they would be made at different times. I think that is quite as true here, because the roads made here are certainly three distinct roads, roads which do not join each other, roads

(3) 3 B. & Ad. 108; s. c. 1 Law J. Rep. M.C. 86.

(4) 3 B. & S. 183.

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which only communicate with each other by means of old existing roads, which would still be repairable by the parish and not by the trust.

Then these are to all intents and purposes three distinct roads, although part of one system. I think, therefore, this case is distinguishable from *The King v. Cumberworth* (3). If we look to the true question, what are the rights of the public and what are its interests, I am of opinion that this is a turnpike road within the Act of Parliament, and that the order for contribution was rightly made.

BRETT, L.J.—I am of opinion that the judgment of the Court of Queen's Bench ought to be affirmed. The question is whether the road from Littlehampton to Rustington is a turnpike road within the meaning of 4 & 5 Vict. c. 59. If it is, the justices had authority to make the order they have made.

It is argued that it is not a turnpike road for three reasons. First, it is said that even if the whole system of roads had been made, and it was clear that tolls might be legally taken in respect of all the roads, including this particular road, yet that the road would not be within the enactment, because the trust being for an unlimited time the road would be taken out of the General Turnpike Acts by s. 90 of 4 Geo. 4. c. 95. But it was decided in *The Company of Proprietors of the Northam Bridge and Roads Company v. The London and Southampton Railway Company* (5) that the words "turnpike road" must not have a limited application. If it is a highway on which a turnpike is lawfully erected, and upon which tolls can be legally taken, then the road is a turnpike road. As all turnpike Acts, including the present, are passed for the benefit of the public, I think that construction of "turnpike road" is correct. It is true that by 5 Geo. 4. c. xciv., a benefit is given to the promoters and subscribers of the undertaking, but that benefit is subservient to the benefit conferred on the public. If that Act be properly carried

(5) 6 Mee. & W. 428; s. c. 9 Law J. Rep. Exch. 165.

out, the subscribers can get no benefit from the tolls until the benefit and advantage to the public is first fully secured. I think that this road is a highway on which tolls can be taken. Secondly, it was said that this road, if no tolls were taken on it, would not be a highway repairable by the parish, because it is one of a system of roads, or a part of a larger road, and that the whole system of roads or the whole of the road was not completed by the trustees. For that proposition the cases of *The King v. Cumberworth* (6) and *The King v. Edge Lane* (7) were cited. Those cases were decided upon the authority of the earlier case of *The King v. Cumberworth* (3), and if that case cannot be supported neither can the other two, which were decided in the same Court, and merely follow upon the earlier authority. In the case of *The King v. Cumberworth* (3) first decided, three propositions were laid down, although it may be only one was necessary for the decision of the case. A system of roads having to be made under a private Act of Parliament, it was said the trustees were bound to make all the roads, and if therefore the whole system were not completed they would be compelled to complete it. That was one proposition. It was next said that although a road was used by the public, yet it was not a road repairable by the parish unless the parish acquiesced in the use of the road by the public. Lastly, it was said that where a system of roads were to be made by trustees under a private Act, and any one of the roads, or part of one of the roads, was made, even if that part was used by the public, it would not be a highway repairable by the parish unless the whole system of roads was made. Those, in effect, were the three propositions to be deduced from the earlier case of *The King v. Cumberworth* (3). Soon after that decision the proposition that in order to charge a parish with the repair of a highway they must have adopted the highway was over-

(6) 4 Ad. & E. 731; s. c. 6 Law J. Rep. M.C. 21.

(7) 4 Ad. & E. 723; s. c. 5 Law J. Rep. M.C. 91.



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ruled in the case of *The King v. Leake Inhabitants* (8). Next the proposition that trustees could be compelled to finish a road which they had obtained a power to make was also overruled in the case of *The York and North Midland Railway Company v. The Queen* (2). The third proposition whenever it has been mentioned has always been excepted to, but it was followed because the point has only been raised in Courts other than a Court of Appeal. The question has now come before us, and the objection which has always been made as to the third point must prevail, and *The King v. Cumberworth* (3) ought to be entirely overruled. The counsel for the appellant put an extreme case: he said if only a small part of a road was made and the greater part was not made, it would be hard to them to throw the burden of repairing that small part of road in the parish when they could derive little or no benefit from so small a part of a larger scheme, but the learned counsel was obliged to admit that an extreme case from an opposite view would also be hard, that where eleven and a half miles of a road are made and half a mile not made, and the public for a number of years have used the portion that has been made, the larger part was not to be repaired by the parish, because the half mile of road was not made.

Then it was said that the trustees could not dedicate to the public a part of a road, that is, the part of the road that was made and thrown open for their use; but if the trustees are not owners of the land taken by compulsion and do not finish all the roads they ought to give up the property. That cannot be: the trustees are as capable of dedicating the part of the road as any private owner who is possessed of land. They are the owners of the part of the road that is thrown open to the public, and the public have the option of taking or rejecting the road; and the theory of making a road a public highway repairable by the parish is this, that the public have seen that the road which is offered to them is useful to them; if it is not useful to the public,

they would not take it. It is by their general assent and user of the road that it is proved to be useful to the public, and then there is no reason why the parish should not repair it. It seems to me, therefore, that *The King v. Cumberworth* (3) ought to be overruled, and that this piece of road was a public highway repairable by the parish, although the rest of the road was not completed because the public have used the road.

But then it is said if this is a highway, it is not a turnpike road, because no toll can be legally taken upon any part of the road until the whole road is finished. It does not seem to me that as to this point one is called upon to enter into a discussion as to whether *The King v. Cumberworth* (3) was rightly decided or not. The whole question must be whether, upon the particular Act, it is a condition precedent to the right to take tolls upon a part of the road that the whole of the road should be finished. I think the rule in construing any instrument, either an Act of Parliament or any other document, is that it is not to be held that there is a condition precedent unless it is clearly expressed, or unless such is the clear inference to be drawn from the language which is used, and the ground upon which I say that it is not a condition precedent in this case is that there seems to me to be no such enactment in this Act of Parliament; and there is nothing from which such an inference can reasonably or necessarily be drawn, as that it is a condition precedent to the taking of tolls, say, upon all the road except a mile, supposing all the road had been finished except a mile, or upon all the roads except a by-road, that the one small piece of road or the one by-road must be finished; and if it would not be a condition precedent in that case, it is not a condition precedent in the present case. Therefore it seems to me this would be a public highway if it was not a turnpike road; that it is a turnpike road, that is to say, that it is a road which otherwise would be a highway, but upon which tolls are lawfully taken. It is therefore within the definition which is given in the case of *The Company of Proprietors of the Northam Bridge and Roads*

(8) 5 B. & Ad. 469; a. c. 2 Nev. & M. 595.

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*v. The London and Southampton Railway Company* (5). That definition is, I think, a right one. I therefore think the judgment of the Queen's Bench Division ought to be affirmed.

COTTON, L.J.—The question we have to consider upon this appeal is, whether the justices had power to make an order under 4 & 5 Vict. c. 59, appropriating a part of the highway rate towards the repair of a certain portion of a road made under a private Act. I think that where there are certain persons charged with the duty of keeping a road in repair, and they have funds for the purpose, then the parish are not to repair the road, but they are liable to be called upon by the justices to supplement the funds in the hands of the parties who had charge of the road to make good any deficiency. That is a much more convenient course than to allow an indictment to be preferred against the parish.

The words of the recital in the 4 & 5 Vict. c. 59, are not restrictive, and when we find in the enactment itself words capable of a reasonable and fair interpretation, we must not limit the enactment by reference to the recital. I think the Act of Parliament applies to turnpike roads made after the passing of the Act, and I am also of opinion that even as regards old roads, if they come within the fair meaning of the words used in the enacting part, we cannot deprive the roads of the benefit of the statute by referring to the recital. I use advisedly the words "deprive the roads of the benefit of the Act," because it is not the trustees who are seeking to have the benefit of this Act for their own purposes. It is simply out of regard to the public interest that this application is made, and although, no doubt, the question of the private interest these trustees had may fairly be taken into consideration in seeing whether or not this can be considered as a highway, yet it is not their interest in any way which is to be regarded; it is the interest of the public, who are entitled to have this road kept in a particular manner, if it is a highway and if it is a turnpike road.

Now, is it a highway and is it a turn-

pike road? It was argued upon both those points that it was not so, because the means of communication established by this private Act were to be considered as a private speculation, and if that had been so it would have been a strong argument to prevent it being considered a highway or a turnpike road; but I cannot consider that is the real effect of this Act of Parliament. In my opinion it was for the public benefit that these roads and this ferry should be made, and although certain persons contributed certain sums of money to enable both these objects to be carried out, the roads have to be thrown open to the public, and the public would have a right to use these subject only to a certain rate of tolls. It was to become a public highway: a road and highway for the benefit of the public. We must look to the whole purport of the Act of Parliament, and then say whether this was intended to be anything in the nature of a private speculation to benefit certain promoters of the undertaking or whether it was not. In my opinion the Act was passed to establish a highway for the benefit of the public, part of that highway being the ferry which was to be kept in order, and for which proper boats were to be supplied. That being so, the fact that the surplus of the tolls was to go to the trustees does not make it a private speculation so as to prevent its becoming a highway, if otherwise a turnpike road. But is it a turnpike road? And I mention that before I deal with an argument which equally applies to a turnpike road or a highway. To be a turnpike road it must be part of a road in respect of which tolls shall be legally taken. It is perfectly obvious that does not mean that the particular bit of road must be a road for the use of which, by itself, tolls can be taken; it must be part of a system for the use of which tolls are authorised to be taken. It is said here that tolls could not lawfully be taken, and that this could not be considered a highway, for the reason that the whole of the system of the roads or the whole of the roads which by this Act of Parliament it was contemplated would be made, had not been made; and that argument was said to be founded

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upon certain cases which were referred to. Of course in deciding that question, irrespective of any authority upon the point, we must look to the Act, and must see whether, in the contemplation of the framers of the Act, it was a condition precedent either to its being a highway or to the right of the trustees to receive any tolls, that the whole of this system should be completed; that the whole of the roads were to form a public highway, or that in respect of which the trustees could claim tolls. It is clear upon the Act, as regards the ferry, tolls could be taken as soon as the ferry was put in proper order and proper boats were provided; but as regards the roads, when we look at what these roads were, I think we cannot but come to the conclusion that neither as regards the highway nor as regards the right to take the tolls could it be a condition precedent that all the roads should be completed. Having regard to the fact that there is a road which is separated by the ferry from another portion of the roads contemplated by the Act, and that that forms the very portion which, it is said, is not made; if it had been intended that no toll should be taken until the whole of the other means of communication were made throughout, I should have said we should expect to find that intention clearly expressed, and not that it would leave it to conjecture as to whether, if one road on the west side of the river had been completed, though a small portion on the east had not, there would have been a right to take tolls. Whether they could have taken tolls when that particular bit on the west side was completed, it is unnecessary to give an opinion upon, but having regard to the divisions between the roads, the fact that they have a right to put up a toll-house and to take tolls is a strong argument that the completion of all the roads was not a condition precedent. Then section 72 contemplated that part of the work would not be finished within ten years, and then the powers given by the Act cease. It is unnecessary, in my opinion, to go further, but I think we can see, looking to the Act, and to the fact that there is a requisite division by the river

of several of the roads, and that the roads are broken up, that the true construction of the Act is that neither as regards the liability of the public to repair it as a highway nor the right to take tolls, can it be considered as a condition precedent that the entire system down to the last 300 yards should be completed before any toll is taken. It is said that is contrary to the decision in *The King v. Cumberworth* (3), but, as has been pointed out by Brett, L.J., that case has been followed by Courts which could not overrule it. This case coming before a Court of Appeal, although *The King v. Cumberworth* (3) does lay down as a general proposition that there shall be no liability to repair a road under a somewhat similar Act of Parliament unless the entirety is made, that there shall be no liability to pay tolls unless the entirety is completed, that, in my opinion, is no longer law, and ought no longer to be considered as applicable to these cases.

Then there is another point which Bramwell, L.J., mentioned in his judgment, and which I in no way dissent from. Even if the tolls could not be taken in consequence of the entirety of this road not being finished, I think it would be a very reasonable construction of the 4 & 5 Vict. c. 59, to hold that Act still applied to this road as a turnpike road, and that the justices could order part of the highway rates to be applied to its repair, instead of allowing the parties to proceed by indictment against the parish. In this case there is nothing to shew that it is a condition precedent to the tolls being taken or its being a highway, that the entirety should be completed; on the contrary, I think there is an intention in the Act of Parliament that as soon as a portion of this road shall be open to the public it shall become a highway, and that there shall be a right to the tolls, at least, when those communications on the west side of the river are made.

*Judgment affirmed.*

Solicitors—Palmer, Bull & Fry, agents for T. Janman, Chichester, for appellant; Senior, Attree & Johnson, agents for Upperton Lear, Arundel, for respondents.

## [IN THE EXCHEQUER DIVISION.]

1879. { THE LONDON, BRIGHTON AND  
June 20, { SOUTH COAST RAILWAY COMPANY  
24, 30. { (*appellants*) v. THE VESTRY OF  
ST. GILES, CAMBERWELL (*respondents*).

*Metropolitan Management Acts—18 & 19 Vict. c. 120. s. 105—25 & 26 Vict. c. 102 s. 77—Paving—Owner of Land bounding or abutting on a Street—"Street."*

*A railway company over whose railway a road is carried by a bridge supported on piers, which rest on the slopes of the cutting in which the railway runs, are not owners of land bounding or abutting on a street of which such road is a continuation.*

CASE stated under 20 & 21 Vict. c. 43, by one of the Metropolitan Police Magistrates sitting at Lambeth.

An information was preferred by the respondents against the appellants under section 77 (1) of the Metropolitan Amendment Management Act, 1862, charging that the respondents had under powers

(1) Section 77 of the Metropolitan Management Act, 1862 (25 & 26 Vict. c. 102), is as follows:—

"Where any vestry or district board shall, under the powers given by the one hundred and fifth section of the firstly recited Act, have paved or be about to pave any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same, as well as the owners of houses therein, provided that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property should they deem it just and expedient to do so; and any such costs or expenses, including the cost of paving at the points of intersection of streets, and all such incidental costs and charges shall be apportioned by the vestry or board, and shall be recoverable either before the work shall be commenced, or during its progress or after its completion, and it shall be lawful for the vestry or district board, at their discretion, to accept payment of the amount apportioned or charged in respect of each house or premises by instalments spread over a period not exceeding twenty years, and any such amount shall be recoverable from the present or any future owner of the premises, either by action at law or in a summary manner before a justice of the peace at the option of the vestry or board."

given by the Metropolis Management Act, 1855, section 105 (2), paved a certain new street called Chadwick Road, in their parish, and that 2011. 18s. 9d. had been required by the respondents to be paid by the appellants as owners of land and premises in that parish as a contribution to the expenses of paving the same, and that they unlawfully neglected to pay the same. The facts as stated in the case were as follows:—

1. Prior to the 30th of December, 1865, Chadwick Road ran across the land now occupied by the line of the appellant company, and the road was at that time a private road. On the 30th of December, 1865, the appellant company under the powers conferred upon them by the London, Brighton and South Coast Railway (Additional Powers) Act, 1864, purchased

(2) Section 105 of the Metropolitan Management Act, 1855 (18 & 19 Vict. c. 120), is as follows:—

"In case the owners of the houses forming the greater part of any new street laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate, be desirous of having the same paved as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved, then and in either of such cases such vestry or board shall well and sufficiently pave the same, either throughout the whole breadth of the carriage-way and footpaths thereof or any of such breadth, and from time to time keep such pavement in good and sufficient repair; and the owners of the houses forming such street shall on demand pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement (such amount to be determined by the surveyor for the time being of the vestry or board), and in case such estimated expenses exceed the actual expenses of such paving, then the difference between such estimated expenses and such actual expenses shall be repaid by the said vestry or board to the owners of houses by whom the said sum of money has been paid; and in case the said estimated expenses be less than the actual expenses of such paving, then the owners of the said houses shall on demand pay to the said vestry or board such further sum of money as, together with the sum already paid, amounts to such actual expenses."

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from the owners thereof so much of the said road as was required by the appellant company for the construction of their said line, and in place of the old road built a bridge carrying the road over their said line and over the place where the road had formerly been, and raised the level of the remainder of the road so as to pass over the said bridge in the manner the same now is.

2. There is a gate placed across the said road on the west side thereof immediately after the said road has crossed the bridge. On the said gate is a notice board having the words "Private—No thoroughfare" written thereon, and the road onwards from that point is still a private road. As far as that point it is a public highway.

3. On the 3rd of November, 1877, the respondents served upon the appellants a preliminary notice stating amongst other things that the respondents deemed it necessary that part of Chadwick Road, being a new street as defined by the Metropolis Management Act, 1855, and the Metropolis Management Amendment Act, 1862, should be well and sufficiently paved, and that the respondents had determined and were about to pave the same in pursuance of the 105th section of the said Act, and that the contribution of the appellants towards the estimated expenses of such paving in respect of the railway abutting north and south sides, also land on south side of which the appellants were stated to be the owners, was 201*l.* 18*s.* 9*d.*

4. The appellants having objected to pay the said sum the respondents served upon them three several notices requiring them to pay to the respondents as their contribution towards the expenses of paving part of the said road under the provisions of the said Acts the sum of 98*l.* 11*s.* 3*d.* as owners of the London, Brighton and South Coast Railway for a frontage of 190 feet 5 inches on the north side thereof; the sum of 88*l.* 12*s.* 7*d.* as the owners of the London, Brighton and South Coast Railway for a frontage of 173 feet 9 inches on the south side thereof, and the sum of 14*l.* 14*s.* 11*d.* as the owners of land for a frontage of 24 feet 9 inches on the south side thereof.

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5. The said road carried over the line of the appellant company crosses the said line at an angle of 45 degrees, running east and west by the said bridge, which is supported on stone piers, erected by the railway company upon the slope of the cutting on either side of the said line.

6. The said first mentioned measurement of 190 feet 5 inches, in respect of which it is sought to charge the appellants with the sum of 98*l.* 11*s.* 3*d.*, is the total length on the north side thereof of so much of the said road as passes over the land and railway, and cutting and land on each side thereof, of the appellant company. The said second mentioned measurement of 173 feet 9 inches, in respect of which it is sought to charge the appellants with the sum of 88*l.* 12*s.* 7*d.*, and the said third mentioned measurement of 24 feet 9 inches, in respect of which it is sought to charge the appellants with the sum of 14*l.* 14*s.* 11*d.*, together make the total length on the south side thereof of so much of the said road as passes over the land and railway of the appellant company.

7. No portion of the land of the appellant company, in respect of which it is sought to charge them as aforesaid, is at present used for any other purpose than for their said railway, and the appellant company make no use of the said Chadwick Road.

8. Throughout the length of the said road, as it passes over the appellants' railway, it is carried upon the said bridge.

9. It was contended on the part of the appellants:—

(1) That the said road was not a new street within the meaning of the said Acts.

(2) That the appellants are not the owners of land bounding or abutting upon the said road within the meaning of the said Acts, and that none of their land is land bounding or abutting upon the said road within the meaning of the said Acts; and

(3) That under the provisions of the Railway Clauses Act, 1845, the appellants are themselves bound to maintain the said road throughout the length in respect of which it is now sought to

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charge them, and that, consequently, the respondents had no authority to direct such portion of the said road to be paved at the expense of the appellants.

10. The magistrate was of opinion that the said road is a new street within the meaning of the said Acts, and that the appellants are the owners of land bounding or abutting upon the said road within the meaning of the said Acts, and accordingly ordered the appellants to pay to the respondents the said sum of 20*l.* 18*s.* 9*d.*

11. The question of law arising on the above statement for the opinion of the Court is whether the appellants are liable to pay the said sum of 20*l.* 18*s.* 9*d.* to the respondents.

*Macrae*, for the appellants.

*E. Clarke* (*R. V. Williams* with him), for the respondents.

The arguments used and cases cited sufficiently appear in the judgment of the Court.

The judgment of the Court (3) was (on June 30) delivered by—

*HAWKINS, J.*—The question in this case is whether the appellants are liable to contribute towards the expenses of paving a part of Chadwick Road in the respondents' parish, which the respondents determined to pave as a new street, under the power conferred upon them by section 105 of the Metropolis Management Act, 1855. The appellants were sought to be made so liable as owners of "land" "bounding or abutting" on such street by virtue of the 77th section of "The Metropolis Management Amendment Act, 1862." This liability was resisted upon three grounds—

1st. That the appellants were not the owners of land "bounding or abutting," on the Chadwick Road.

2nd. That if they were so, that part of the Chadwick Road upon which they so bounded or abutted was not a new street within the meaning of the Acts referred to.

And 3rdly. That inasmuch as the appellants were themselves bound under

the Railway Clauses Act, 1845, to repair and maintain that part of the Chadwick Road upon which their lands were said to abut, the respondents had no authority to direct that portion of the road to be paved under the 105th section of the Act of 1855.

Chadwick Road was in the year 1865 a private road. In that year the appellants constructed one of their lines of railway in a deep cutting across it at a right angle, and in order to enable them to do so purchased of the then owner so much of the said road as was required for that purpose. In compliance with the provisions of the Railway Clauses Act, 1845, they carried the Chadwick Road over their cutting and railway by means of a bridge running east and west; which bridge is supported on stone piers erected by the respondents upon the slopes of the cutting.

Immediately after the road has crossed the bridge, and on the western side of it, a gate is placed across the road, on which is affixed a notice board with the word "Private" written thereon. Up to this gate, but no further, the road has now become a public road. There is a continuous row of houses along the southern side of Chadwick Road up to the eastern end of the bridge, and opposite this row of houses on the northern side are houses, a brewery and office, but at the western end of the bridge there is no building save one cottage, which is on the north side of the road, opposite to which, on the south side of the road, and abutting on to it to the extent of 24 feet 9 inches, is a small piece of land belonging to the appellants, and occupied as we were informed as a cabbage garden.

The open space occupied by the cutting on the northern side extends to the length of 190 feet 5 inches, and on the southern side to the length of 173 feet 9 inches.

The respondents contended that the bridge and road up to the gate are parts of a new street, which they are empowered to pave under the Metropolis Management Act, 1855, s. 105, and that the railway and cutting over which the bridge is constructed are lands of the

(3) Kelly, C.B., and Hawkins, J.

*London, Brighton, &c. Rail. Co. v. Vestry of St. Giles, Camberwell, Exch.*

appellants, bounding or abutting upon the bridge within the meaning of section 77 of the Metropolis Management Amendment Act, 1862.

With regard to the small piece of cabbage garden the only question is whether the road upon which it abuts is part of a new street which the respondents are empowered to pave, for it cannot be disputed that it is land of the appellants abutting on the road.

We think it cannot be contended after the cases of *The London and North Western Railway Company v. St. Pancras* (4) and *Higgins v. Harding* (5), that the banks of the cutting and the metalled surface upon which the railway is laid are not "lands" of the company within the meaning of section 77 of the Act of 1862. We proceed therefore at once to consider whether under the circumstances of this case they can be deemed to "bound or abut" upon the Chadwick Road. For the purpose of determining this question we think some assistance may be derived from a reference to the terms of the 105th section of the Act of 1855, which imposes the obligation to contribute towards the paving of new streets. By that section it is thus enacted, *inter alia*: "In case the owners of the houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board, &c., be desirous of having the same paved; or if such vestry or board deem it necessary, &c., then and in either of such cases such vestry or board shall well and sufficiently pave the same, &c., and the owners of the houses forming such street shall on demand pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement." It is obvious from the language of this section that the legislature by it intended only to impose the liability of contributing towards the expense of paving any street upon the owners of houses ranged along the street itself, and opening

into, or contiguous to it. This enactment, however, it will be observed, applied only to the owners of "houses" forming the street, and not the owners of bare lands, however much such land might be benefited by paving the street upon which it abutted. The 77th section of the Metropolis Management Amendment Act, 1862, was enacted to remedy this apparent injustice. By that section it is provided that "the owners of land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same as well as the owners of houses therein," intending it is clear to place the owners of lands upon the same footing as owners of houses, in other words, to make the owners of such lands liable as would have been liable under the 105th section of the 1855 Act, had their lands been occupied by houses. It seems to us clear that neither the railway running under the bridge nor the sloping sides of the cutting can be in any sense shewn to bound or abut upon the Chadwick Road within the fair and reasonable construction of the 77th section of the 1862 Act. Could it possibly be said that if houses were erected on the spot now occupied by the railway, or on the sloping banks, that they formed part of a street with which they had no communication, and which was actually carried over them? Could the lands crossed by the high viaducts and railway bridges which are to be found in many parts of the country be said to bound or abut upon the roadway of the viaducts or bridges themselves? Or could the rivers traversed by bridges high above them be said to bound or abut upon the roadway thereof? In the course of the argument the case of *The London and North Western Railway Company v. St. Pancras* (4), was cited in support of the contention of the respondents. That case, however, only decided that the railway must be considered to abut upon the street notwithstanding the fact that it was separated from it by a dead wall which was also the company's property. The point now under discussion was not raised or suggested. That case is, therefore, no authority for the respondents.

(4) 17 Law Times, 654.

(5) 42 Law J. Rep. M.C. 31; s. c. Law Rep. 8 Q.B. 7.

*London, Brighton, &c. Rail. Co. v. Vestry of St. Giles, Camberwell, Etcn.*

This disposes of so much of the contribution as is claimed from the appellants in respect of the lands alleged to bound or abut upon the bridge itself. There remains, however, the small piece of land used as a cabbage garden which unquestionably abuts upon Chadwick Road at the western end of the bridge. As to this the only question is whether that part of the road can be deemed to be part of a new street. We are of opinion that it cannot. In *Pound v. The Plumstead Board of Works* (6), Blackburn, J., says, speaking of section 105 of the Act of 1855—"I think that it is plain the Legislature are here using the word 'street' in its ordinary natural and popular sense, and mean a place with continuous houses on each side." In *Galloway v. The Mayor of London* (7), Lord Chelmsford said, "The word street does not mean the new roadway but a thoroughfare with houses on both sides." It is impossible in language to pronounce a definition of what constitutes a new street which shall be applicable to all cases. Each case must depend upon its own particular circumstances. But having regard to the facts that the line of houses terminates at the eastern end of the bridge, that one solitary cottage alone is to be found at the western end, and that immediately after crossing the bridge from the eastward the thoroughfare ceases, and the road is closed by a private gate; we think the road ceases to be a street at the eastern extremity of the bridge, and consequently that the land used as cabbage garden does not abut upon a new street, and the company, therefore, are not liable to contribute to the paving of Chadwick road in respect of it.

This objection of course applies equally to the other lands of the company, namely, the railway and the banks of the cutting in addition to the objection that they do not abut upon the bridge.

Our judgment being for the appellants upon the grounds we have discussed, it

does not become necessary for us to consider whether the liability of the company to repair the bridge under the Railway Clauses Act, 1845, would afford them in law an answer to a claim for contribution to the paving of the Chadwick Road. We abstain from expressing any opinion upon that question.

It follows from what we have said that our judgment is for the appellants.

*Judgment for the appellants with costs.*

Solicitors—Norton, Rose, Norton & Brewer, for appellants; G. W. Marsden & Son, for respondents.

[IN THE DIVISIONAL COURT FOR THE Q.B., C.P. AND EXCH. DIVISIONS.]

1879. } THE QUEEN v. THE JUSTICES  
July 30. } OF SURREY.

*Prison Act, 1877—40 & 41 Vict. c. 21, ss. 4 and 57—3 & 4 Vict. c. 54. s. 2—Maintenance of Insane Prisoners.*

*The liability for the maintenance of insane prisoners, which by 3 & 4 Vict. c. 54. s. 2, is imposed upon the county in default of any ascertained place of settlement, is not transferred from the county to the Consolidated Fund by the Prison Act, 1877 (40 & 41 Vict. c. 21).*

This was a rule for a mandamus, calling upon certain justices of the county of Surrey to shew cause why they should not make an order upon the treasurer of the county to pay the expenses of maintenance, &c., incurred in respect of Mary Bray, a prisoner in the county gaol, who had been certified to be insane, and had been transferred to the County Lunatic Asylum. By 3 and 4 Vict. c. 54. s. 2, when a prisoner has been duly certified to be insane, and has been transferred by a warrant of the Secretary of State to a lunatic asylum, it is the duty of two justices of the county, in default of the place of settlement of such prisoner being ascertained, to make an order upon the

(6) 41 Law J. Rep. M.C. 51; s. c. Law Rep. 7 Q.B. 194.

(7) 35 Law J. Rep. Chanc. 471; s. c. Law Rep. 1 H.L. 34.



*The Queen v. Justices of Surrey, Q.B.*

treasurer of the county for the payment of the expenses incurred in his removal to the asylum and for his maintenance therein. The Prison Act, 1877 (40 & 41 Vict. c. 21), enacts in section 4 that "On and after the commencement of this Act all expenses incurred in respect of the maintenance of prisons to which this Act applies, and of the prisoners therein, shall be defrayed out of moneys provided by Parliament." The words "maintenance of a prisoner" are defined in section 57 of the same Act as including "all such necessary expenses incurred in respect of a prisoner for food, clothing, custody, safe conduct, and removal from one place of confinement to another, or otherwise, from the period of his committal to prison until his death or discharge from prison, as would, if this Act had not passed, have been payable by a prison authority." Two of the justices of Surrey had refused to make the order required by the earlier Act in the case of Mary Bray, on the ground that the liability to pay such expenses had been transferred from the county to the Consolidated Fund by the operations of these sections of the Prison Act, 1877.

On the 21st of July the *Attorney-General* obtained a rule *nisi* for a mandamus, which now came on for argument.

*Herschell* (*E. Clarke* with him), for the justices of Surrey, shewed cause.—The entire question depends upon the construction of the Prison Act, 1877. By that Act the property in prisons was transferred from the counties to the Secretary of State, and at the same time the counties were relieved from all expenses of maintenance. Formerly, the county bore the expense, whether the prisoner was sane or lunatic. Now, there is this curious result, that the expense is thrown upon the county only when the prisoner becomes lunatic. Again, all the prisons in England have now ceased to be local prisons, and are opened to the country generally. The Secretary of State may move prisoners at his will from one prison to another; and as a matter of fact, all the female prisoners from Surrey are at the present time in Westminster. The whole intention of the Prison Act was to

transfer every liability from the local rates to the Consolidated Fund. The language of the 57th section also points in this direction. The definition of "maintenance of prisoners" is made as wide as it could be, and is intended to include every possible head of expense from the date of committal to the date of discharge. As to the words "as would have been payable by a prison authority," the expenses of a lunatic were formerly payable out of the same fund, and by order of the same authority, as those of an ordinary prisoner.

*E. Clarke* followed on the same side.—The intention of the Prison Act was to impose a new obligation on the Consolidated Fund, and not to relieve it. The former Act (3 & 4 Vict. c. 54), will still be kept in operation for the purpose of certifying a lunatic, and transferring him to an asylum.

*Poland* (with him the *Attorney-General*), in support of the rule.—The liability of the county to pay for a lunatic prisoner is nowhere referred to in the Prison Act, and therefore cannot be altered by that Act. It is a sound canon of construction that if two statutes can be read together without contradiction, they should both be allowed to stand. It cannot be said that the lunatic is a prisoner while in the asylum. He is in one sense in confinement; but care and medical treatment, and not punishment, is the object of his detention. The argument on the other side would take away the liability of maintenance not only from the county, but also from the place of settlement, if such could be found. The present procedure is identical with that for pauper lunatics under 16 & 17 Vict. c. 97. s. 98; their maintenance also, in default of a settlement, is chargeable to the county.

*DENMAN, J.*—I am of opinion that this rule should be made absolute. It is admitted that the county was liable to provide for the maintenance of lunatic prisoners prior to the Prison Act, but it is contended that that liability is now transferred to the Consolidated Fund. There is some force and plausibility in the arguments which have been urged, that the Legislature could not have contem-

*The Queen v. Justices of Surrey, Q.B.*

plated drawing a distinction between sane and insane prisoners, and between confinement in prisons and confinement in lunatic asylums. But on the other hand, it may very well be that the Legislature deliberately intended to leave the asylums as they were. It would be rash for us to attempt to undertake the duty of supplementary legislation. The important clause in the Prison Act affecting the question is section 4, which is very short and as follows: "On and after the commencement of this Act all expenses incurred in the maintenance of prisons to which this Act applies, and of the prisoners therein, shall be defrayed out of moneys provided by Parliament." In the first place, it is very doubtful whether in the present case the lunatic can be called a "prisoner" at all. Still less is she a "prisoner therein," i.e. a prisoner confined in a prison to which the Act applies. An asylum is not a prison transferred under the Act. I am, therefore, of opinion that she is not a "prisoner therein" within the meaning of this 4th section. All observations upon other clauses of the Act are mere inferential arguments. On the question of policy, I am not qualified to give an opinion; and it is my duty to abstain from doing so. I have only the statute before me, and I cannot extend its provisions by supplementary legislation.

POLLOCK, B.—I am of the same opinion. It is admitted that, until the passing of the Prison Act, the cost of maintaining a lunatic prisoner was borne, not by "the prison authority," but by the place of settlement or the county, according to the ordinary rule. I may also observe that, in 3 & 4 Vict. c. 54, when prisoners who become lunatic are mentioned, they are spoken of as "insane persons," and not as "prisoners." That being so, and that statute not having been repealed, it is our duty to give a reasonable construction so far as we can to both statutes. The terms of the Prison Act clearly do not include prisoners who have become insane, and who have been removed to a lunatic asylum. It has been argued that this is a narrow construction

to put upon the 4th section, when coupled with the 57th section. But it is evident from the language of the latter section that it was intended to apply to many other incidental purposes. It refers to "all such necessary expenses incurred in respect of a prisoner for food, clothing, custody, safe conduct, and removal from one place of custody to another, or otherwise, from the period of his committal to prison until his death or discharge from prison, as would if this Act had not passed have been payable by a prison authority." That preserves and does not destroy the distinction I have pointed out above, for the lunatic is not a prisoner. Many general considerations have been addressed to us, which may very well be considered elsewhere. It is not our duty to deal with them. The county authorities have not succeeded in bringing the case within the Prison Act.

*Rule for a mandamus made absolute.*

Solicitors—The Solicitor to the Treasury, for the Crown; Smallpiece & Son, agents for F. F. Smallpiece, Guildford, for justices of Surrey.

## [IN THE COURT OF APPEAL.]

(Appeal from the Common Pleas Division.)

1879. }  
June 12. }

MIGOTTI v. COLVILLE.

*Imprisonment—Computation of Time—  
"One Calendar Month."*

[For the report of the above case, see 48 Law J. Rep. Q.B., C.P. & Exch. 695.]

# INDEX

## TO THE REPORTS OF CASES

### CONNECTED WITH

## THE DUTIES AND OFFICE OF MAGISTRATES.

MICHAELMAS 1878 to MICHAELMAS 1879.

**APPEAL**—*jurisdiction of court of appeal to hear case stated by quarter sessions for the opinion of the Queen's Bench Division*—The decision of the Queen's Bench Division in the matter of a poor rate, first, is not a mere opinion but a judgment binding on the sessions; secondly, is an order within section 19 of the Judicature Act, 1873, as interpreted by section 100. It is therefore subject to appeal. *The Overseers of the Foreign of Walsall and the Mayor, &c., of Walsall v. London and North Western Rail. Co.* (H.L.), 65

**ASSESSMENT COMMITTEE**—*appeals to sessions against rate: reference by agreement to arbitration: costs to abide judgment of umpire: action for costs against assessment committee*—An assessment committee, being unincorporated and merely a select body of guardians, cannot be sued in an action as a committee, neither are the various members thereof personally liable for acts done by them as members of the committee. *The Leicester Waterworks Company v. The Assessment Committee of Barrow Union, and Nuttall*, 41

Plaintiff's company complained in 1872 of being over assessed with reference to certain works which belonged to them, and which passed through some parishes in the Barrow Union; they accordingly brought appeals, which the assessment committee defended in the name of the guardians, in pursuance of 27 & 28 Vict. c. 39. s. 2. In 1872 the committee in question consisted of twelve, the defendant N. being chairman and S. vice-chairman of the committee. On the 8th of June, 1872, a meeting was held, at which the waterworks company were represented by the chairman, and the guardians of the B. Union by the assessment committee; and it was unanimously agreed that the question as to the rateable value of the plaintiffs' works should be settled by an arbitrator; and that, pending the negotiations, the appeals should be respite. An agreement was, on the 29th of June, accordingly drawn up and signed by the plaintiffs, and by the defendant N. "as chairman for, and on behalf of the assessment committee of the Barrow Union," by

which the disputes between the parties were referred to arbitration, and the costs of the proceedings left in the discretion of the arbitrator. There was no Judge's order, or order of Sessions, ordering or authorising the reference. The reference was held, and the award published early in 1874, in favour of the plaintiffs, the costs of the reference being also given to them. Accordingly the plaintiffs now brought this action to recover the expenses connected with the reference, which they had been compelled to pay on taking up the award, but which the defendants declined to refund. It was admitted that the assessment committee in all their proceedings were acting with the approval and consent of the guardians of the union:—*Held*, that the defendants were not liable, and that the action, if maintainable at all, should have been brought against the guardians of the Barrow Union. *Ibid*.

Whether, in the absence of a Judge's order, or order of Sessions, under Baines's Act (12 & 13 Vict. c. 45. ss. 12, 13), the guardians of the union would have been liable, under the circumstances above mentioned, if sued within the period limited by 22 & 23 Vict. c. 49. s. 2—*Quære*. *Ibid*.

**BASTARDY**—*application of statute to children born "after passing of act:" birth the same day as the passing of act*—Where an Act comes into operation on a given day, it becomes law as soon as the day commences. *Tomlinson v. Bullock*, 95

By the Bastardy Laws Amendment Act, 1872, any single woman who may be delivered of a bastard child "after the passing of the Act" may apply to a justice for a summons to be served on the man alleged to be the father of the child, &c. A child was born on the 10th of August, 1872, being the day on which the Act received the royal assent:—*Held*, that such child was born "after the passing of the Act," which in contemplation of law took place as soon as the clock began to strike twelve on the previous night. *Ibid*.

**BASTARDY** (continued)—*bastardy laws amendment act, 1872, s. 3: "single woman": marriage of mother after birth of child*—To entitle a woman to apply under s. 3 of 35 & 36 Vict. c. 65, for a summons to be served on the man alleged by her to be the father of her child, she must at the date of such application be either unmarried or separated from her husband. *Stacey v. Lintell*, 108

Where, therefore, a woman who, while single, had been delivered of a bastard child, subsequently married, and while living with her husband applied for an affiliation summons against the putative father, held that the justices had no jurisdiction to hear the information. *Ibid.*

**COINING**—*uttering counterfeit coin*—24 & 25 Vict. c. 99, s. 9, enacts that "whosoever shall tender, utter or put off any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, shall be guilty of a misdemeanour." The prisoner uttered two coins which were or had been real sovereigns, coined at the Mint, but they had been fraudulently filed at the edges to such an extent as to reduce the weight by one twenty-fourth part. The effect of the filing was to remove the milling entirely, or almost entirely. In order to restore the appearance of the coins, a new milling had been made on each coin with tools:—*Held*, per LORD COLERIDGE, POLLOCK, B., and HUDDLESTON, B. (*dissentientibus* LUSH, J., and STEPHEN, J.), that the coins were false and counterfeit within the meaning of the statute. *The Queen v. Hermann*, 106

**COMPANY**—*delivery of list of members to registrar within fourteen days after general meeting*—By section 39 of the Companies Act, 1867, every company formed under the principal Act of 1862 must hold, under a penalty, a general meeting within four months after its Memorandum of Association is registered. By section 26 of the Companies Act, 1862, every company under that Act must, within fourteen days after the first ordinary general meeting, make out a list of its members, and forward the same to the Registrar of Joint Stock Companies within a further period of seven days, subject to a penalty of 5*l.* *per diem* in default. On a summons taken out against the Ladies' Association (Limited) for not having forwarded a list of members as aforesaid, the magistrate decided that it was necessary for the complainant to prove that the first ordinary general meeting had been held, and on failure of such proof, dismissed the summons:—*Held*, that the magistrate was right; for the date of the general meeting formed a *tempus a quo* from which the period of fourteen and seven days was to run, and that it could not be presumed against the company that a general meeting had been duly held. *Edmonds v. Foster* (45 Law J. Rep. M.C.

41) distinguished on the ground that the summons in the present case set out the period of time in the words of the statute, and therefore the requirements of the statute must be strictly followed. *R. v. Newton*, 77

**COSTS.** See Assessment Committee.

**CRIMINAL LUNATIC**—*order for maintenance on parish of settlement: date at which settlement to be computed*—The last legal settlement of a criminal lunatic into which the justices are directed to enquire by section 7 of 3 & 4 Vict. c. 54, upon an application for an order of maintenance, is the settlement at the date of such enquiry, and not at the date of the order for removal to the asylum. *Guardians of Barton Regis Poor Law Union v. Clerk of the Peace for Berks*, 51

**ELEMENTARY EDUCATION**—*attendance order: previous conviction for non-compliance, proof of: evidence*—Where a parent is summoned under sub-section 2 of section 12 of 39 & 40 Vict. c. 79 (the Elementary Education Act, 1876), to answer a charge of a second case of non-compliance with an attendance order made upon him, in order to prove the previous adjudication of non-compliance it is not necessary to produce a signed copy of the previous conviction in accordance with 34 & 35 Vict. c. 112, s. 18, but it may, upon the hearing of such charge, be proved by the production by the clerk of the Court of the book containing a memorandum of such adjudication, and by the evidence of the school board officer who heard such previous adjudication made upon the person so summoned. *The School Board for London v. Harvey*, 130

— See Factory.

**EMBEZZLEMENT**—*venue: jurisdiction*—It was the duty of the prisoner, a commercial traveller, to remit daily to his employers the moneys which he collected without reduction. The prisoner on the 1st and 2nd of March, 1878, collected at Newark two sums of money, which he did not remit or account for. There was no evidence that the prisoner returned to Grantham, where he resided, on either of those days. In the first week in April, one of his employers went to Grantham and saw the prisoner, and taxed him with receiving moneys and not accounting to them for them. The prisoner thereupon handed to his employer a list of moneys he had collected and not accounted for, including the above two sums. He was indicted and convicted at the borough of Grantham Quarter Sessions for embezzling the above two sums of money:—*Held* (MANISTY, J., *dubitante*), that there was no evidence of embezzlement within the borough of Grantham. *The Queen v. Treadgold*, 102

**EVIDENCE**—*evidence further amendment act, 1869: proceedings "in consequence of adultery": evidence of husband to prove non-access*—Proceedings were instituted by a board of guardians to compel a husband to support a child born of his wife during marriage. The husband opposed the proceedings on the ground that the child was illegitimate by reason of the adultery of the wife:—*Held*, not to be "a proceeding instituted in consequence of adultery," within the meaning of the Evidence Further Amendment Act, 1869 (s. 3), so as to make the husband competent to give evidence tending to prove the fact of non-access. *In re Rideout's Trusts* (39 Law J. Rep. Chanc. 192; s. c. Law Rep. 10 Eq. 41); and *In re Yearwood's Trusts* (46 Law J. Rep. Chanc. 478; s. c. Law Rep. 5 Ch. D. 545), considered. *The Guardians of the Poor of Nottingham Union v. Tomkinson*, 171

— See Elementary Education.

**EXTRADITION ACT**—*limitation of Act by treaty: exemption of British subject from surrender*—

By the Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 2, Her Majesty is empowered, in cases where an arrangement has been made with any foreign state for the surrender to such state of any fugitive criminals, to direct, by Order in Council, that the Act shall apply in the case of such foreign state, and may limit the operation of the order, and render the operation thereof subject to such conditions and exceptions as may be deemed expedient. By section 6, where the Act applies in the case of any foreign state, any fugitive criminal of that state who is in any part of Her Majesty's dominions is liable to be apprehended and surrendered in manner provided by the Act. In 1874 a treaty was made, in pursuance of the above statute, between the British Government and the Swiss Government, by which, however, it was expressly provided, *inter alia*, that no subject of the United Kingdom shall be delivered up by the Government of the United Kingdom, and an Order in Council was subsequently issued which recited the treaty and declared that the Act should be in force as regards Switzerland. W., a British subject, was in custody on a charge of theft, alleged to have been committed in Switzerland, for the purpose of being handed over to the Swiss Government:—*Held*, that the prisoner was entitled to be discharged, inasmuch as the treaty contained an express exception in favour of British subjects, and the provisions contained in the Extradition Act could only apply so far as they were consistent with the terms of the treaty. *R. v. Wilson*, 37

**FACTORY**—*education of children employed in: bye-laws of School Board compelling attendance*—The proviso in section 74 of the Elementary Education Act, 1870, precludes a school board from using its power so as to interfere with

the arrangements already made by the Factory Acts. A school board is, therefore, not entitled to enforce its bye-laws as to the hours of attendance by children, against a child who, though not obeying such bye-laws, is attending an efficient elementary school pursuant to the Factory Acts. *Mellor v. Denham*, 113

**FALSE IMPRISONMENT**—*computation of time: one calendar month: expiration of time of imprisonment*—Plaintiff, who was sentenced by a magistrate to be imprisoned, first, for "one calendar month;" and secondly, "for fourteen days, to commence at the expiration of the imprisonment previously adjudged," was taken into the custody of defendant (the Governor of Coldbath Fields Prison) during the afternoon of the 31st of October, 1877, and finally released at 9 a.m. on the 14th of December. Plaintiff complained that he had therefore been imprisoned for a longer period than he was liable to be detained, and he accordingly brought this action for false imprisonment:—*Held*, per DENMAN, J., that the plaintiff was not strictly entitled to his discharge until midnight on the 14th of December, and that therefore he had not been detained illegally. *Migotti v. Colville*, 48. Affirmed on appeal, see C.P. 695

**FRIENDLY SOCIETIES ACT**—*disputes between society and members: jurisdiction of magistrates*—The provisions of section 30 of the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), apply to friendly societies in general, and are not restricted, as with regard to industrial assurance companies they are, to such as receive contributions by means of collectors at a greater distance than ten miles from the registered office of the society. *In re United Patriots' National Benefit Soc. and Holt*, 55

Where, therefore, by the rules of a friendly society all disputes between members, or persons claiming through members, and the society, were to be referred to arbitration, it was held that, nevertheless, a Court of summary jurisdiction had jurisdiction, under subsection 10 of section 30, to decide, upon the application of a person claiming through a member, a dispute between him and the society. *Ibid*.

**HIGHWAY**—*repair of highways: license by justices to get materials in enclosed land: extent and duration of license*—Plaintiff was owner and occupier of a farm in the parish of L., and defendant was in 1877 the surveyor of highways for the parish. In 1866, the justices at special sessions granted their license under 5 & 6 Will. 4. c. 50. s. 54, authorising the then surveyor to get materials, for the repair of the highways within the parish, from a field forming part of the said farm, and the surveyor, in pursuance of the license, got such materials as

were necessary. Materials continued to be got during subsequent years, down to 1877, for the same purpose; but in 1877, in consequence of objections raised by the plaintiff, the defendant, as surveyor, applied to the justices for a new license. The justices having declined to accede to the application on the ground that the license granted in 1866 was still in force, defendant entered the land, and got further materials for the repair of the highways:—*Held*, that the license granted to the surveyor in 1866 was limited to the necessities of the particular occasion, and was not in force in 1877, so as to justify the defendant in entering the plaintiff's land during that year. *Manvers and Browne v. Bartholomew*, 3

**HIGHWAY (continued)**—*person preceding locomotive on foot*—The 3rd section of 28 & 29 Vict. c. 83, which, as amended by 41 & 42 Vict. c. 77. s. 29, requires one of the three persons employed to conduct a steam locomotive on a public highway to precede such locomotive on foot by twenty yards, and in case of need to assist horses or carriages drawn by horses, in passing the same, is not the less complied with because such person, whilst preceding the locomotive on foot, leads a horse and cart of his own. *Davis v. Browne*, 92

— *turnpike act: roads authorised to be made by trustees under private act: tolls: completion of part of roads: insufficiency of tolls to keep completed part in repair: application for contribution towards maintenance out of highway rate: jurisdiction of justices*—A private Act of Parliament (5 Geo. 4. c. xciv.) after authorising certain trustees to establish a ferry and make roads in communication therewith, provided that the roads when made, as well as the ferry, should be maintained and repaired out of certain tolls thereby authorised to be taken. The Act specified no limit of time for the expiration of the trust, but it was provided that if the execution of the authorised works should not be completed within the space of ten years, all the powers and authorities thereby given should cease and determine, save only as to so much of the work as should have been completed within that time. The ferry was established and all the roads made with one exception, but the funds derived from the tolls being insufficient to keep one of the roads so made in repair, an order was made by justices in Special Sessions under the provisions of 4 & 5 Vict. c. 59. s. 1, for contribution out of the highway rates towards the repair of such road:—*Held*, that the road in question was a turnpike road within the meaning of 4 & 5 Vict. c. 59, and that as the funds of the trust were inadequate to keep it in repair, the justices had a discretion to appropriate a portion of the highway rate towards its maintenance. *Held* also, that the completion by the trustees of the whole system of roads specified in the Act of

4 Geo. 4. c. xciv. was not a condition precedent to the right to call upon the parish to contribute towards the repair of the roads that had been made. *The King v. Cumberworth* (3 B. & Ad. 108; s. c. 1 Law J. Rep. (M.C. 86) overruled. *The Queen v. French* (App.), 176

— *furious driving of carriage along highway: bicycle*—A bicycle is a "carriage," and the propulsion of it by means of a person seated on and carried by it is a "driving of a carriage" within 5 & 6 Will. 4. c. 50. s. 78. *Taylor v. Goodwin*, 104

**INDICTMENT**—for obscene libel: omission to set out the alleged obscene matter—In an indictment for publishing an obscene book the words alleged to be obscene must be set out in full; and the defect to so set them out will not be cured by a verdict of guilty. *R. v. Bradlaugh and Besant* (App.), 5

**INSANE PRISONER.** See Prison Act.

**JURISDICTION.** See Appeal. Embezzlement. Friendly Societies. Perjury.

**JUSTICE OF THE PEACE**—*fees to clerk: liability to pay*—A railway station-master gave a person into the custody of a police constable on the charge of picking pockets at the railway station, and he afterwards appeared and gave evidence before two justices, who convicted the prisoner under the Vagrant Act, 5 Geo. 4. c. 83, of frequenting a place of public resort with intent to commit a felony:—*Held*, that the station-master was not liable for the fees payable to the clerk of the justices in respect of such conviction. *Reddish v. Hitchinor*, 31

— *summary order: disqualification of justices: public health act: local authority, prosecution by, for nuisance: urban authority, members of acting as justices*—Section 258 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), which enacts, "No justice of the peace shall be deemed incapable of acting in cases arising under this Act by reason of his being a member of any local authority," does not extend to enable a justice, being a member of an urban sanitary authority, to adjudicate upon a prosecution, which in the latter capacity he has been a party to instituting. *R. v. The Justices of Weymouth*, 139

**LIBEL.** See Indictment.

**LICENSING ACTS**—*renewal of public-house license: discretion of justices*—A man who had had a public-house license for many years was refused the renewal of it, on the ground that the neighbourhood was sufficiently supplied, he not having

taken out an excise license or used his house as an inn:—*Held*, that the application was not for a new license, and that the justices had a discretion as to granting or refusing the application, under 9 Geo. 4. c. 61. s. 1, and were not fettered by the limitations in sections 8 and 19 of 32 & 33 Vict. c. 27, which are confined to applications for licenses for the sale of beer, cider and wine. *R. v. Smith*, 38

— *appeal: quarter sessions: sub-section 3: conviction: time for entering into recognisance: "immediately": question of fact*—By the Licensing Act, 1872, section 52, an appeal is given to a person aggrieved by an order or conviction made by a Court of summary jurisdiction, and by sub-section 3 the appellant is required "immediately after" giving notice of appeal to the sessions against the order or conviction to enter into a recognisance to try the appeal, &c.:—*Held*, that the question whether an appellant has duly complied with the requirements of the section was one of fact to be determined by the sessions, having regard to all the circumstances of the case. The word "immediately" means the same thing as "forthwith," and implies prompt action and as speedy as the circumstances reasonably admit of. *The Queen v. The Justices of Berkshire*, 137

LOCOMOTIVE. See Highway.

METROPOLIS—*poor rate: water company: valuation of property: supplemental valuation list*—During the first year after a quinquennial valuation list in the metropolis had come into operation, some new houses were connected by means of service pipes with a water company's mains previously existing and assessed in the quinquennial list. Such connections caused an increase of the company's gross receipts arising from the additional rentals derived from the new houses; but no alteration was made in the mains themselves, the service pipes being the property of the owners or occupiers of the houses:—*Held*, that the increased rental so derived constituted an alteration of the matters stated in the valuation list, within section 46 of the Valuation of Property (Metropolis) Act, 1869, and was properly taken into account in a supplemental list made under that section, whereby the rateable value of the company's mains was assessed at a greater amount than it had stood at in the quinquennial list. *The Queen v. The Assessment Committee of The Parish of St. Mary, Islington*, 123

— *district rate: inequality of benefit: exemption of part of a parish*—By the Metropolitan Management Act, 1855, s. 158, district boards may require the overseers of the parishes within their district to levy the sum which such boards may require for the execution of the Act. By section 159 district boards may either exempt parts of parishes if not benefited by the expenditure from

payment or require a less rate to be levied. By section 161 the rates are to be levied on the persons and in respect of the property ascertained by the rate for the time being for the relief of the poor. The Guardians of Lewisham, as overseers of the parish, were required by the district board to levy a sum of 11,524*l.* for expenses incurred in the execution of 18 & 19 Vict. c. 120, and as the sum was not for the equal benefit of the parish the precept directed that as regards such parts of the parish as consisted of land used as arable, meadow or pasture land, the rate should be assessed on a lower scale. There were 3,000 acres of such land in the parish, the whole of which were assessed on the lower scale though they did not lie together, but were scattered about:—*Held*, that the board had a discretion, under 18 & 19 Vict. c. 120. s. 159, to exempt or order a less rate to be levied on the arable meadow or pasture land in question, though not all grouped together, but scattered about in various parts of the parish. *Howell v. The London Dock Co.* (27 Law J. Rep. M.C. 177) followed. *The Queen v. The London, Brighton and South Coast Rail. Co.*, 116

— *paving: owner of land bounding or abutting on a street—"street"*—A railway company over whose railway a road is carried by a bridge supported on piers, which rest on the slopes of the cutting in which the railway runs, are not owners of land bounding or abutting on a street of which such road is a continuation. *The London, Brighton and South Coast Rail. Co. v. The Vestry of St. Giles, Camberwell*, 184

METROPOLITAN BUILDING ACT—*dangerous structures: "owner" of building: liability for repair of district church*—The incumbent of a district church in the metropolis, built under the Church Building Act, which provides that the repairs shall be made by the district, is not the owner of the church within the meaning of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), so as to be liable to pay the expenses incurred by the Metropolitan Board of Works, in respect of their dealing with it as a dangerous structure under sections 69 to 74 of that Act. *R. v. Lee*, 22

MINE—*coal mines regulation act: accumulation of water in adjoining colliery: inability of mine owner to provide remedy*—By 35 & 36 Vict. c. 76. s. 46, the inspector of mines has power in certain cases, by notice in writing, to call upon a mine-owner to remedy any matter connected with his mine which, in the opinion of the inspector, is dangerous and defective, so as to threaten or tend to the bodily injury of any person. The appellants were the owners of certain coal mines, adjoining which was a disused colliery belonging to B. In one of the pit-shafts of the latter, which communicated with the appellants' mines, water had accumulated to a considerable extent,

so that there was danger of the flow of water from the pit-shaft flooding a portion of the appellants' mine, and so endangering the lives of the men working therein. The inspector of mines accordingly gave notice, in writing, to the appellants, under 35 & 36 Vict. c. 76, s. 46, requiring them to remedy the matter. The appellants thereupon took the best practicable measures for removing the accumulation of the water, but failed to comply with the notice; they however continued the men at their work, though requested by the inspector not to do so:—*Held* (by COCKBURN, L.C.J., and MELLOR, J.; *dissentiente* LUSH, J.), that the inspector had no power to call upon the appellants to remove a danger which was not immediately connected with their own mines, also that the terms of the 46th section conferred no authority on an inspector to order the withdrawal of men under any circumstances. *Spon Lane Colliery Co. (Lim.) v. Baker*, 25

voted at that station:—*Held*, that in order to justify a conviction of such an offence under that section, it must be shewn that the information reached the mind of the person to whom it is communicated, and it is not enough to shew that such person had the means of knowing it. Therefore, where the evidence was only that the agent had during a municipal election gone from the polling station to the committee room of the candidate for whom he was agent, and had there left his part of the burges roll on which he had put a mark against the name of every voter who had obtained a ballot paper, but did not shew that anyone there had looked into such part, or had in fact obtained any information from it, it was held there was no evidence on which a magistrate ought to convict the agent under the said 4th section. *Stannanought v. Hazeldine*, 89

Non-Access. See Evidence.

**MINES (continued)—coal mine: neglect of general rules under 35 & 36 Vict. c. 76, s. 51: liability of agent as well as manager**—The Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), s. 61, enacts certain general rules which are to be observed in every mine to which that Act applies, and that every person who contravenes or does not comply with such rules shall be guilty of an offence against the Act, and that in the event of any contravention of or non-compliance with any of the rules "by any person whomsoever being proved, the owner, agent and manager shall each be guilty of an offence against the Act, unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the said rules," to prevent such contravention or non-compliance. The manager of a coal mine in Staffordshire and the respondent, the agent of the same mine, were summoned for non-compliance with the first general rule for procuring adequate ventilation in the mine. The magistrate convicted the manager, under whose directions the mine was being worked, but declined to convict the agent also of the same offence:—*Held*, that the agent as well as the manager of a mine to which the said Act applies was liable to be convicted of an offence against the Act, in not complying with the said rules as to ventilation in the mine, unless he gives evidence to shew that he had to the best of his power enforced the said rules. *Wynne v. Forrester*, 140

**PAUPER LUNATIC—derivative settlement: divided parishes act: order of removal**—A pauper born in 1840 in the appellant union, had never acquired a settlement in her own right. The pauper's father was born in the L. union, and he had never acquired a settlement elsewhere: *Held* (following the decision in *The Guardians of the Westbury Union v. The Overseers of Barrow-in-Furness*, 47 Law J. Rep. M.C. 79), that the 35th section of 39 & 40 Vict. c. 61 was retrospective in its operation and that therefore the pauper at the age of sixteen acquired her father's settlement which was a birth settlement and could be ascertained without inquiry into his derivative settlement. *The Guardians of the Hereford Union v. The Guardians of the Warwick Union*, 111

**PETTY JURORS — petty sessions: warrant improperly issued: want of written information or oath: jurisdiction of justices**—S. was arrested on an illegal warrant and taken before the justices in petty sessions, who, having heard the charge and taken evidence in support of it, convicted him. No objection was taken by S. to the jurisdiction of the justices. H. was afterwards indicted for perjury committed by him at the hearing of the case at petty sessions, and convicted, subject to the opinion of the Court for Crown Cases Reserved as to the jurisdiction of the justices in petty sessions, the objection thereto being that S. was arrested on a warrant which had been issued without any information in writing or on oath:—*Held* (KELLY, C.B., *dissentiente*), that the charge having been made in the presence of S., who was then and there called upon to answer it, it was immaterial, so far as the jurisdiction of the justices to hear that charge was concerned, whether the accused was before them voluntarily or otherwise, or on legal or illegal process, and therefore that H. was rightly convicted of perjury. *The Queen v. Hughes*, 161

**MUNICIPAL ELECTION—infraction of secrecy: communication: means of knowing**—The 4th section of the Ballot Act, 1872 (35 & 36 Vict. c. 83), makes it an offence punishable on summary conviction for an agent at a polling station to communicate before the poll is closed to any person any information as to the name or number on the register of voters of any elector who has applied for a ballot paper or



**POOR—settlement by residence: infant living apart from parent**—Where an illegitimate child had when a few weeks old been placed by its mother in the care of another person, with whom it lived from 1871 to 1878, in the A. union, the mother during that period not having exercised any dominion over it, but having virtually abandoned it,—*Held*, that this constituted a residence of the child in the A. union within the meaning of section 34 of the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61). *The Queen v. The Guardians of the Leeds Union*, 129

**POOR RATE—valuation list: appeal: union assessment committee amendment act: objection to valuation list before rate made: refusal of relief by committee: publication of rate: necessity of second appearance before committee after making of rate: next practicable sessions**—By the Union Assessment Committee Amendment Act (27 & 28 Vict. c. 39), s. 1, it is enacted that no person shall appeal to sessions against a poor-rate made in conformity with the valuation list approved by the assessment committee, unless he shall have given to such committee notice of objection against the list, and shall have failed to obtain such relief in the matter as he deems just:—*Held*, that a person who has given notice of objection to a valuation list, and failed to obtain relief from the assessment committee, before a poor-rate is actually made in conformity with the list, need not, under 27 & 28 Vict. c. 39, s. 1, make fresh application for relief to the assessment committee after the rate is made, as a condition precedent to an appeal against the rate. *The Queen v. The Justices of Wiltshire*, 142

**PRISON ACT—maintenance of insane prisoners**—The liability for the maintenance of insane prisoners, which by 3 & 4 Vict. c. 54, s. 2, is imposed upon the county in default of any ascertained place of settlement, is not transferred from the county to the Consolidated Fund by the Prison Act, 1877 (40 & 41 Vict. c. 21). *The Queen v. The Justices of Surrey*, 188

**PUBLIC HEALTH—paving private streets: recovery of expense from owners: "owner in default"**—Where an owner of premises having received a notice from the urban sanitary authority under section 150 of the Public Health Act, 1875, to pave, &c., the street adjoining his premises, fails to comply with the same, and afterwards the local authority execute the works, but after the work has been begun by the local board and before completion of it, the owner sells the premises, he ceases upon such sale to be an "owner in default," and cannot be ordered to pay the expenses incurred by the local authority in executing the works; such expenses being by section 257 of the same Act recoverable only from the person who is "owner of the premises when the works are completed." *The Queen v. The Swindon New Town Local Board*, 119

**—owner re-building cottages: "sufficient privy"**—By the Public Health Act, 1875, section 35, it shall not be lawful to rebuild any house pulled down to or below the ground floor without a sufficient water-closet, earth closet or privy. P. pulled down and rebuilt two cottages and provided one privy, which afforded sufficient accommodation to the respective occupiers of both cottages:—*Held*, that the requirements of the 35th section had been complied with, and that it was not necessary to provide a separate privy for each cottage. *The Queen v. The Guardians of the Poor of Clutton Union*, 135

— See Rate.

**RAILWAY COMPANY—passenger travelling without having paid his fare: tourist ticket: intent to avoid payment of fare**—The respondent was charged, under 8 Vict. c. 20, s. 103, with travelling in a third-class carriage of the Great Western Railway without having previously paid his fare and with intent to avoid payment thereof. The respondent was found at Neath on the 18th of November, 1878, in a third-class carriage on his way to New Milford, and produced to a ticket examiner at Neath the forward half of a tourist ticket, dated the 28th of September, 1878, and available for two months. The ticket in question, which was not transferable, had been issued from Ludlow to New Milford to A., from whom the respondent had purchased the forward half for a sum considerably less than he would have had to have paid for an ordinary single third-class ticket. There was evidence to shew that the respondent intended to defraud the railway company:—*Held*, that there had been a violation of the conditions under which the ticket was issued, and that the respondent was liable under the circumstances to be convicted under 8 & 9 Vict. c. 20, s. 103, for travelling without having paid his fare. *Langdon v. Howells*, 183

**RATE—sanitary purposes in a borough: district or borough rate: exemption conferred by local act**—By a local Act commissioners were appointed in 1848, with power to levy a district rate for sanitary purposes throughout a district partly within and partly without the borough of W.; by this Act railways were exempted from a part of the rate so levied. The Public Health Act, 1872, constituted the borough of W. an urban sanitary district, and the town council the sanitary authority; it enacted that in the case of the council of a borough all expenses incurred under the Sanitary Acts should be paid out of a borough rate, "provided that where an urban sanitary authority had, before the passing of this Act, power to levy within its district a rate for sanitary purposes," all expenses incurred by such authority under the Sanitary Acts, should be charged on such rate unless where "at the time of the passing of this

Act any such expenses were chargeable upon the borough rate." The definition of Sanitary Acts in section 60 did not include Local Acts. The Public Health Act, 1875, section 207, enacts that all expenses incurred by an urban authority in the execution of this Act shall be defrayed out of a district rate, subject to the exception "that if in any district the expenses incurred by an urban authority (being the council of a borough) in the execution of the Sanitary Acts, were, at the time of the passing of this Act, payable out of the borough rate," then the expenses incurred under the Act shall be paid out of the borough rate. This Act gave railways an exemption with respect to district rates. By a local Act passed in 1876, the Act of 1848 was, as far as is material, repealed; the borough of W. was extended so as to include the whole of the commissioners' district; the commissioners were abolished; the town council was made the sanitary authority for the whole borough, and succeeded to all the duties and powers of the commissioners. In November, 1876, the council of the borough levied a borough rate for all purposes, including sanitary expenses, and declined to allow the respondents the exemption claimed by them in respect of their railway:—*Held* (affirming the judgment of the Queen's Bench Division), that the respondents were entitled to the exemption claimed, inasmuch as in the borough of W. all sanitary expenses were, at the time of the passing of the Act of 1875, payable out of a district rate, so that the case fell within the general enactment, and not within the first exception contained in section 207 of that Act. *The Overseers of the Foreign of Walsall, and the Mayor, &c., of Walsall v. London and North-Western Rail. Co. (App.)*, 57. Affirmed on appeal to the House of Lords, 166

— See Metropolis. Poor Rate.

**SALE OF FOOD AND DRUGS ACT**—ss. 6, 13, 14, 17 and 20: "to the prejudice of the purchaser: purchase by officer for analysis"—Where an inspector duly appointed under section 13 of the Sale of Food and Drugs Act, 1875, purchased for analysis an article of food, and took the proceedings upon such analysis prescribed by the Act, and it was proved that the article so purchased was not of the nature, substance and quality of the article demanded by him, but an inferior article, though not known by him to be so at the time of the purchase, —*Held*, that it was a "sale to the prejudice of the purchaser" within section 6 of the Act. *Semle*, per LUSH, J.—Section 6 is not limited to the case of an admixture of a foreign substance with the article demanded, but may apply where the article supplied is of a different and inferior quality from that demanded. *Davidson v. McLeod*, in the Scotch Court of Justiciary, dissented from. *Hoyle v. Hitchman*, 97

**SALMON FISHERY ACT**—*fishing mill dam: abandonment of fishery*—A fishing mill dam having been constructed originally partly for the purpose of fishing, and partly for the purpose of supplying water to a mill, had been used for both purposes for many years previous to the passing of the Salmon Fishery Act, 1861, and was so continued after the Act, until the occupier removed all the machinery and appliances for catching fish in the dam sluice, and ceased to use it for fishing purposes. Upon a subsequent information against him, under section 20, for not removing all obstructions to the free passage of fish, it was proved that the fenders at the sluice still remained, and were raised and lowered by the occupier solely for the purpose of regulating the supply of water at the mill, and irrespective of the close season or the passage of fish:—*Held*, that, assuming the abandonment of the fishery and removal of the machinery and appliances to have been *bona fide*, notwithstanding its not having been done till after the passing of the Act, such abandonment prevented the application of section 20, as the structure was not, when the complaint arose, a fishing mill dam, but had been converted into an ordinary mill dam. *Rositer v. Pike*, 81

**SETTLEMENT OF PAUPERS**—*divided parishes act: derivative settlement: birth settlement*—The pauper was born in the respondent parish, and had not acquired a settlement in her own right. Her father was born in D., in the appellant union, and had acquired through his father, the pauper's grandfather, a derivative settlement in M.:—*Held*, that the case came within the last part of 39 & 40 Vict. c. 61. s. 35, and that, as the pauper's settlement could not be ascertained without inquiring into her parent's derivative settlement, she must be deemed to be settled in the respondent parish, the place of her birth. *Guardians of Woodstock Union v. The Churchwardens, &c., of St. Pancras*, 1

— See Criminal Lunatic. Pauper Lunatic. Poor.

**SHIPPING**—*pilot carried to sea beyond limits of pilotage: pilotage dues: liability of shipbroker*—The compensation to which a pilot is entitled under section 357 of the Merchant Shipping Act, 1854, for being taken without his consent beyond the limits of his pilotage, is not recoverable from the shipbroker as "pilotage due" under section 363. *Mortco v. Julian*, 126

**STREET.** See Metropolis Management.

**TOLLS**—*exhibition of tolls on a board*—Where a Pier Act requires the exhibition on a board of "the duties for the time being authorised to be taken as thereinbefore mentioned," and sup-

plies a schedule of maximum tolls, but allows their being reduced and raised again by resolution of the proprietors, it is not enough for the board to contain the schedule, but it must exhibit the tolls as at the time in question fixed by resolution. *Gregaon v. Potter*, 86

— See Highway.

**TRESPASS**—*hunter in pursuit of fox*—A person who is out hunting with foxhounds for the purpose of sport, cannot justify a trespass in entering the lands of another on the ground that he is in fresh pursuit of a fox. *Paul v. Summerhayes*, 33

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**WATER**—*waterworks clauses act: supply of water to houses: supply after water had been stopped for arrears of water rate*—Where in consequence of a neglect to pay the water-rate due to a waterworks company, the company, in exercise of the power given them by section 74 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), have cut off the communication pipe between their pipes and the house in respect of which the rate was payable, the owner or occupier of such house is not entitled to receive

a supply of water (although he pays or tenders the water rate for the same), nor are the company liable to the penalty imposed by section 43 for neglecting or refusing to furnish such owner or occupier with a supply of water, until the communication pipe has been restored, and there is nothing in that Act to compel the company to restore the same. *Semble*, the company have no right to refuse to allow the restoration of the connecting pipe and the supply of water until bygone rates have been paid. *The Company of the Proprietors of the Sheffield Waterworks v. Wilkinson. The Same v. Corbridge*, 145

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**ACTION—escape of water from reservoir: cause beyond owner's control: maxim; sic utere tuo ut alienum non laedas**—The plaintiff sued for the flooding of his premises by the overflowing of a reservoir of the defendants. The reservoir was constructed in a proper manner, such as to prevent its overflowing under any ordinary circumstances, and the overflowing was caused by the forcing into it of an additional quantity of water through circumstances over which the defendants had no control, and which they could not be expected to anticipate, namely, a large discharge of water from a reservoir of a third party into a public watercourse feeding the defendants' reservoir and an obstruction in the watercourse below the outlet of the reservoir at places over which the defendants had no control:—*Held*, that the defendants were not liable. —*Fletcher v. Rylands* (37 Law J. Rep. Exch. 161) distinguished, *Nichols v. Marsland* (46 Law J. Rep. Exch. 174) followed. *Box v. Jubbs*, 417

their signature, a charter-party purporting in the body to be made by them "as agents for charterers":—*Held*, that the defendants were personally liable upon the charter-party. *Hough and Co. v. Manzanos and Co.*, 398

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**APPEAL—jurisdiction of court of appeal: appeal against judgment entered by judge according to finding of jury**—Where after a trial by jury and judgment entered pursuant to the finding of the jury, it is desired to set aside that judgment, the application must be made to a Divisional Court and not to the Court of Appeal. Such an application is really an application to set aside the verdict, and for a new trial within Order XXXIX. rule 1, and does not come within the provisions of Order XL. rule 4. *Davies v. Felix* (App.), 3

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**AFFIDAVIT OF DOCUMENTS—privilege**—It is not sufficient that an affidavit of documents should state that certain documents are privileged; it must also state, and, as far as possible, verify, the facts on which the claim of privilege is founded. *Gardner v. Irwin* (App.), 223

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**AGENT—personal liability of agent signing in his own name: charter-party**—The defendants signed in their own name, without qualifying  
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— *from county court: time for moving for appeal*—In order to enable the plaintiff to appeal within the eight days prescribed by section 6 of the County Courts Act, 1875, the County Court Judge allowed his judgment, delivered the 18th of April, to be treated as delivered a fortnight later, namely, on the 2nd of May; and such judgment was accordingly entered and dated the 2nd of May. The plaintiff having appealed within eight days of the 2nd of May,—*Held*, that such appeal was not brought within eight days of the "ruling order, direction or decision of the Judge," as prescribed by section 6 of the County Courts Act, 1875. *Wilberforce v. Souton*, 28

**APPEAL** (continued)—*from order absolute for new trial: interlocutory appeal: enlargement of time*]

—An order absolute for a new trial is an interlocutory order, an appeal from which must be brought within twenty-one days from the date thereof, under Order LVIII. rule 15. *Highton v. Treherne* (App.), 167

Where a party failed to appeal from such interlocutory order within twenty-one days, under the mistaken belief that such order was final, and that appeal might be brought at any time within twelve months,—*Held*, that such mistake was not a circumstance which would justify the Court in enlarging the time for appealing after the expiration of the twenty-one days under Order LVII. rule 6. *Ibid*.

—*special case stated by arbitrator under lands clauses consolidation act*—Under section 19 of the Judicature Act, 1873, an appeal will lie to the Court of Appeal from a decision of a Divisional Court on a special case submitted by an arbitrator appointed under the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), s. 25. *Bidder v. The North Staffordshire Rail. Co.* (App.), 248

—*from judge at chambers: time for appealing*]

—Under Order LIV. rule 6, an appeal from an order of a Judge in chambers after the expiration of eight days is too late, although such order was made in the long vacation, and no Divisional Court has sat during the eight days succeeding the date of the order. *Crom v. Samuel* (46 Law J. Rep. C.P. 1; s.c. Law Rep. 2 C.P. D. 21) approved. *Runtz v. Sheffield* (App.), 385

—**Jurisdiction**: case stated by quarter sessions for the opinion of the Queen's Bench Division: poor rate. *The Overseers of the Foreign of Walsall and the Mayor, Aldermen and Burgesses of Walsall v. The London and North Western Rail. Co.* (M.C. 65), H.L. 348

—**Quarter sessions**: conviction: time for entry into recognisance: "immediately": question of fact. *The Queen v. The Justices of Berkshire* (M.C. 137), 768

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**APPORTIONMENT**—*successive assignees of lease*]

An assignee of a lease who assigns between two quarter days is liable under the Apportionment Act for rent up to the date of such assignment. *Swansea Bank (Lim.) v. Thomas*, 344

**ARBITRATION**—*want of care and skill in certifying under builder's contract*—Statement of claim set out an agreement under which plaintiff contracted with a company to build for them a hall whereof defendant was employed as architect;

defendant was to be allowed to order additions and deductions, the amount of which were to be ascertained by him in a certain manner; all matters of dispute were to be left to defendant, and his decision was to be final; plaintiff was to be paid on the certificate of defendant. The statement of claim then alleged—that the work was done and the certificate given, but that defendant did not use due care and skill in ascertaining the amounts to be paid by the company to the plaintiff, and neglected and refused to ascertain the amount of the said additions and deductions in the manner aforesaid, and knowingly or negligently certified for a much less sum than was, in fact, the net balance payable; and further—that defendant refused to reconsider the said certificate and allow plaintiff to point out to him the said errors in the bill of quantities:—*Held*, that no cause of action against defendant was disclosed by the above statement of claim; defendant's duties involving the exercise of judgment and skill. *Stevenson v. Watson*, 318

Per LORD COLBRIDGE, C.J.—Had the defendant's duties been merely ministerial, the action would have been maintainable. *Ibid*.

—*remitting back award for reconsideration*]

The reference to arbitration of a question of disputed compensation, pursuant to section 180 of the Public Health Act, 1875, is a submission to arbitration by consent, within the meaning of the Common Law Procedure Act, 1854, and the Court has a discretionary power, under section 8 of that Act, "at any time" to remit the award back to the reconsideration of the arbitrator. The Court, however, in the exercise of its discretion, took into consideration the lapse of time between the making of the award and the application to remit, and refused the order to remit on the ground, amongst others, that it was too late.—*Kellett v. The Local Board of Tranmere* (34 Law J. Rep. Q.B. 87), dissented from. *Warburton v. The Haslingden Local Board*, 451

—*reference by consent: award under 20l. in action of contract: costs of reference*—Where a cause has been referred by consent, and the order of reference leaves the costs of the reference and award in the discretion of the arbitrator, and the award is for less than 20l. in an action founded on contract, the arbitrator's control over the costs of the reference and award is not taken away by section 5 of the County Courts Act, 1867. *Galatti v. Wakefield* (App.), 70

**ASSESSED TAX**—*inhabited house duty: "dwelling-house: club"*—A building used for the ordinary purposes of a club, and not slept in at night, is not an "inhabited dwelling-house" within the meaning of 14 & 15 Vict. c. 36, and is not liable to the duty payable upon inhabited dwelling-houses. *Riley v. Read*, 437

**ASSESSMENT COMMITTEE**—Appeal to sessions against rate: reference to arbitration: costs in discretion of umpire: absence of order under Baines's Act, authorising reference: action for costs against assessment committee: liability of poor law guardians. *The Leicester Waterworks Co. v. The Assessment Committee of the Barrow Union, and Nuttall, and Sheffield* (M.C. 41), 134

**ASSIGNMENT.** See Stamp.

**ATTACHMENT.** See County Court Jurisdiction.

**ATTACHMENT OF DEBT**—*garnishee: registrar of county court: payment into court*—Money paid into a County Court by the judgment debtor to answer a judgment obtained by A. cannot be attached by a judgment creditor of A. under a garnishee summons against the Registrar of the Court issued after the money has been paid into Court. *Dolphin v. Layton* (*Scott, garnishee*), 426

—*judgment creditor: order dismissing action not a judgment*—By Order XLII. rule 20, "Every order of a Court or a Judge, whether in an action, cause or matter, may be enforced in the same manner as a judgment to the same effect." By Order XLV. rules 1 and 2, "Where a judgment is for the recovery by or payment to any person of money, the party entitled to enforce it may apply to have the judgment debtor examined as to debts due to him, and the Court or a Judge may upon the application of such judgment creditor . . . order that all debts owing from third persons, garnishees, to the debtor be attached to answer the judgment debt."—*Held*, that a person who had obtained an order dismissing with costs an action against him for want of prosecution, though entitled to enforce the order as a judgment, was not a judgment creditor within rule 2 of Order XLV. *Cremetti v. Crom*, 387

—*company judgment debtor: money payable to preference shareholders*—Money due from D. Company working a line of railway, to S. Company which made it, but payable as dividend by S. Company (under the terms of an arrangement between the two confirmed by an Act of Parliament) to certain shareholders of S. Company who took their shares on the security of their dividends being so provided for, is attachable by a judgment creditor of S. Company in the hands of D. Company. *Bouch v. Sevenoaks, Maidstone and Tunbridge Rail. Co.*, 338

**AVERAGE.** See Shipping.

**BANKERS**—*conversion: crossed cheques: protection to collecting banker: "not negotiable": forged indorsement*—By section 12 of the Crossed Cheques Act, 1876 (39 & 40 Vict. c. 81), it is enacted, "a person taking a cheque crossed generally or specially bearing in either case the words 'not negotiable,' shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had. But a banker, who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself, shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment":—*Held*, that the cheque mentioned in the latter part of that section is not limited to the cheque described in the former part as one bearing upon it the words "not negotiable," and that, therefore, a banker, who in good faith and without negligence in due course of collection receives payment for a customer of a cheque crossed generally, but having a forged indorsement, is protected by such 12th section from liability to the true owner of the cheque for having placed the amount of such payment to the credit of his customer, notwithstanding such cheque has not the words "not negotiable" upon it. *Matthiessen and Another v. The London and County Banking Company*, 529

**BANKRUPTCY**—*joint and separate estates under liquidation: discharge granted by joint creditors only: property left in possession of debtor or subsequently acquired*—A trustee under a liquidation, who, with the authority of the creditors, permits the debtor to remain in possession of his furniture as apparent owner, does not, in the absence of knowledge that the debtor was holding himself out as the real owner, and dealing with it as such, forfeit his right to it so long as there has been no closing of the liquidation or order of discharge; and his right to it and to any after acquired property cannot be defeated by a bill of sale given by the debtor subsequently to the liquidation. *Meggy v. Imperial Discount Co. (Lim.)* (App.), 54

Where a liquidating debtor has separate as well as joint creditors and assets, an order of discharge by the joint creditors will not operate to discharge him from his separate debts, and any after acquired property will therefore vest in the trustee appointed under the liquidation. *Ibid.*

—*disclaimer by trustee: "leasehold interest: lease of chattels"*—A lease of chattels is not a "leasehold interest" within the meaning of rule 28 of the Bankruptcy Rules, 1871; and therefore a trustee in bankruptcy may disclaim a lease of chattels under section 23 of the Bankruptcy Act, 1869, without leave of the Court. *Sheffield Waggon Co. v. Stratton* (App.), 35

**BANKRUPTCY (continued)—cause of action accruing after bankruptcy**—The Bankruptcy Act, 1869, does not in any way affect the right of an uncertificated bankrupt to sue in respect of causes of action accruing after bankruptcy. *Herbert v. Sayer* (5 Q.B. Rep. 965; s.c. 12 Law J. Rep. Q.B. 286) followed. *Jameson v. The Brick, Stone and Lime Co. (Lim.)* (App.), 249

— **liquidation by arrangement: discharge, effect of: creditor omitted from statement of debtor**—A certificate of discharge obtained by a debtor whose affairs have been liquidated by arrangement under section 125 of the Bankruptcy Act, 1869, is a good bar to an action by a creditor whose name and address have been omitted from the list of creditors delivered to the registrar, and who has had no notice of the proceedings, and is distinguishable in this respect from a composition with creditors under section 126. *Heather v. Webb* (46 Law J. Rep. C.P. 89; s.c. Law Rep. 2 C.P. D. 1) approved. *Elmalie v. Corrie* (App.), 462

— **composition: statement of affairs: name of creditor inserted, but debt omitted**—The plaintiff entered into a composition with his creditors under section 126 of the Bankruptcy Act, 1869. The defendants who were *del credere* agents of the plaintiff, claimed to rank as creditors for a sum of 1,100*l.*, which was the aggregate amount of the plaintiff's debts to three merchants for goods sold to the plaintiff through the defendants, the purchase price of which the defendants, as such agents, had become bound to pay. In his statement of affairs presented at the meeting of creditors the plaintiff had set down this debt of 1,100*l.* as due to the three merchants. The plaintiff had also set down the defendants as creditors for a separate debt, which was of a smaller amount. The defendants attended a meeting of creditors, tendered proof of their debt of 1,100*l.*, which was admitted, took part in the discussion which ensued at the first meeting of creditors, resisted the resolution for a composition, which was duly carried, and did not accept the composition:—*Held*, that the plaintiff had not complied with the provisions of the Bankruptcy Act, 1869, section 126, relating to composition, in respect of the debt of 1,100*l.*, and that upon the authority of *Ex parte Lang* (Law Rep. 5 Ch. D. 971), there had been no waiver of the provisions of section 126 by the defendants, and therefore that the defendants were not bound by the resolution of composition as to such debt. *Oppenheim v. Jackson*, 441

— **discharge: promise on new consideration to pay old debt**—Defendant having been indebted to plaintiff, and having been released from the debt by discharge in bankruptcy, promised plaintiff, for a new consideration, to pay the

debt:—*Held*, that the Bankruptcy Act, 1869, did not render this promise invalid. *Jakeman v. Cook*, 165

**BASTARDY**—Application of statute to children born "after passing of Act": order for maintenance: birth the same day as the passing of Act. *Tomlinson v. Bullock* (M.C. 95), 399

— "Single Woman": marriage of mother after birth of child. *Stacey v. Lintell* (M.C. 108), 455

**BILL OF LADING—excepted perils: negligent stowage: liability of master**—Plaintiffs shipped a quantity of sugar in bags, to be carried by defendants' steam-ship from Hamburgh to London, at an agreed freight. The vessel was chartered by Messrs. P. & K., plaintiffs having no knowledge of the charter; and the bill of lading which was received by plaintiffs was signed "P. & K., agents." The bill of lading provided that the sugar should be delivered in good order, "the act of God, the Queen's enemies, pirates, robbers, jettison, barratry and collision, fire on board or on shore, and all accidents, loss and damage of whatsoever nature or kind, and however occasioned, from machinery, boilers, steam and steam navigation, or from perils of the sea or rivers, or from any act, neglect or default whatsoever of the pilot, master or mariners in navigating the ship; the owners of the ship being in no way liable for any of the consequences of the causes above excepted; and it being agreed that the officers and crew of the vessel in the transmission of the goods as between the shippers, owners and consignee thereof be considered the servants of such shipper, owner or consignee." In an action for damage caused by negligent stowage, —*Held*, that the damage done to the sugar was a tortious act, in respect of which plaintiffs could recover from defendants, whether the latter were bound by the bill of lading or not. *Hayn, Roman & Co. v. Culliford* (App.), 372

— See Shipping.

**BILL OF SALE—affidavit: attesting witness: sufficiency of description**—In the attestation clause to a bill of sale, the attesting witness was described as "E. C., solicitor, Bloomfield Street, London." In the affidavit filed with the bill, the attesting witness described himself as "of Bloomfield Street, in the city of London, solicitor," and the affidavit concluded, "I reside at Grove House, Acton, in the city of London:—*Held*, that the description in the affidavit of the attesting witness's residence, though inaccurate, was sufficient, as it was not calculated to mislead persons of ordinary knowledge and intelligence. *Blount v. Harris*, 159



— *registration: receipt for purchase-money on sale by the sheriff*—The sheriff's officer, under an execution which had been levied on the goods of A. in an action by B against the said A., sold such goods to C., the father-in-law of the said A., and the sheriff's officer gave a receipt for the purchase-money, in which it was expressed that the money had been received for the goods which had been seized in the said action and sold to the said C. A list of such goods was given at the foot of the receipt. The goods were not removed, but were at once let to the said A., in whose possession they were allowed to continue until seized in execution by a subsequent creditor:—*Held*, that the receipt was not a bill of sale, and was not as such required to be registered under the Bills of Sale Act, 1854. *Woodgate v. Godfery*, 271

— *affidavit: description of residence and occupation of maker*—The "description of the residence and occupation of the person making or giving" a bill of sale required by 17 & 18 Vict. c. 36 (Bills of Sale Act, 1854), s. 1, to be filed with the bill of sale, is the description of such residence and occupation at the date of the affidavit, and not at the time of the making or giving of the bill of sale. *Button v. O'Neill* (App.), 368

BYE-LAW. See Railway Company.

CARRIERS BY RAILWAY—*undue preference: unequal charges: advantages of rival lines*—The respondent carried on business as a brewer at B., and employed the appellants to convey goods for him by their railway. Respondents' premises were not connected by sidings with any railway. He was charged by the appellants a station to station rate for the carriage of goods to and from B. (inclusive of charge for station accommodation), and one shilling per ton for cartage. Three other firms at B. had premises connected with the Midland Railway by sidings, from which all goods forwarded or received were loaded and unloaded. The cost of cartage was thus saved, and in addition the Midland Railway Company allowed to these three firms a rebate of 9d. per ton, as representing the value of station accommodation, and other services which by reason of the connecting sidings were not required. The appellants, with the view to attract the custom of the three firms, carted goods for them gratuitously, and allowed to them also a rebate of 9d. per ton on the station to station rate. The result was that the respondent had to pay 1s. 9d. per ton more than the three firms for goods carried under the same circumstances:—*Held* (affirming the unanimous decision of the Queen's Bench Division and of the Court of Appeal, 47 Law J. Rep. Q.B. 284), that the transaction amounted to a breach of section 90 of the Railways

Clauses Consolidation Act, 1845, as being a reduction of charges in favour of the three firms, and of section 2 of the Railway and Canal Traffic Act, 1854, as being an undue preference of the three firms, and that the respondent was entitled to recover back the 1s. 9d. per ton from the appellants. *Evershed v. London and North Western Rail. Co.* (H.L.), 22

CHARGING ORDER—*on stock standing in name of judgment debtor*—An order obtained *ex parte* under 1 & 2 Vict. c. 110. ss. 14, 15, charging stock standing in the name of a judgment debtor, cannot be made absolute when it appears that the judgment debtor was dead at the date of the original order. *Finney v. Hinde*, 276

CHARTER-PARTY—*deadweight: refusal of foreign power to allow ship to load: readiness to load*—Plaintiff knowing that the ship R. was under a contract with the British Government to load military stores as deadweight at Malta, and that with such stores on board she would not, without special permission, be permitted by the Spanish Government to load any cargo at a Spanish port, entered into a charter-party with her owners by which it was agreed that the R., "after loading deadweight at Malta for owners' benefit" should proceed to a Spanish port, and there load a cargo of fruit. The ship proceeded with the military stores on board to Valencia to load plaintiff's cargo, but permission could not be obtained from the Spanish Government to load. The ship was in all other respects ready to load:—*Held*, that no action could be maintained by the charterers against the shipowners for not being ready to load, as both parties were prevented from performing their contract to be ready with a ship and cargo by the action of a superior power. *Cunningham v. Dunn* (App.), 62

— *perils of the seas: deviation to save property: liability of shipowners*—The owners of cargo are entitled to recover against the shipowners the value of the cargo under a charter-party which contained the usual exception in case of accident from "perils of the seas," where the cargo had been lost at sea in consequence of the ship stranding after deviating from her proper and usual course in the endeavour to save another ship and cargo in imminent danger from perils of the sea, inasmuch as the exception did not extend to such a case. *Soaramanga and Company v. Stamp*, 478  
There is an implied contract in all charter-parties which have no express stipulation on the subject that the master of the ship will not deviate unnecessarily from the usual and proper course, but that he may do so when it is reasonably necessary in order to save human life, but this last exception does not allow of a deviation to save a cargo and ship in imminent danger where the saving of life does not require it, and does not, therefore, exonerate the owner of

such ship from liability to the owner of cargo carried by such ship for a loss subsequent to such deviation, though there was no negligence in the master, and the loss was not caused by the deviation. *Ibid.*

**CHARTER-PARTY (continued)—*demurrage*:** "*cargo to be discharged with all despatch, according to the custom of the port*"—Under a charter-party, which provides that the cargo is to be discharged with all despatch, according to the custom of the port, but which does not otherwise specify the time to be occupied in the discharge, the duty of the charterer is to use reasonable diligence in performing that part of the delivery which falls upon him according to the custom of the port, but he is not bound to take measures to obviate delays which may arise, owing to the custom of unloading at the port, without his act or default.—So held by *BRETT, L.J.*, and *THESIGER, L.J.* (*disentente Cotton, L.J.*). *Postlethwaite v. Freeland* (App.), 358

— See Agent, Shipping.

**CHEQUES.** See Bankers.

**CHURCH—*private chapel annexed to church: chancel: evidence of acts of ownership***—The church of St. Nicholas, Arundel, regarded as one building, is a cross church, with a nave and aisles, a central tower, transepts rather shorter than would be usual in a church of such proportions, and eastward of the central tower and transepts, a building called the Fitzalan Chapel, which occupies the place commonly filled by the parish chancel, but which has never been used as such:—*Held*, by *LORD COLERIDGE, C.J.*, on motion for judgment, on evidence of numerous acts of ownership by the plaintiff and his ancestors for more than three hundred years in respect of such chapel, to the exclusion of the vicar and his parishioners, and on documentary title, beginning from the time of the founder in the fourteenth century, not inconsistent with such rights of ownership, that the said Fitzalan Chapel was the private property of the plaintiff, and not the parochial chancel of the church. *The Duke of Norfolk v. The Rev. George Arbuthnot*, 737

**CHURCH DISCIPLINE ACT—*meaning of the words "it shall be lawful:" obligation on bishop to issue a commission or to send the case to the provincial court: complaint by parishioner against clerk for alleged ecclesiastical offence: writ of mandamus: public worship regulation act***—A parishioner of the parish of C. made a complaint to the Bishop, under the Church Discipline Act (3 & 4 Vict. c. 86. s. 3), in respect of offences committed by the rector of the parish against the laws ecclesiastical. By 3 & 4 Vict. c. 86. s. 3, it is provided that, "in every case of any clerk in Holy Orders who may be charged

with any offence against the laws ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the said laws, it shall be lawful for the Bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or if he shall think fit of his own mere motion to issue a commission . . . for the purpose of making inquiry as to the grounds of such charge or report." By section 13 it is further provided that "it shall be lawful for the Bishop, if he think fit," to send the case, by letters of request, to the Court of Appeal of the province, there to be heard and determined. The Bishop declined to issue a commission or to send the case to the Provincial Court, not on the ground that the matters complained of were not offences against the ecclesiastical law or were of too unsubstantial a character to call for inquiry, but on the ground that the rector was of advanced age, and that the complaint was made in opposition to the expressed wishes of the great majority of the parishioners. A writ of mandamus was then applied for, directed to the Bishop, commanding him to issue a commission to inquire into the matter of the complaint, or to send the case to the Provincial Court by letters of request:—*Held*, by the Queen's Bench Division, that the rule for the mandamus must be made absolute, inasmuch as the words "it shall be lawful," in 3 & 4 Vict. c. 86. s. 3, imposed a duty which required the exercise of the power in the circumstances contemplated by the statute. The refusal of the Bishop was founded not on the nature of the complaint or on the right of the applicant to seek redress, it being admitted that there had been such a substantial departure by the rector from the established ritual as amounted to an offence against the ecclesiastical law:—*Held* further, that, under these circumstances, the Court ought not, in the exercise of its discretion, to refuse to issue the writ. *The Queen v. The Bishop of Oxford* (App.), 609

*Held*, by the Court of Appeal reversing the decision of the Queen's Bench Division, that the words "it shall be lawful" are in this section permissive, not compulsory, and confer on the Bishop a discretion, so that he can, under section 3 of 3 & 4 Vict. c. 86, refuse to allow any proceedings to be instituted against a clerk who has offended against the laws ecclesiastical. Under the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 86), which applies also to offences such as formed the subject-matter of the complaint by the applicant, there is no provision for the summoning of a commission of inquiry, but three parishioners can set the Bishop in motion, who then has an arbitrary discretion to determine whether the suit shall proceed or not. It is further provided by section 18 that, where sentence has been pronounced against an incumbent for an offence under 3 & 4 Vict. c. 86, he shall not also be proceeded against under the later Act, and vice

*versæ*:—*Held*, by the Queen's Bench Division, and by the Court of Appeal affirming the decision of the Queen's Bench Division, that the Public Worship Regulation Act, 1874, does not repeal the earlier statute and does not preclude a promoter from applying to the Bishop to take proceedings under it; for that the Public Worship Regulation Act was intended to provide a more expeditious and a more simple procedure in criminal ecclesiastical suits. *Ibid*.

Judgment of WIGHTMAN, J., in *The Queen v. The Bishop of Chichester* (29 Law J. Rep. Q.B. 23), approved and followed. *Ibid*.

COAL MINES REGULATION—*checkweigher: discontinuance of office*—Where the men employed in a mine appoint and pay a checkweigher under the Coal Mines Regulation Act, 1872, and are afterwards all discharged, his office ceases. If they are re-engaged with others, but nothing further is done with regard to the checkweigher, he is not "stationed by the persons employed in the mine" within the meaning of the Act, and cannot maintain an action against the mine owner for preventing him from acting after the re-engagement of the men. *Whitehead v. Holdsworth*, 254

—Accumulation of water in adjoining colliery: inability of mine owner to provide remedy: notice by inspector: jurisdiction. *The Spow Lane Coll. Co., Ltd., v. Baker* (M.C. 25), 200

COMMISSION—*sale of ship: principal and agent: introduction of purchaser*—The defendant having ships for sale employed the plaintiff to obtain purchasers, agreeing to pay a commission if the plaintiff should be the means of introducing a purchaser. In February, 1876, plaintiff introduced a person who had been recommended to buy one of the plaintiff's ships by A., and the defendant agreed that if this resulted in a sale the plaintiff and A. should share the commission. No sale did result, and in March A. mentioned the defendant's same vessel to B., who chanced to call upon him in reference to a ship of another owner. Plaintiff hearing of this, informed the defendant of B.'s call, and suggested his seeing B. on the subject. Defendant did nothing in the matter, and B. had at that time no intention of purchasing the defendant's ship, and made no communication about it to anyone. Defendant then told plaintiff that it was no use doing anything until the ship returned home, and the plaintiff thenceforth took no steps to find a purchaser. A., however, in April, again reminded B. of the vessel, but B. took no notice of his letters, and neither plaintiff nor defendant were aware of A.'s having written. In May B. wrote as broker direct to the defendant in reference to the vessel, and after some negotiation, on the 13th of June, disclosed the name of the principal for whom he was acting, and the sale was effected. Plaintiff, on hearing afterwards of the

sale, claimed his commission, on the ground that the purchaser had been introduced through the medium of his original negotiations with A. The jury found on questions left to them, first, that the plaintiff was authorised to find a buyer for the defendant's vessel, and, secondly, that B. was induced to enter upon the negotiation for the purchase by the information he received from A.:—*Held* (reversing the decision of LUSH, J., page 37), that the plaintiff was entitled to his commission. *Wilkinson v. Alston*, App., 733

— See Principal and Agent.

COMPANY—*allotment of shares: contract, when complete: letter posted but not received*—Where an offer is made by a letter which expressly or impliedly authorises the sending of an acceptance of such offer by post, and a letter of acceptance is duly addressed and posted, the contract is complete, even though the letter of acceptance is never received by the offerer. So held (affirming the decision below, 219) by BAGGALLAY, L.J., and THESIGHER, L.J.; *dissentiente* BRAMWELL, L.J. *The Household Fire and Carriage Accident Insurance Company (limited) v. Grant* (App.), 577

—*promoter: liability for money received in a fiduciary character: payment out of purchase-money for services to vendor: judgment on findings by jury*—P. had a silver mine in America which he desired to sell for the best price. The defendants, who were metal-brokers receiving a commission on the sale of the ore from the mine, were aware of this, and that the mine could only be sold to a company to be formed for that purpose. By the establishment of such a company in England the defendants would sustain a loss on their commission, but P. promised the defendants that if they would assist him in getting the mine sold he would guarantee them against such loss by giving them 5,000*l.* in paid-up shares of whatever company was formed, it being intended that P. should include in his purchase-money a sum sufficient to cover such 5,000*l.* The defendants gave P. active assistance in selling the mine to some company, but it was not proved that they took any part in the formation of the company which was in fact established. Afterwards P., in fulfilment of his promise, gave the defendants 250 paid-up shares of such company, from which they realised on sale 5,968*l.* The arrangement between P. and the defendants for thus remunerating them for their services to him, out of money to be charged to the company as part of the purchase-money, was unknown to the company:—*Held*, in an action by the company against the defendants for profits received to the use of and as trustees for the company, that it was a question of fact for the jury whether the defendants were promoters, and

that on the above facts there was evidence on which a jury might find that the defendants were promoters, and that they were liable to refund the profits they had received on the 250 shares of the company. *The Emma Silver Mining Co. v. Lewis*, 257

Order XL. rule 10, which gives power to the Court upon a motion for judgment to give judgment on any of the matters in dispute, is applicable to section 17 of the 39 & 40 Vict. c. 59, which provides for all proceedings down to final judgment being, so far as practicable, heard by the Judge before whom the trial took place, and such Judge may, therefore, in the exercise of his discretion, act under such power, by giving judgment on a finding by the jury on one of the questions in a cause, where the jury have been discharged from coming to any finding on the other questions. *Ibid.*

**COMPANY (continued)—sale of shares: dividend declared after sale**—A sale of shares in a company to be completed on a future day without mention of dividends passes dividends declared after the sale but before the day of completion. *Black v. Homersham*, 79

**CONFLICT OF LAWS—baron and feme: ante-nuptial debt: lex loci contractus: married woman's property**—By the law of Jersey the husband is liable for the ante-nuptial debts of his wife, while by the law of England (Married Woman's Property Act, 1874) the husband is not liable for the ante-nuptial debts of his wife, except to the extent of certain assets derived from her and specified in section 5 of that Act. The defendant and his wife were sued in England for a debt which had been contracted by the wife before marriage. The debt was for goods sold in Jersey to the wife while a *feme sole* residing there; she subsequently had come to England, and there married the defendant, an Englishman. At the time of the marriage, the Married Woman's Property Act, 1874, was in force. There were, however no assets derived from the wife for which the husband could be rendered liable within section 5:—*Held*, that the husband was not liable. *De Gruchy v. Wills*, 726

**CONTRACT—corporation by statute for public purposes: corporate seal necessary**—By section 85 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), every contract by a local board of health whereof the value exceeds 10*l.*, and by section 174 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), every contract by an urban sanitary authority, whereof the value exceeds 50*l.*, shall be in writing, and sealed with the seal of such board or authority, as the case may be. Defendants, who were a local board within section 85 of the Act of 1848, and an urban sanitary authority within the meaning of section 174 of the Act of 1875, were found by a jury to

have authorised their surveyor to employ plaintiff, an architect, to prepare certain plans for offices they intended to erect, but which they did not erect, and to have ratified the act of their surveyor in preparing them; and such offices were found also by the jury to be necessary for the purposes of the defendants, and the plans necessary for the erection of the offices. The plans were ordered when the Public Health Act, 1848, was in force, but not finished till after the Act of 1875 had come into force. There was no contract under seal with the plaintiff, and no ratification of any contract under seal with him, and the value of the work done exceeded 50*l.*:—*Held*, affirming the judgment of LINDLEY, J., that the enactments requiring a seal were mandatory, and not merely directory, and that defendants were not liable to pay for the plans. *Hunt v. Wimbledon Local Board (App.)*, 207

*Quare*, whether they would have been so liable, upon an executed consideration, if they had made full use of the plans by having offices built in accordance with them. *Ibid.*

**CONVERSION—what amounts to: conversion by bailes: misdelivery: pre-delivery: measure of damages: costs**—The defendants were in possession of plaintiffs' goods as bailees, under orders not to part with them except upon delivery orders signed by plaintiffs. The defendants parted with the goods upon the order of one G., who was plaintiffs' agent for the sale but not for the delivery of the goods. Shortly afterwards plaintiffs sent a delivery order for the same goods to T., who indorsed it to G., who lodged it with defendants to cover the previous delivery. Afterwards plaintiffs being unable to obtain the price of the goods from T., sued defendants for the conversion of the goods, and claimed the full value. *Held*, by BRAMWELL, L.J., and THESIGER, L.J., that there had been a conversion in respect of which plaintiffs were entitled to recover; but that what had occurred with respect to the delivery order was equivalent to a return of the goods by defendants to plaintiffs, and therefore, under the circumstances of this case, the damages could only be nominal. By BAGGALLAY, L.J., that plaintiffs were not entitled even to nominal damages. *Hiort v. The London and North Western Railway Company (App.)*, 545

*PER CURIAM*, the plaintiffs must pay the costs of the action. *Ibid.*

**COPYRIGHT—musical composition: sole liberty of performing: entries on register**—The Statute 5 & 6 Vict. c. 45. s. 20, applies the provisions of 3 & 4 Will. 4. c. 15. s. 1, to musical compositions, and 5 & 6 Vict. c. 45, applies therefore to the right of performing musical compositions published within ten years before the passing of that Act. C. assigned by deed in 1843 to D. his copyright in certain songs which had been composed by him in 1836 and registered

in 1841, and also the sole liberty of printing and publishing the same, "together with the sole and exclusive privilege of vending the same and all other his estate, right and title, interest, property, contingent possibility, benefit, claim and demand whatsoever, both at law and in equity," in those compositions:—*Held*, that after the 5 & 6 Vict. c. 45, the author had two distinct rights in these songs, the copyright and the sole right of representation or performing, and these words in the deed passed both the copyright and the sole liberty of performing the songs. C. afterwards assigned to A. the exclusive right of performing the same songs, and A. made entries on the Register at Stationers' Hall, representing himself as proprietor, under that assignment, of that right. H., claiming title under the earlier assignment to D., moved to expunge these entries:—*Held* (affirming the judgment of the Queen's Bench Division), that H. was a person "aggrieved" within the meaning of section 14 of 5 & 6 Vict. c. 45, and that the entries must be expunged. *Ex parte Hutchings and Romer; re the songs "Kathleen Mavourneen" and "Dermot Astore"* (App.), 505

CORPORATION. See Contract.

CORRUPT PRACTICES (MUNICIPAL ELECTIONS)—*treating: refreshment to voters: municipal election: corrupt practices prevention act*—The Corrupt Practices (Municipal Elections) Act, 1872, incorporates the provisions of section 23 of 17 & 18 Vict. c. 102, and makes it an offence to give refreshment to voters at a municipal election. *Hargreaves v. Simpson*, 607

COSTS—*Liverpool court of passage: action for slander*—Section 91 of the Judicature Act, 1873, which provides that "The several rules of law enacted and declared by this Act shall be in force and receive effect in all Courts whatsoever in England, so far as the matters to which such rules relate shall be respectively cognizable by such Courts," extends Order LV. in the first schedule of the Judicature Act, 1875, to the Liverpool Court of Passage, so that a plaintiff in an action of slander, who has recovered 1s. damages, is entitled to his costs in the absence of any order depriving him of them. *King v. Hawksworth*, 484

—*power to order successful plaintiff to pay costs of the defendant*—The power of a Judge over the costs of an action tried by a jury is, under the proviso at the end of Order LV., as extensive as that given to the Court by the general rule at the beginning of the same order. *Harris v. Petherick* (App.), 521

A plaintiff who was non-suited in an action, in which he claimed on two causes of action two separate sums of 85*l.* and 6*s.* respectively, obtained a rule for a new trial, no order being

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made as to costs. On the second trial the verdict was for the plaintiff for the smaller sum of six shillings, and for the defendant as to the claim for the larger sum. The Judge before whom the second trial was held, ordered the plaintiff to pay the costs of both trials. —*Held* (affirming the judgment of the Queen's Bench Division), that it was competent for the Judge to make the order. *Ibid.*

—*jurisdiction of judge at Nisi Prius: order made without application*—In an action tried by a jury the Judge before whom such action is tried has power of his own motion to make an order at the trial depriving a successful plaintiff of costs under Order LV., and no application is necessary in order to give him jurisdiction to exercise such power. *Baker v. Oakes* (46 Law J. Rep. Q.B. 246; s. c. Law Rep. 2 Q.B. D. 171) discussed. *Turner v. Heyland*, 535

—*order depriving successful plaintiff of costs: divisional court, jurisdiction of over costs*—Order LV. provides that, "Where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial, for good cause shewn, the Judge before whom such action or issue is tried or the Court shall otherwise order":—*Held*, that where no application has been made to the Judge at the trial to deprive a successful plaintiff of his costs, it is nevertheless competent to defendant to come to the Divisional Court which has jurisdiction, for good cause shewn, to make an order that costs shall not follow the event. But such application to the Court must be made promptly. *Bowey v. Bell*; *Brooks v. Israel*; *North v. Bilton*; *Siddons v. Lawrence*, 161. Affirmed on appeal. *Myers v. Defries*. *Siddons v. Lawrence* (App.), 446

—*amount recovered reduced by successful counter-claim below 20*l.**—Where plaintiff's claim exceeds 50*l.*, and he recovers a sum exceeding 20*l.*, he will not be deprived of his costs under section 5 of the County Courts Act, 1867, on the ground that the defendant has succeeded on a set-off and counter-claim so as to reduce the amount actually recovered as the balance to less than 20*l.* Section 67 of the Judicature Act of 1873 has no application to such a case. *Potter v. Chambers*, 274

—*action for slander where damages less than 40*s.**—Where in an action for slander tried by a jury, the plaintiff obtained a verdict with nominal damages, the Judge at the trial refusing to certify for costs,—*Held* (reversing the decision of the Court of Appeal, 46 Law J. Rep. Exch. 545), that the plaintiff was entitled to his full costs. *Parsons v. Tinsling*, 46 Law J. Rep. C.P. 230; s. c. Law Rep. 2 C.P. D. 110 approved. *Garnett v. Bradley* (H.L.), 186

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**COSTS (continued)—practice: security for costs: foreigners domiciled abroad: temporary residence in England**—Although the plaintiff is a foreigner, usually resident abroad, and only temporarily in England for the purpose of bringing the action, an order for security for costs will not be made, if the plaintiff be actually in England at the time of the application being made. *Redondo v. Chaytor and another* (App.), 697

— **power of master or district registrar**—The enactment in section 49 of the Judicature Act, 1873, that no order by the High Court or any Judge thereof as to costs only which by law are left to the discretion of the Court shall be subject to any appeal, does not apply to the order of a Master or district registrar, and therefore a Judge of such Court has power to vary as to costs an order of a district registrar dismissing the action without costs. *Foster v. Edwards*, 767

— See Security for Costs. Solicitor and Client. Taxation of Costs.

**COUNTY COURT—sending action of contract to county court**—Defendant in an action in the High Court in which the writ was indorsed with a claim of 50*l.*, "and interest from the date of the writ," applied under the County Courts Act, 1867, section 7, for an order that the action should be tried in a County Court as an action of contract where "the claim indorsed on the writ" did "not exceed 50*l.*":—*Held*, that the claim indorsed on the writ exceeded 50*l.* within the meaning of the Act. *Inslay v. Jones*, 222

— **appeal: practice: appeal from garnishee order**—The statutes giving a right of appeal from the County Court extend only to an appeal from a decision in a cause or action. A garnishee order is therefore not the subject of appeal, not being made in the action. *Mason v. The Wirral Highway Board*, 679

— See Practice.

**COUNTY COURT JURISDICTION—injunction to restrain a nuisance: power to enforce obedience by attachment**—In an action for nuisance brought in a County Court where the claim for damage is within the limits of its jurisdiction, the Judge has power to grant an injunction restraining the nuisance, and also to enforce obedience by attachment, affirming the decision of the Divisional Court, page 300. *The Queen v. Harrington* (App.), 677

**COVINS.** See Penalties.

**CRIMINAL INFORMATION—responsibility of proprietor of newspaper for libel inserted without his authority, consent or knowledge: liability for act of editor**—On the trial of a criminal information for libel, it was proved that defendants, proprietors of a newspaper, had appointed an editor to undertake the literary management of the paper, and given him general authority and discretion as to the insertion of articles therein, and that the article in question was inserted by him without their knowledge, and without any specific authority or consent from them. The Judge left to the jury the question whether the general authority to the editor included an authority to publish the libel, and a jury found defendants guilty. Upon motion for a new trial on the ground of misdirection, and that the verdict was against evidence,—*Held*, by COCKBURN, L.C.J., and LUSH, J. (*dissentientes* MELLOR, J.), that, inasmuch as the "authority" mentioned in section 7 of 6 & 7 Vict. c. 96, means authority to publish the libel, and as the general authority to an editor to conduct a newspaper must, in the absence of anything to give it a different character, be taken to mean authority to conduct it according to law, the direction of the Judge was defective in not so explaining the law to the jury as bearing on the question left to them; and that the general authority given to the editor to use his discretion in the insertion of articles was not of itself sufficient to make defendants criminally responsible as being evidence that the publication had been made with their authority, consent or knowledge within section 7 of 6 & 7 Vict. c. 96. *R. v. Holbrook*, 113

**CROWN.** See Petition of Right.

**DAMAGES.** See New Trial.

**DEBTOR AND CREDITOR.** See Fraudulent Conveyance.

**DEMURRAGE.** See Charter-party. Shipping.

**DEVIATION.** See Charter-party.

**DISCOVERY—of documents: affidavit: sufficiency of description: privilege**—Defendant's affidavit of documents contained the following paragraph:—2. "I have in my possession or power certain letters and correspondence which have passed between me and my legal adviser, in relation to the matters in question in this cause, and with a view to my defence to the plaintiff's claim, and certain instructions to and opinions of counsel in relation to the same matters, all of which I claim to be privileged from producing." In a further affidavit he swore, "The documents referred to in paragraph 2 of my former affidavit are numbered

50 to 76 inclusive, and are tied up in a bundle marked A., and initialed by me":—*Held*, that the two affidavits together were sufficient, as they identified the documents for which privilege was claimed, sufficiently to enable the Court to order them to be produced if necessary. *Taylor v. Batten* (App.), 72

— See Affidavit of Documents. Petition of Right.

DISTRESS. See Injunction.

DOMINANT AND SERVIENT TENEMENT. See Easement.

**EASEMENT**—*right to lateral support for buildings from adjoining land: principal and contractor: liability of principal for damage caused by contractor's negligence*—The right to the support for buildings from adjoining land is not a right of property. Such right cannot be claimed under the Prescription Acts, but may be acquired by prescription at common law, or by presumption of a lost grant arising from twenty years' open and uninterrupted enjoyment. *Angus v. Dalton and The Commissioners of Her Majesty's Works and Public Buildings* (App.), 225 Per COTTON, L.J., and THESIGER, L.J. (*dissentiente* BRETT, L.J.), such presumption cannot be rebutted by proof that no such grant in fact was ever made. Per BRETT, L.J., proof that such grant has never in fact been made is an absolute rebuttal of the presumption. *Ibid*.

One of two adjoining houses having been, twenty-seven years before the accident, altered internally by plaintiffs (the owners) so as to rest chiefly on a pillar built on the edge of their land, and contiguous to the land on which the adjoining house of defendants stood, fell down in consequence of excavations made by defendants on the site of their house which they had pulled down, and by reason of the pillar being deprived of the lateral support previously afforded by the soil under the surface of the adjoining land of defendants. In an action by plaintiffs to recover damages for the loss caused by the fall of their house, the Judge at the trial directed a verdict for plaintiffs:—*Held*, by COTTON, L.J., and THESIGER, L.J., that the case must go down for a new trial, to determine whether the burden which had been put upon the servient tenement was such as the owner could reasonably be expected to be aware of and provide for. By BRETT, L.J., that judgment should be entered for the defendants. *Ibid*.

*Held also*, by COTTON, L.J., and THESIGER, L.J. (affirming *Bower v. Peate*), that where a principal has employed a contractor to do work which is in its nature dangerous to adjoining property, the employer is bound to see that proper means are adopted to prevent injurious consequences, and cannot discharge himself of

his liability by employing a competent contractor and directing him to use proper precautions. *Ibid*.

— *prescription: access of air: obstruction: nuisance*—Defendants raised the wall of their house so as to overtop the chimneys of the adjoining houses of plaintiff, and piled timber upon their roof, causing plaintiff's chimneys to smoke:—*Held*, that plaintiff had no cause of action, on the grounds, first, that the free access of air to plaintiff's premises was not an easement for which he could prescribe either by statute or at Common Law; and, secondly, that no nuisance had been caused by defendants, since the smoke which caused the annoyance to plaintiff was produced by plaintiff on his own premises. *Bryant v. Lefever* (App.), 380

— *ancient lights: implied grant: unity of ownership: dominant and servient tenement: sub-division of property: alteration in premises: destruction of easement*—The principle of law that where the owner of an estate has been in the habit of using *quasi* easements of apparent and continuous character over the one part for the benefit of the other part of his property, and alienates the *quasi* dominant part to one part and the *quasi* servient to another, the respective alienees will, in the absence of express stipulation, take the land burdened or benefited by the qualities which the previous owner had a right to attach to them, applies, even though the owner were not in actual possession of both parts of the property at the time of alienation. *Barnes v. Loach*, 756

If the alteration in a dominant tenement or in the mode of using an easement is not of such a nature that the tenement is substantially changed or the burden on the servient tenement materially increased, an easement is not destroyed in consequence of the alteration. *Ibid*.

**ELEMENTARY EDUCATION**—*general expenses of school board: power of board to borrow for temporary purposes: deficiency of school fund*—A school board is entitled to borrow money to defray general current expenses, when the school fund is deficient: such loan being temporary in its character, and to be paid off out of the next rate levied. Interest on such a loan is properly a charge to be allowed in the accounts of the school board for the half-year in which the deficiency has occurred. *The Queen v. Sir Charles Reed*, 729

— Factory, education of children employed in: bye-laws of School Board compelling attendance. *Mellor v. Denham* (M.C. 113), 608

— Attendance order: non-compliance, second case of: previous conviction for non-compliance: evidence. *The School Board for London v. Harvey* (M.C. 130), 608

**EVIDENCE**—*action to recover back money obtained by fraud: evidence of similar acts with other persons*—Plaintiff sought to recover from a life assurance company the premium he had paid for insuring his life with the company, on the ground that he had been induced to effect such insurance by the fraud of a person who had various fictitious names, and who, with the knowledge and connivance of the company, pretended that he would lend plaintiff money if he so insured his life with the company, but who, when such insurance was effected, imposed such conditions on plaintiff before he would lend the money as had the effect intended by him of preventing the loan from being made. In support of such case plaintiff produced at the trial evidence of other persons who had in a similar way been induced to insure their lives with the said company under the pretence of a loan which, in like manner, was never made, and which evidence went to shew that the transaction with plaintiff was one of a class of transactions of the same nature:—*Held*, that such evidence was admissible. *Blake v. The Albion Life Assur. Soc.*, 169

— Evidence further amendment: proceedings "in consequence of adultery": evidence of husband to prove non-access. *The Guardians of the Poor of Nottingham Union v. Tomkinson* (M.C. 171), 755

**EXECUTOR.** See Residuary Legatee.

**EXTRADITION**—*warrant of apprehension: description of offence: "crimes against bankruptcy law"*—Upon a rule for a Habeas Corpus to discharge a prisoner arrested under the Extradition Acts, 1870 and 1873, on the ground that the warrant whereon he was arrested did not sufficiently describe the offence, it appeared that the warrant (which was a warrant issued by a metropolitan police magistrate without the order of a Secretary of State) described the offence as "the commission of crimes against bankruptcy law":—*Held*, that the warrant sufficiently described the offence. *In re Terraz*, 214

— Limitation of Act by treaty: exemption of British subject from surrender: writ of habeas corpus. *The Queen v. Wilson* (M.C. 37), 200

**FALSE IMPRISONMENT**—Action: computation of time: one calendar month: expiration of time of imprisonment. *Migotti v. Colville* (M.C. 48), 159

**FALSE REPRESENTATION**—*sale of animals in public market: implied representation of freedom from infectious disease*—A man who sends animals to market does not thereby impliedly represent to a purchaser that they are not, so far as he

knows, suffering from infectious disease, at all events where they are sold subject to an express condition that no warranty will be given. *Ward v. Hobbs* (H.L.), 281

Purchasers are not within the purview of the Contagious Diseases Animals Act, section 57, and cannot in consequence maintain an action upon a violation of the duty imposed by that section. *Ibid.*

Whether the owner of other animals infected in the market could recover damages for their loss—*Quere. Ibid.*

**FOREIGN ATTACHMENT.** See Interpleader.

**FRAUDS, STATUTE OF**—*contract not to be performed within a year: part performance: contract of service*—Under section 4 of the Statute of Frauds, a parol contract not to be performed within a year is not void, though no action can be brought upon it; and no fresh contract can be implied from acts done in pursuance of and during the existence of such contract. *Britain v. Rossiter* (App.), 362

The equitable doctrine of part performance taking contracts out of the operation of section 4 of the Statute of Frauds, cannot be extended by the High Court of Justice, under section 24, sub-section 7, of the Judicature Act, 1873, beyond the limits to which it was confined by the Courts of Equity. It is, therefore, applicable only to contracts for the sale and purchase of lands, and not to a contract of service. *Ibid.*

— *contract not to be performed within a year: agreement on termination of employment*—Where a servant contracted to serve his master in the way of his trade for a term of three years, and if he should leave the service not to engage in a like service within a certain area, and at the expiration of the said term made a contract in like terms except as to the period of employment, it was held that the latter contract was for an indefinite term of service during the joint lives of the master and servant, and was *prima facie* a contract not to be performed within a year within the Statute of Frauds, and must be in writing. *Davey v. Shannon*, 459

— See Pleading. Vendor and Purchaser.

**FRAUDULENT CONVEYANCE**—*Stat. 13 Eliz. c. 5: debtor and creditor: resulting trust*—An insolvent trader executed a deed by which he conveyed all his property to trustees who were, *inter alia*, to carry on his business and realise his estate in such manner as they might deem expedient, and out of the proceeds thereof, after making certain payments, to apportion the residue equally among such of his creditors as executed or assented to the deed. It was further



provided that if within a given time any creditor neglected or refused to assent to the deed, his dividends should be paid by the trustees to the debtor. It was admitted that the deed was executed for the purpose of defeating any execution that might prevent the equal distribution of the debtor's property among his creditors:—*Held*, that the deed was fraudulent and void under 13 Eliz. c. 5. *Spencer v. Slater*, 204

**FRIENDLY SOCIETIES**—Disputes between society and members: reference to arbitration: jurisdiction of magistrate over disputed claim. *In re The United Patriots' National Benefit Society and Holt* (M.C. 55), 185

**GARNISHEE.** See Attachment of Debt. Interpleader.

**HIGHWAY**—turnpike: *disused tollhouse*: "not required for purposes of the road": *encroachment on road by dwelling-house*—Where a toll-house had ceased to be used as such since 1867, but was used as a dwelling-house for one of the men employed in the repair of the road, and the trustees had no intention of reimposing the toll at that point,—*Held*, that the toll-house had become "useless and was no longer required for the purposes of the road" within the meaning of section 57 of 4 Geo. 4. c. 95; that the turnpike trustees were not entitled to maintain it as a dwelling-house, it being an encroachment on the road within section 118 of 3 Geo. 4. c. 126; and that the adjoining landowner, as being a person using the road, had a right to call upon the trustees by mandamus to pull down and remove the materials of the toll-house. *The Queen v. The Greenlaw Turnpike Trustees*, 409

—*street*: turnpike road: *alteration in level of by local board*: *compensation: award*—The Public Health Act, 1848, vests by section 68 all streets, being highways, in local boards of health, authorises them to alter or raise the level of such streets, and directs by section 144 that compensation shall be made out of the rates to all persons damaged by the exercise of the powers of the Act; the amount, in case of dispute, to be settled by arbitration. By section 2 the word street is to apply to and include any highway not being a turnpike road, and any road, footway, &c., and the parts of such highway, road, footway, &c., within the district, and by an amending Act the word highway is defined to mean any highway repairable by the inhabitants. The Local Government Act, 1858, authorised local boards to take on themselves by agreement with turnpike trustees the maintenance and repair of a turnpike road within their district. A local board, through whose district a turnpike road and footpath passed, agreed with the turnpike trustees to repair and to raise the footpath, the

trustees agreeing to raise the road at the same place. The necessary result of thus raising the footpath was to damage the house of the plaintiff, who thereupon claimed compensation from the board under section 144 of the Public Health Act, 1848.—*Held* (by BART, L.J., COTTON, L.J., *dissentiente* BRAMWELL, L.J., reversing the judgment of the Queen's Bench Division), that the road in question was, although a turnpike road, a street within section 68 of the Act, and was vested in the local board by virtue of that section, and that the plaintiff was therefore entitled to compensation from the local board for the damage caused by the alteration made by them in the exercise of their statutory powers, and an award made against the board under section 144 was enforceable. *Nutter v. The Accrington Local Board of Health* (App.), 487

—repair of highways: license by justices to get materials in enclosed land: extent and duration of license. *Earl Manvers and Browne v. Bartholomew* (M.C. 3), 53

—Locomotive on highway: person preceding locomotive on foot. *Davis v. Browne* (M.C. 92), 401

—furious driving of carriage along highway bicycle. *Taylor v. Goodwin* (M.C. 104), 427

—Turnpike Act: roads authorised to be made by trustees under private Act: tolls: completion of part of roads: insufficiency of tolls to keep completed part in repair: application for contribution towards maintenance out of highway rate: jurisdiction of justices. *The Queen v. French* (M.C. 175) (App.), 768

**HUSBAND AND WIFE.** See Conflict of Laws.

**IMPRISONMENT**—*computation of time*: "one calendar month"—Where a term of one calendar month's imprisonment begins in one month and ends in another, the month must be calculated from the day on which the imprisonment commences to the day before the (numerically) corresponding day in the following month. If there is no such numerically corresponding day, the term will end on the last day of the following month. *Migotti v. Colville*, 695

**INCLOSURE**—*general inclosure: award: private roads: vendor and purchaser*—H. sold Whiteacre to the defendant, reserving all rights to an allotment in respect thereto under a pending inclosure. The conveyance was made with all ways "to the said lands appertaining, or held, or used, or occupied therewith." At the time of the conveyance there were certain trackways across Blackacre (then part of the waste await-

ing inclosure), which had been used with Whiteacre for more than forty years. Blackacre was subsequently allotted to H., and by him before the award sold to C., who devised it to the plaintiff. The trackways were not set out in the award:—*Held*, that upon the making of the award the trackways were stopped up and extinguished by 8 & 9 Vict. c. 118. s. 68, in favour of H. and all claiming through him, notwithstanding the terms of the conveyance to the defendant. *Turner v. Crush*, H.L., 481

**INCOME TAX—quarries: mines: annual value]**—

A property in which slate is gotten by levels driven underground into the mountain, is a quarry and not a mine for the purposes of the rules for assessing income-tax, and its annual value is the profits for the preceding year, and not the average profits for the five preceding years. *Jones v. The Cwmorthin Slate Company (limited)*, 486

**INDICTMENT—obscene libel: omission to set out the alleged obscene matter: error: verdict.** *The Queen v. Bradlaugh and Besant* (M.C. 5), (App.), 63

**INJUNCTION—restraining distress for rent]**—The

Court will not grant an injunction to restrain a landlord from distraining for rent, even though it is doubtful whether he is entitled to such rent, without providing for the landlord having the amount of such rent secured to him in the event of his ultimately being found to be entitled to it. *Shaw v. The Earl of Jersey*, 308

**INTERPLEADER—foreign attachment in Lord Mayor's Court: garnishee order obtained during existence of attachment]**—The operation of a garnishee order made under the Common Law Procedure Act, 1854, is not suspended by the existence of an attachment in the Lord Mayor's Court, the former being a process of execution, the latter merely a process to compel an appearance. *Richter v. Laxton*, 184

— **non co-extensive claims]**—Defendant, the proprietor of a horse repository, sold there by public auction a horse to the plaintiff, warranted quiet to ride and in harness, but subject to a condition, by which if considered by the buyer incapable of working from any infirmity or disease it might be returned on the second day after the sale, and the matter determined by veterinary surgeons according to the terms provided for in such condition. The horse was returned accordingly by plaintiff, who demanded to have back the money he had paid for the purchase, and this being refused he brought an action against defendant for damages for breach of the warranty. A. B., who had placed the horse at the repository for sale, claimed of defendant the proceeds of the

sale, stating that the horse had left the repository perfectly sound:—*Held*, that defendant was not entitled to an interpleader order. *Wright v. Freeman*, 276

**INTERROGATORIES—procedure: onus of proof]**—

When a party takes out a summons under Order XXXI. rule 5, objecting to answer interrogatories, his summons should state whether the objection goes to the whole of the interrogatories, or to any, and which of them, specifying in the latter case, by their numbers, the particular interrogatories objected to. He may take both objections at the same time. In such a case it is the duty of the Judge to consider the interrogatories, either as a whole, or as the particular interrogatories, objected to, as the case may be, and to decide accordingly; and the onus is on the party who objects to the interrogatories to shew that they are bad. If the summons merely objects to the interrogatories generally, and the Judge finds, on looking at them, that some are relevant and some irrelevant, he is not bound to go through them, to separate the bad from the good, but is entitled to require the party objecting to point out the particular interrogatories that are objectionable. *Allhusen v. Labouchere* (App.), 34

— **mode of taking objection to]**—The object of the new rule 5, Order XXXI., in the rules of the Supreme Court, November, 1878, is to compel a party interrogated to make his objections with his answer, except in certain specified cases. It is no longer competent for him, before answer, to apply to have the whole set of interrogatories struck out, on the ground that some of them, or parts of some of them, are not such as he is bound to answer. *Gay v. Labouchere*, 279

**JUDGMENT DEBT.** See Partnership.

**JUSTICE OF THE PEACE—Fees to clerk: liability to pay: municipal corporation: conviction under the vagrant act.** *Reddish v. Hitchinor* (M.C. 31), 46

— **summary order: disqualification of: local authority: prosecution by, for nuisance: urban authority: members of acting as justices.** *The Queen v. The Justices of Weymouth* (M.C. 139), 702

**LANDLORD AND TENANT—forfeiture of tenancy: beerhouse conducted in absence of licensed person: right of married woman to bring action of trespass]**—Under the Married Woman's Property Act, 1870, a married woman can maintain an action in her own name against a wrongdoer for her expulsion from a beer-house, in which she carried on business apart from her husband, and for loss of profits, stock in trade and fixtures

which she had purchased with her separate earnings, it being a remedy for the protection of her property within the meaning of section 11. *Moore v. Robinson*, 156

A married woman living apart from her husband had accumulated enough of her separate earnings to purchase the goodwill and stock of a beer-house, which was taken for her by S., to whom the license was transferred, and who agreed with the landlord not to do anything to imperil the license on pain of forfeiting the tenancy and the fixtures. S. executed a declaration of trust in favour of plaintiff, and handed it to her with the license indorsed in blank; and she carried on the business. S. having gone away to sea, defendant, the landlord, served a notice at the house, requiring him to remove his goods by the following day, and on the following day entered and took possession, turning plaintiff and her furniture out of the house:—*Held*, on action brought to recover damages for the expulsion, that, in the absence of evidence that the house had been improperly conducted, the absence of S., the licensed person, did not cause the license to be imperilled so as to create a forfeiture, and justify the entry by defendant. *Ibid*.

— *landlord's property tax*—A landlord promised his tenant that if he would continue to pay his rent in full without deducting anything for property tax, he, the landlord, would repay to him all sums which he had paid or should pay for such property tax. The tenant having paid his rent in full to the landlord during his lifetime, claimed from his executors the amount of property tax so paid and not deducted from his rent:—*Held*, on demurrer (affirming the decision of the Queen's Bench Division), that the agreement was not void as "an agreement for the payment of rent in full" within section 103 of 5 & 6 Vict. c. 35. *Lamb v. Brewster* (App.), 421

— *notice to quit, sufficiency of: "optional notice"*—A landlord gave his yearly tenant six months' notice to quit, in the usual form; and in the same document gave him further notice that he would allow him to retain possession of the premises after the expiration of the notice, at an increased rent payable in advance:—*Held* (by BRAMWELL, L.J., COTTON, L.J.; BRETT, L.J., dissenting), a sufficient notice to quit, not vitiated by the further notice contained in the same document. *Ahearn v. Bellman*; *Sedgwick v. Ahearn* (App.), 681

— *covenant to pay rates, taxes and charges: charge upon premises or persons in respect thereof: public health*—Defendant was tenant of a public-house under a lease by which he covenanted to pay "all rates, taxes, charges and assessments whatsoever which now are or may be charged or assessed upon the said premises or any part thereof, or upon any person or

persons in respect thereof, land tax and property tax excepted." The plaintiff, who had acquired the lessor's interest in the premises, received a notice from the local board of health, under the Public Health Act, 1848, s. 69, requiring him as owner to sewer, level pave, &c., a street adjoining the premises. The plaintiff failing to comply with this notice, the local board executed the required works themselves, and under the above Act and the Acts amending the same, demanded and obtained from the plaintiff the proportion of the expenses and interest, assessed in respect of these premises:—*Held*, that the plaintiff was entitled to recover these expenses from the defendant, for that such expenses were a "charge upon the premises" as well as "upon a person in respect thereof," which the defendant by his covenant had undertaken to pay. *Hartley v. Hudson*, 751

LEASE. See Apportionment.

LEX LOCI CONTRACTUS. See Conflict of Laws.

LIBEL. See Criminal Information. Pleading.

LICENSE—Renewal of public-house license: general discretion of justices. *The Queen v. Smith* (M.C. 38), 200

LIMITATIONS, STATUTE OF—*action for recovery of land: ecclesiastical commissioners succeeding to estates of ecclesiastical corporation*—The statute of limitations (3 & 4 Will. 4. c. 27) fixes, by s. 2, twenty years as the limit within which a claimant can sue to recover land; but provides, by s. 29, that deans and other ecclesiastical corporations sole may do so within sixty years. By 3 & 4 Vict. c. 113, s. 57, the ecclesiastical commissioners are to have, for the purpose of recovering lands vested in them as successors to ecclesiastical corporations sole, all the rights and powers which belong to those to whose estates they have succeeded. Certain decanal estates vested in the commissioners in 1854; in 1877 they sued to recover possession of part of these estates from defendant who had been in possession adversely to plaintiffs for more than twenty and less than sixty years:—*Held*, that the claim of plaintiffs was barred, the statute of limitations being a restrictive and not an enabling statute; that the rights of plaintiffs to sue to recover land are defined by s. 2 of the statute of limitations; and that they cannot sue for this purpose after the lapse of twenty years, although those to whose estates they succeed could have done so within sixty years. *The Ecclesiastical Commissioners for England v. Rowe* (App.), 152

— *acknowledgment taking debt out of the statute: conditional promise to pay*—Defendant having owed plaintiffs money since 1866, and

having paid no instalments since 1870, in May, 1874, wrote to them as follows:—"Believe me that I shall never lose out of sight my obligations towards you; and I shall be glad, as soon as my position becomes somewhat better, to begin again and continue my instalments." It was proved that in one year and one year only, since 1874, defendant's income exceeded its amount at the date of the promise by 14*l*.—*Held*, that the letter contained not an unconditional acknowledgment of the debt from which a promise to pay could be implied, but an acknowledgment coupled with a promise conditional on defendant's position becoming somewhat better, and that the condition had not been fulfilled. *Meyerhof v. Froelich* (App.), 43

**MARINE INSURANCE—insurance to cover loss of freight: mode of calculating underwriter's liability**—Plaintiffs, shipowners, entered into a charter party by which they were to receive freight for their ship at a named rate. There was also a provision, that if any of the cargo was sea-damaged, the freight on such portion should be only two-thirds of the named rate. Plaintiffs insured with defendants for a sum "to cover only one-third loss of freight in consequence of sea-damage as per charter-party." Part of the cargo was sea-damaged, and plaintiffs having only received two-thirds freight on that portion sued defendants for the difference between the sum received and the full freight on that part of the cargo:—*Held*, that the insurance was made to cover the difference between the full freight which might be earned, and the amount actually received; and therefore that the plaintiffs were entitled to recover the full amount claimed, and not merely such a portion of the loss as the sum for which defendants subscribed the policy, bore to the whole value of the freight which might have been earned. *Griffiths v. Bramley-Moore*, (App.), 201

—**constructive total loss: abandonment: notice of, when necessary**—Where the assured has received full information of a disaster having occurred to an insured vessel, of such a nature as to cause imminent danger of her becoming a total loss, he must at once make his election to treat the loss as constructively total, and must give notice of abandonment to the underwriters; and he is not excused from the necessity of giving such notice by the fact that the vessel has been subsequently sold, and that the sale as a matter of fact was the best course in the interests of all concerned, and that no advantage would, in the circumstances of the case, have accrued to the underwriters from such notice.—*Rankin v. Potter* (42 Law J. Rep. C.P. 169), explained. *Kaltenbach v. Mackenzie* (App.), 9

—**action by assignee: defence: set-off: counter-claim**—To an action on a policy of insurance on a ship's cargo brought by the assignee of such policy in his own name by virtue of the 31 & 32 Vict. c. 86, defendant may set off any debt which he might have set off if the action had been brought in the name of the person who had effected the policy; "any defence" in the 1st section of that Act not being confined to a defence arising on the policy itself. *Pellas & Co. v. The Neptune Marine Insur. Co.*, 370  
*Semble*, a counter-claim is within the meaning of the words "any defence" in that section. *Ibid*.

—**re-insurance against fire: declarations of risk: usage of underwriters**—In accordance with an agreement entered into between the plaintiffs, a marine insurance company, and the defendants, a fire insurance company, the defendants subscribed a policy whereby they undertook to re-insure the plaintiffs against loss or damage by fire to the extent of 50,000*l*. by such ships as might be declared at and from certain ports to destination, the policy to be subject to the same conditions (as far as they related to the fire risk only) as the original policy or policies, and would pay as might be paid thereon. The policy provided that the arrangement was to be in force for one year from the 1st of October, 1876, and to include only such vessels as were coal-laden; the policy to be supplemented by further policies on like terms should the amount thereof not prove sufficient for the year's transactions. This policy becoming exhausted by declaration of risk, the defendants, on the 9th of July, subscribed a second policy similar in terms to the former policy, and this second policy becoming likewise exhausted, a third policy was, on the 25th of October, subscribed by the defendants, similar in terms to the former policies. On the 7th of June the plaintiffs insured a coal-laden ship, the *Hampden*, and there was a loss by fire of the cargo on the 18th of September, which would have been covered by the policy of insurance if the risk had been duly declared, but through the negligence of the plaintiffs' manager the risk had not been declared. At the time the third policy was effected the plaintiffs knew of the loss, and on the 2nd of November they declared the *Hampden* and claimed for a loss. The plaintiffs having brought an action to recover the loss, it was—*Held*, that the plaintiffs were entitled to recover, for that the defendants were insurers in respect of a marine risk, and as such subject to the usage of underwriters, stated in *Stephens v. The Australasian Insurance Company*, by which, in the case of open policies on ships to be declared, the policy attaches to the goods as soon as, and in the order in which they are shipped, in which order the assured is bound to declare them, and in case of mistake as to the order of shipment, the assured is bound to rectify the declaration

which may, in the absence of fraud, be altered even after the loss is known. *The Imperial Marine Insurance Co. v. The Fire Insurance Corporation (Lim.)*, 424

— *total loss: salvage and costs: refitting: insurable interest*—By agreement between the plaintiff and W., the plaintiff undertook at his own expense and risk to transport the *Cleopatra* obelisk from Alexandria to London, and there to erect it uninjured. In the event of success W. was to pay the plaintiff 10,000*l.*, but in the event of failure, the plaintiff was to incur no liability to W. It was calculated that the 10,000*l.* would no more than cover the expenses. The obelisk was delivered to the plaintiff by the Khedive of Egypt for the purpose of conveying it to London; the plaintiff expended money and labour in preparing for the transport, and built a vessel called the *Cleopatra*, which was little more than an iron case, in which the obelisk was stowed, and in which it would float, and agreed with the owners of the steamship *Olga* to tow the *Cleopatra*, with the obelisk on board, from Alexandria to London for 900*l.* After payment of this sum the plaintiff had expended in all 4,000*l.* on the transport, &c. The plaintiff next effected two policies of insurance, against total loss only, with the defendants respectively, the first of which, with the defendant Whitworth, was for 1,000*l.* "upon the goods and merchandise in the good ship *Cleopatra*, iron vessel, containing the *Cleopatra* obelisk. The goods and merchandises, &c., for so much as concerns the assured by agreement between the assured and assurers in this policy, are and shall be valued at 4,000*l.*" The second policy with the Sea Insurance Company was for 2,000*l.* "upon any kind of goods and merchandises, and also upon the body, &c., of and in the good ship *Cleopatra*, iron vessel, containing the *Cleopatra* obelisk. The said ship, &c., goods and merchandises, &c., for so much as concerns the assured by agreement between the assured and the company in this policy, are and shall be, vessel and obelisk, valued at 4,000*l.*" The suing and labelling clause in both policies was as follows:—"And in case of any loss or misfortune it shall be lawful for the assured, their factors, servants, and assigns, to sue, labour and travel for, in and about the defence, safeguard and recovery of the said goods and merchandise, or any part thereof, without prejudice to this insurance, to the charges whereof the assurers will contribute each one according to the rate and quantity of his sum herein assured." The *Cleopatra* and the obelisk left Alexandria in tow of the *Olga*; a severe storm was encountered in the Bay of Biscay, when the *Olga* was compelled to cast off the *Cleopatra* and take her crew on board. The following day the *Cleopatra* was lost sight of, and after vainly endeavouring to find her, the *Olga* came on to England without her. Subsequently the steamer

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*Fitzmaurice* fell in with the *Cleopatra* and succeeded in towing her into Ferrol, a neighbouring port. The Court of Admiralty awarded 2,000*l.* salvage to the *Fitzmaurice*; the plaintiff had to pay—first, the salvage; second, the costs; third, certain expenses in refitting the *Cleopatra* at Ferrol, and towing her thence to London. The plaintiff now sought to recover from the defendants the several amounts under these heads of expense:—*Held*, that both policies were on the ship and obelisk, and that the plaintiff had an insurable interest in each to the extent of 4,000*l.*, which was sufficiently described in the respective policies. That the defendants were liable to the plaintiff for the 2,000*l.* paid as salvage; for, though the policies were against the risk of total loss only, the *Cleopatra* was only saved from total loss by the services of the salvors, and the defendants, therefore, having had the benefit of their services, were bound to indemnify the plaintiff against his liability in respect of them, and that each of the defendants were bound to contribute in proportion to the amount subscribed by them. That the defendants were not liable to the plaintiff for the costs of the Admiralty proceedings, or the expenses of refitting the *Cleopatra* at Ferrol and towage from thence to England, such costs and expenses being too remote to be covered by the policies. *Dixon v. Whitworth. The Same v. The Sea Insurance Company*, 538

— *broker's lien on policies for premiums*—The plaintiff employed S. & Co. to insure a cargo. S. & Co. employed the defendant for the same purpose, who effected the policies required. According to the course of trade monthly credits were given for the premiums by the defendant to S. & Co., and by S. & Co. to the plaintiff, the defendant retaining the policies in his hands. The plaintiff paid S. & Co. in due course, but S. & Co. became insolvent before paying the defendant:—*Held*, that there was nothing in the contract or course of business inconsistent with the common law right of an insurance broker to a lien upon policies for premiums due thereon. *Fisher v. Smith* (H.L.), 411 *Held* also, that the lien was the lien of the defendant, and was, therefore, not discharged by the payment to S. & Co. *Ibid*

— See Shipping.

MARKET—*prescription: right to prevent sale of marketable articles in shops on market day*—The right of the owner of a market to prevent tradesmen from selling marketable articles in their shops within the limits of the franchise, without paying the market dues in respect of such sales, is not unreasonable and may be gained by immemorial custom or prescription. The grant of a market "with all liberties and free customs to such a market belonging" does not imply such a right. *Mayor, Aldermen and Burgesses of Penryn v. Best* (App.), 103

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In an action for the infringement of such a right in respect of a meat market within a borough, it was proved that, from the time of living memory up to 1862, butchers having shops within the borough were in the habit of closing their shops on market days and going into the market to sell their goods, paying stallage. That in 1862 two butchers refused so to close their shops but submitted on actions being brought, and afterwards paid the market dues for what they sold in their shops on market days; and that the defendant had paid dues in like manner for some time before the year 1875 when he declined to continue the payment:—*Held* (reversing the judgment of the Exchequer Division), that there was evidence from which the jury might find that the plaintiffs had established their right to prevent the owners of butchers' shops from selling in them on market days without paying market dues. *Ibid*.

— See Negligence.

**MASTER AND SERVANT**—loss of service: servant passenger: negligence of railway company: damages to master]—A master cannot maintain an action *per quod servitium amisit* against a railway company for an injury to his servant whilst a passenger on the company's railway, caused by neglect of their duty to carry safely the servant according to their contract with him as such passenger, unless the master was a party to the contract. But where the servant is injured by the negligence of another railway company, not party to the contract, in running their train against the train in which the servant is such passenger, the master can maintain an action *quod servitium amisit* against such other company. *Berringer v. The Great Eastern Railway Company*, 400

**MEASURE OF DAMAGES.** See Sale of Chattel.

**MERGE.** See Partnership.

**METROPOLIS MANAGEMENT**—obligation of vestry to remove dust, &c., from houses: contract of sale of dust and refuse]—By the Metropolis Management Act, 1855, s. 127, a duty is imposed on a vestry of collecting and removing all dirt, ashes, rubbish and filth in or under houses and places within their parish. Plaintiff contracted with defendants for the purchase of the dust, filth and refuse which should be collected by their servants from the houses, &c., in the parish of P. In each house there was a receptacle called a dust-bin, the contents of which were put into baskets by the scavengers, and thence into carts by the vestry, and conducted to the brickfields of the plaintiff. The dust-bins contained, in addition to dust, a number of articles known as "tots," of more

or less value, thrown away by the occupiers of the houses or their tenants, for the purpose of being taken away by the dust carts and got rid of:—*Held*, that the plaintiff was not entitled to these "tots" under the terms of his contract with the vestry, inasmuch as there was no obligation on the part of the latter under 18 & 19 Viet. c. 120, s. 125, to remove them, and the contract must be construed to include only such things as the vestry were compelled by the statute to take away. *Collins v. Paddington Vestry*, 345

— members of vestry: churchwarden: disqualification: bankruptcy]—The disqualification of the members of vestries provided by section 54 of the Metropolis Management Act, 1855, on their becoming bankrupt, applies to the churchwardens as well as to elected members. *Leftley v. Monnington*, 543

— district rate: inequality of benefit: exemption of part of a parish. *The Queen v. The London, Brighton and South Coast Rail. Co.* (M.C. 116), 544

— paving: owner of land bounding or abutting on a street: "street." *The London, Brighton and South Coast Railway Company v. The Vestry of St. Giles, Camberwell* (M.C. 186), 768

**METROPOLITAN BUILDING**—dangerous structures: "owner" of building: liability for repair of district church: church building. *The Queen v. Lee* (M.C. 22), 109

**MINES**—coal mine: neglect of general rules: liability of agent as well as manager. *Wynn v. Forrester* (M.C. 140), 679

**MORTGAGE.** See Stamp. Staying Proceedings.

**MORTGAGOR AND MORTGAGEE**—right of mortgagor to sue in respect of injury to mortgaged property: joinder of parties: nonjoinder no bar to action]—A mortgagor in possession of the beneficial interest in a covenant can sue for an injunction against the person on whom the burden of the covenant lies, to restrain a breach of the duty thereby imposed, without joining the mortgagee as plaintiff in the action. *Fairclough v. Marshall* (App.), 146

The nonjoinder of a necessary plaintiff is no bar to an action, and therefore when a plaintiff is wanting judgment ought not to be entered for defendant, but the proper party should be joined under Order XVI. rules 13, 17. *Ibid*.

**MUNICIPAL ELECTION**—infringement of secrecy: communication: means of knowing. *Stannought v. Hazeldine* (M.C. 89), 420

— See Corrupt Practices.

**NEGLIGENCE—duty of owner of market : dangerous erection in market place**—Defendants, owners of a market for the sale of cattle, had, some three years before action, erected some railings round a statue in the street of the town where the market was held, and near to the site which plaintiff, who was in the habit of bringing cattle to the market, occupied and paid a toll for. A cow of plaintiffs' was killed in trying to jump the railings, and in an action brought against defendants to recover damages for her loss, the jury found that the railings were of insufficient height:—*Held*, by LUSH, J., on further consideration, that plaintiff was entitled to recover; on the ground that the owners of the market were under an obligation to keep the market place free from danger to those who lawfully frequented it; and that by erecting the railings of insufficient height they had been guilty of a misfeasance, resulting in damage to plaintiff, who was not a mere licensee of a particular site, but entitled to use the whole of the market-place subject to the regulations and control of the owners. *Lax v. The Mayor, &c., of Darlington*, 143

— *dangerous article : duty attaching to management of*—The defendant, a gas fitter, was employed by M. & Co. to repair a gas-meter in a cellar on their premises. In order to repair the meter the defendant took it away, replacing it by a temporary connection consisting of a flexible tube, one end of which was pushed into the inlet pipe, and the other end into a pipe communicating with the house. The plaintiff, a servant of M. & Co., whose duty it was to light the gas in the cellar, afterwards went there with a light and was injured by an explosion of gas which immediately ensued. The jury having found that the defendant was negligent in doing the work, and that the accident proceeded entirely from the defendant's negligence, it was held, that the defendant was liable. *Parry v. Smith*, 731

**NEW TRIAL— inadequacy of damages : action for personal injury**—A new trial may be granted for inadequacy of damages in an action for personal injuries where the Court is of opinion that from the circumstances of the case the damages are unreasonably small. *Phillips v. The London and South Western Rail. Co.*, 693

**NON-JOINDER.** See Mortgage and Mortgagee.

**NOTICE TO QUIT.** See Landlord and Tenant.

— See Master and Servant. Railway Company.

**NUISANCE—duty to neighbour : tree poisonous to cattle : liability to prevent encroachment of branches**—An occupier of land adjoining a meadow where cattle are pastured, who grows

a tree likely to be eaten by cattle, and poisonous, if eaten, must keep it within his own boundaries, and if he does not do so is *prima facie* answerable for the death of the cattle caused by their browsing on branches which project beyond his boundaries.—*Fletcher v. Rylands* applied. *Crowhurst v. The Burial Board of Amersham*, 109

**PARLIAMENT—county vote : description of qualification : part of property parted with : amendment**—The description of the qualification of a county voter in the fourth column of the register consisted of fifteen specified plots of land on the Victoria estate. He had in fact parted with fourteen of these plots, but the plot which he retained was of sufficient qualifying value to confer the franchise:—*Held*, that the Revising Barrister had power and ought to have amended by striking out the surplus plots. *Smith v. Woolston*, 84

*Semble*, that since 28 & 29 Vict. c. 36. s. 6, the Revising Barrister must confine the objector to the particular column and grounds of objection specified in the notice of objection. *Ibid*.

— *county vote : objection to person on list of claimants : proof of claim*—Where the name of a person inserted in the list of claimants for a county is objected to, the revising barrister has only to consider whether the claimant is entitled to be on the list "in respect of his qualification described on such list;" he is not to require proof of due notice of the claim, for that is a matter between the claimant and the overseers.—*Davies v. Hopkins* (27 Law J. Rep. C.P. 6), followed. *Leonard v. Alloways*, 81

— *borough vote : rating qualification : owner paying rates by agreement with occupier*—Section 19 of 32 & 33 Vict. c. 41, enacts that—"The overseers in making out the poor-rate shall, in every case, whether the rate is collected from the owner or occupier, or the owner is liable to the payment of the rate instead of the occupier, enter in the occupier's column of the rate book the name of the occupier of every rateable hereditament, and such occupier shall be deemed to be duly rated for any qualification or franchise as aforesaid:"—*Held*, that this clause applies not only to cases where the owner is "liable" by agreement with the overseers under section 3, or by order of the vestry under section 4 of the same Act, but also to cases where the owner is liable by agreement with the occupier to pay the rates. *Barton v. The Town Clerk of Birmingham*, 87

The same section provides that—"any occupier whose name has been omitted shall, notwithstanding such omission and that no claim to be rated has been made by him, be entitled to every qualification and franchise depending upon rating, in the same manner as if his name had not been so omitted." H. had, during the

qualifying period, resided within the borough, and had occupied, as yearly tenant, a set of rooms as a "counting-house" within the meaning of 2 Will. 4. c. 45. s. 27. This set of rooms was one of several separate sets in the same house which were similarly occupied. The landlord, who himself occupied part of the premises but did not sleep there, paid all rates for the whole house, and his name appeared on the rate book as occupier. H. had not claimed to be rated or tendered payment of any rates; nor was his name entered in the book. The rent paid by H. was more than it otherwise would have been, in consideration of the landlord paying the rates:—*Held*, that the landlord was "liable to the payment of the rate instead of the occupier" within the first part of section 19, and that H. was entitled to the franchise by virtue of the proviso at the end of the section. *Ibid*.

*Cross v. Alsop* (40 Law J. Rep. C.P. 53), distinguished. *Smith v. The Overseers of Seghill* (44 Law J. Rep. M.C. 114), followed. *Ibid*.

**PARLIAMENT (continued)—borough vote: payment of poor-rates by landlord: poor-rate assessment and collection act: deductions allowed: notice in writing to overseers a condition precedent: waiver**—It is a condition precedent to the overseers of a parish being empowered to make any abatement or deduction from a poor-rate under section 4, sub-section 2 of the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), that the owner of the rateable hereditaments should give notice to such overseers in writing that he is willing to be rated in respect of all such hereditaments of which he is owner, whether the same be occupied or not; and the giving of such notice is a matter which cannot be waived by the overseers who are in discharge of a public duty. Therefore where no such notice was given, but the owner (pursuant to an agreement with his tenant, the occupier,) paid the poor-rate made in respect of the house the tenant occupied, and was allowed by the overseers a deduction from the rate not exceeding the limit given by such section 4, sub-section 2, but which deduction was not authorised by any other clause in the Act, it was held that there had not been such a payment of poor-rate as was by the Act to be deemed a payment of the full rate by the occupier for the purpose of the franchise, and, consequently, that such occupier was not entitled to the borough franchise under section 3 of the Representation of the People Act, 1867. *Bennett v. Atkins*, 95

—**borough vote: notice of objection: service: poor-rate collector**—Notice of objection to the name of the appellant being retained on the list of voters for the borough of Bedford, was sent to the office of the collector of poor-rates, appointed by the guardians of the poor of five parishes, constituting the borough of Bedford. The collector was in the habit of discharging

all the ordinary overseer's duties, including that of making up the lists. He transacted the whole of the business connected with the poor-rates and the preparation of the list of voters at his said office, which was within the borough, where all the parish books were kept, and all notices of claims and objections were sent. The collector produced such notices to any voter requiring to see them, and also attended to produce them at the Revising Barrister's Court. The overseers did nothing whatever besides receiving notice of claims and objections if sent to them, and signing the lists which the collector produced to them, and there was no other office in the borough where any parish business was transacted:—*Held*, that the collector's office was "the place for transacting parochial business" within 6 Vict. c. 18. s. 101, and that the notice was duly served. And, *Seem*, that the collector was a person executing the duties of overseers of the poor within that section. *Green v. Mepham*, 92

**PARTIES—adding plaintiff without his consent**—Where an official liquidator of a company, suing upon a guarantee of defendant equitably assigned to the company, sought to add the assignor's name as plaintiff without evidence of his consent or tendering him an indemnity, the Court refused to allow the name to be added. *Turquand v. Fearon*, 341

—**change of by death: survival of cause of action to administratrix**—Plaintiff who had obtained a verdict in an action to recover money paid for shares which proved to be of no value, and which he had been induced to take on the faith of a fraudulent prospectus issued by defendants, died pending an appeal, and his administratrix sought to be added as a party to the action in his place:—*Held* (affirming the decision of the Common Pleas Division, 46 Law J. Rep. C.P. 636), that the cause of action, being one which diminished the value of the personal estate in the hands of the administratrix, survived, and that the administratrix was rightly added as a party to the action under Order L. *Twycross v. Grant* (App.), 1

—**joinder of plaintiffs: claim by indorsees of bill joined with claim by drawer**—S., indorsee of a bill of exchange, sued defendant as acceptor, the writ being specially indorsed under the Bills of Exchange Act. Defendant obtained leave to defend on an affidavit denying the acceptance. S. thereupon joined F., the drawer of the bill, as co-plaintiff, and the plaintiffs then delivered a joint statement of claim which alleged that F. sold goods to the defendant in respect of which 90*l.* was due on the 3rd of January; that on that day F. drew, and the defendant accepted a bill of exchange for 53*l.* 14*s.*, which was dishonoured, and that afterwards another similar bill was given for the same sum with expenses,



which F. indorsed to S.; that this last-mentioned bill became due on the 17th of August, but that "the defendant has not paid it nor has he paid for the said goods in respect whereof the said bills were drawn and accepted":—*Held*, that this joint claim was embarrassing and must be struck out. *Smith v. Richardson*, 140

— *substitution or addition of other plaintiffs*—Plaintiffs contracted with a vestry to pave a public road with asphalt and to keep the pavement in repair for fifteen years, the pavement when laid to be the property of the vestry. Shortly after the pavement was completed defendants, acting under statutory powers, laid down a tramway along the pavement, but so constructed and maintained their tramway as to occasion unnecessary damage to the pavement. It being doubtful whether an action, commenced by the plaintiffs against the defendants on the above facts, was brought in the name of the right plaintiffs, the Court, under Rules of Court, Order XVI. rule 2, ordered the vestry to be added or substituted as plaintiffs, on the terms that the vestry was to be indemnified by the original plaintiffs for all costs and expenses. *Val De Travers Asphalt Paving Co. (Lim.) v. London Tramways Co. (Lim.)*, 312

**PARTNERSHIP**—*carried on in the name of an individual member: bill of exchange: liability of dormant partners: onus of proof*—Where a partnership is carried on in the name of an individual member of it, any note or other obligation signed by such individual member in his name is *prima facie* presumed to be the note of the individual and not of the partnership. Plaintiffs sued the defendants, Beatson and Mycock, on two bills of exchange: one drawn by K. on W., and indorsed "William Beatson;" the other drawn by C., addressed to "Mr. William Beatson, Chemical works, Rotherham," and accepted and indorsed "William Beatson." Before January, 1878, Beatson had carried on the business of a chemical manufacturer at Rotherham. On the 1st of January the two defendants entered into a partnership in the same business, on the terms that the style of the firm was to be "William Beatson," that Beatson was to have the whole management of the business, and that neither partner should have authority to draw, endorse or accept bills without the previous consent, in writing, of the other. Beatson had kept an account at the Rotherham bank for several years: after the formation of the partnership no change was made either in the heading of the account at this bank, or in the method of keeping it. It was headed "William Beatson, Esq." The firm had no separate account. The bills sued on were dated respectively the 6th and 18th of March, 1878, and were renewals of earlier bills, originating in accommodation transac-

tions, between Beatson and C., K. and W. The bills were endorsed and accepted by Beatson without the knowledge of Mycock. The proceeds of the bills went into the account at the Rotherham bank, and Beatson drew on this account from time to time for goods supplied to the business, but his account with the bank was overdrawn; and he had drawn out of the account, for his own purposes, a much larger sum than was brought into the account by the proceeds of the bills in question. The plaintiffs who had discounted the bills on the 14th and 18th of March respectively never heard of the existence of any partnership until four months afterwards, and knew nothing of Mycock till then:—*Held*, that Mycock was not liable on the bills as dormant partner. *The Yorkshire Banking Company v. Beatson and Mycock*, 428

— *debt: joint and several liability: judgment recovered against one partner: merger of debt in judgment*—The appellants recovered judgments against W. & Co. for breach of contracts, in respect of which the respondent was a partner with W. & Co. and jointly liable to the appellants. W. & Co. became bankrupts, and the appellants having received a dividend in the bankruptcy sued the respondent for the balance due upon the contracts:—*Held*, that there was no principle of equity which would prevent the operation of the rule laid down in *King v. Hoare* (13 Mees. & W. 494; s. c. 14 Law J. Rep. Exch. 29), that judgment recovered against one or more of several joint contractors is a bar to an action upon the same contract against the others. *Kendall and others v. Hamilton* (H.L.), 705

The expression, that partnership debts are in equity joint and several, is only to be taken *sub modo*, that is to say, as meaning that there is no survivorship of liability in favour of a deceased partner. *Ibid*.

*Held also* (*dissentiente* LORD PENZANCE), that the abolition of pleas in abatement under the Judicature Acts did not take away the right of a defendant to insist on his co-contractors being joined as defendants, and consequently did not affect the validity of the rule in *King v. Hoare*. *Ibid*.

*Per* LORD PENZANCE. Under the Judicature Acts a defendant has no longer an absolute right to insist, by plea in abatement or otherwise, on being sued together with his co-contractors or not at all; and, inasmuch as that right formed the ground of the rule in *King v. Hoare*, that rule is no longer law. *Ibid*.

**PENALTIES**—*judgment obtained by covin and collusion no bar to subsequent bona fide action: evidence of covin and collusion*—Defendants kept the Brighton Aquarium open to the public on Sunday, the 15th of August, 1875, thereby incurring a penalty under 21 Geo. 3. c. 49. Plaintiff issued his writ in an action to recover the penalty on the 17th of April, omitting to

specify in the writ the Sunday in respect of which the action was brought. Defendants continued to keep the Aquarium open every Sunday up to and including Sunday, the 17th of October. On the 20th of October a writ was issued in the name of one R., claiming penalties in respect of all the Sundays from the 15th of August to the 17th of October, both inclusive, and judgment was signed by default in R.'s action on the 28th of October. Defendants pleaded this judgment in bar of plaintiff's action. Reply, that the judgment was obtained by covin and collusion. It was proved that R.'s action was brought at the request of defendants; that defendants' solicitor instructed another solicitor to carry it on in the name of R.; that it was intended to protect defendants from any other actions for penalties in respect of those Sundays, and also to ascertain whether the Home Secretary would remit the penalties under 38 & 39 Vict. c. 80, and that there was an understanding between R. and defendants that he should not enforce the judgment:—*Held*, that the judgment obtained in R.'s action was no bar to plaintiff's action, R.'s action being a nullity, having been, in fact, brought by defendants against themselves. *Held* also, by COTTON, L.J., and THESIGER, L.J., that there was ample evidence of covin and collusion on the part of R. and defendants. *Girdlestone v. The Brighton Aquarium Company* (App.), 373

**PENALTIES** (continued)—Company: delivery of list of members to registrar within fourteen days after general meeting: necessity to prove holding of general meeting. *The Queen v. Newton* (M.C. 77), 352

**PETITION OF RIGHT**—*right of crown to discovery of documents*—The Crown is entitled, under the provisions of the Petitions of Right Act, 1860, and the Rules of Court, 1875, to discovery of documents by a suppliant in a petition of right. *Tomline v. The Queen* (App.), 463

**PHARMACY ACT**—*sale of poisons by unqualified persons: application of statute to corporations: action for penalties*—By 31 & 32 Vict. c. 121. s. 1, it is enacted that "it shall be unlawful for any person to sell or keep open shop for retailing, dispensing or compounding of poisons, unless such person shall be a pharmaceutical chemist or a chemist or druggist within the meaning of this Act." By section 15 a penalty is imposed on "any person" for selling poisons or keeping open shop for the sale of poisons in contravention of the Act. Defendants were a limited company registered in 1878 under the Companies Acts, and formed for the purpose of purchasing and acquiring the trade of a wholesale and retail grocer and general warehouseman then carried on by M. The business of the company included, amongst other departments for the sale of various goods, a

drug department, which was an open shop for the retailing, dispensing and compounding of poisons within the meaning of 31 & 32 Vict. c. 121. The business of this particular department was conducted by L., with the aid of two qualified assistants. L. was a pharmaceutical chemist or a chemist and druggist, and was also a shareholder, but he acted as a servant of the company and was paid a salary or wages. Neither the managing director or any other shareholder were qualified to sell poisons:—*Held*, that defendant company was included under the term "person," and was liable accordingly to a penalty under 31 & 32 Vict. c. 121, for having sold poisons and kept open shop for the sale of poisons in contravention of that Act. *The Pharmaceutical Society v. The London and Provincial Supply Association* (Lim.), 387

**PLEADING**—*action for recovery of land: setting out title: "material facts"*—In an action for the recovery of land, where plaintiff claims by devolution from an alleged predecessor in title, it is not necessary to set out the whole of plaintiff's title in the statement of claim, but it must state the nature and effect of the documents under which plaintiff claims, and such material facts in his pedigree as he relies upon to establish his right. *Philippe v. Philippe* (App.), 135

— *counter-claim: amendments*—Order XVII. rule 5, which empowers a claim against a person as executor to be joined with a claim against him personally, does not include a counter-claim, and a defendant will not be allowed in an action by a plaintiff in his own right to join a counter-claim against plaintiff in his representative character as executor or administrator with a counter-claim against him personally, especially if it will embarrass the trial of the action. Where, however, such a counter-claim can be amended by striking out so much of it as relates to the claim against plaintiff in his representative character, the Court, under Order XXII. rule 9, will order it to be so amended instead of ordering it to be struck out altogether. *Macdonald v. Carington*, 179

— *setting out words of libel*—Notwithstanding Order XIX. rules 4 and 24, the precise words alleged to be libellous must be set out in a statement of claim for libel. *Harris v. Warre*, 310

— *contract: statute of frauds*—Where a defendant relies on the Statute of Frauds as a defence to an action he must not only state in his statement of defence that he relies on such statute, but the facts which make the statute applicable must distinctly appear on the pleadings. To an action for goods sold and delivered and for work and labour, a statement that the defendant will avail himself of the statute 29

Charles 2. cap. 3, without stating facts which would bring the case within the statute, was ordered to be struck out as embarrassing. *Pullen v. Snelus*, 394

— practice: rules of the supreme court: agreement, how to be pleaded]—*Semble*.—Whenever in any pleading an agreement is alleged, it is not sufficient generally to aver the existence of an agreement, and to state its effect; but the pleading should state whether the agreement relied on is in writing or by parol, or the result of a series of documents. *Turquand and the Capital and Counties Bank v. Fearon* (App.), 703

— See Practice.

PLEDGE—rights of pledgee: re-delivery obtained by fraud of pledgor: innocent transferees for value]

—The plaintiffs lent to the firm of D. & Sons their acceptances for 11,500*l.* (for which D. & Sons undertook to provide at or before maturity) on the security of certain flour, a memorandum as to such security being given by D. & Sons in these terms:—"As security for the due fulfilment on our part of this undertaking, we have warehoused in your name sundry lots of flour, and in consideration of your delivering to us or our order, the said flour as sold, we further undertake to specifically pay you proceeds of all sales thereof, immediately on their receipt." The flour in question was duly warehoused with the plaintiffs. Acceptances to the amount of 6,500*l.* were provided by D. & Sons, and it was agreed between them and the plaintiffs that the two remaining bills for 500*l.* each should be renewed, which was accordingly done, a memorandum similar to the former one being again given by D. & Sons. Before the last-mentioned acceptances became due one of the firm of D. & Sons applied to the defendants to advance the sum of 2,500*l.* on the security of the flour deposited with the plaintiffs, but without in any way communicating to them the fact of the flour having been so deposited. The defendants believing the flour to be the property of D. & Sons, advanced the 2,500*l.* on the security of the flour, on the terms that they were to have absolute possession of the flour and to warehouse it in their own name, and to have power to sell it. The plaintiffs by the fraudulent misrepresentations of D. & Sons that they had found a purchaser for the flour and would hand over to them the amount to be received as the price, were induced to part with the possession of the flour, and for that purpose gave, as requested, a delivery order to D. & Sons. Possession of the flour having been transferred to the defendants they, by virtue of the right to sell vested in them by the agreement with D. & Sons, sold the flour in the London market, and delivered it to the respective purchasers. Of the 2,500*l.* thus ad-

vanced by the defendants to D. & Sons, 500*l.* only was paid to the plaintiffs, and D. & Sons afterwards became bankrupts. The plaintiffs having brought an action against the defendants for the wrongful conversion of the flour,—*Held*, that the flour having been given up by the plaintiffs to D. & Sons to sell as their own, the special property, if any, vested in the plaintiffs as pledgees, was intentionally abandoned, and the possession having been parted with, the contract of pledge was, at all events for the time being, at an end. *Held* further, that, though the abandonment of the property in, and the surrender of the thing pledged, might, as between the pledgors and pledgees, have been revoked as having been obtained by fraud so long as the goods remained in the hands of the pledgors, yet that when prior to any such revocation the property in the goods had been transferred by the owners for good consideration to a bona fide transferee, the latter acquired an indefeasible title. *Held* also, that the plaintiffs, having allowed D. & Sons to appear as the ostensible owners of the flour, and to exercise uncontrolled dominion over it without intervening themselves in the transaction, ought to suffer rather than the defendants who had innocently advanced money on the goods in the ordinary course of commercial dealing. *Babcock v. Lawson*, 524

POOR—Criminal lunatic: order for maintenance on parish of settlement: settlement of married woman being a criminal lunatic: date at which settlement to be computed. *The Guardians of the Poor of the Barton Regis Poor Law Union v. The Clerk of the Peace for the County of Berks* (M.C. 51), 165

— Divided parishes, &c.; derivative settlement of pauper: order of removal. *The Guardians of the Woodstock Union v. The Churchwardens, &c., of the Parish of St. Pancras* (M.C. 1), 56

— Divided parishes: derivative settlement of pauper lunatic: order of removal. *Ford Union v. The Guardians of the Warwick Union* (M.C. 111), 485

— Divided parishes: settlement by residence: illegitimate child living apart from mother. *The Queen v. The Guardians of the Leeds Union* (M.C. 129), 601

— water company: supplemental valuation list. *The Queen v. The Assessment Committee of the Parish of St. Mary, Islington* (M.C. 123) 544

— valuation list: appeal: union assessment committee amendment: objection to valuation list before rate made: refusal of relief by committee: publication of rate: necessity of

second appearance before committee after making of rate: next practicable sessions. *The Queen v. The Justices of Wiltshire* (M.C. 142) 590

**PRACTICE—discontinuance of action: findings by arbitrator**—Where an action has been referred to an arbitrator, and the findings of the arbitrator are in favour of the defendant on all the material points, so as to be analogous to a general verdict, a Judge ought not, in the exercise of his discretion, to give leave to the plaintiff to discontinue his action under Order XXIII. rule 1. *Stachlschmidt v. Wilford*, 348

**—payment into Court before defence: acceptance by plaintiff in satisfaction**—Where a defendant has, before delivering his defence, paid money into Court in satisfaction of plaintiff's claim, under Order XXX. rule 1, plaintiff may, on taking the money out in satisfaction, at any subsequent time apply for an order for his costs, notwithstanding his having neglected to give the notice within four days, under rule 4, which would have entitled him absolutely to tax them; and a Judge may, under Order LV., grant such application. *Greaves v. Fleming*, 335

**—time for appealing from master to judge at chambers: Rules of Court, 1875, Order LIV. rule 4**—Rule 4, Order LIV. when interpreted by comparison with rule 6 of the same Order, requires that an appeal summons from a Master to a Judge at chambers should not only be taken out within four days, but also made returnable within four days. *Bell v. The North Staffordshire Railway Company*, 513

**—appeal from master: time for appealing: enlarging time: Order LIV. rule 4**—Although the appeal from a Master's decision must be by summons returnable on a day within four days from such decision in order to comply with Order LIV. rule 4, yet on the hearing of the appeal (even though after such time and without any express summons for the purpose), the Court or a Judge has power under Order LVII. rule 6 to enlarge the time for appealing. *Gibbons v. The London Financial Association*, 514

**—action dismissed for want of prosecution: appeal from order: power to enlarge time**—The Court or a Judge has power under Order LIV., rule 4, and Order LVII., rule 6, to enlarge the time for appealing against an order of a Master made under Order XXIX., rule 1, dismissing an action for want of prosecution, even after such order has taken effect and the action has become dismissed, and when, as decided by *Whistler v. Hancock* (47 Law J. Rep. Q.B. 152; s. c. Law Rep. 3 Q.B. D. 83), there is no power to enlarge the time for doing anything in such action. *Burke v. Rooney. Same v. Same*, 601

**—default of pleading: order dismissing action in default of delivery of statement of claim within a specified time: consent of parties: judicature act**—An order was made on the 6th of May, dismissing an action for want of prosecution, unless the plaintiff delivered his statement of claim within fourteen days, which expired on the 20th of May. On the 19th of May the plaintiff took out a summons to extend the time, but the summons was not served on the defendant until the 20th of May, the day on which it was made returnable, when it was agreed in writing between the parties that it should be adjourned till noon the following day. Accordingly, the summons came on for hearing before a Master on the 21st of May, and an order was made extending the time for delivery of the statement of claim:—*Held*, that the order made on the 6th of May could not be enlarged by the mere consent of the parties, that the action was dead, and that the Master, therefore, had no jurisdiction upon a subsequent application to grant the plaintiff further time for delivering a statement of claim. *King v. Davenport*, 606

**—rule for new trial: power to enter judgment**—The Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), and the Rules of December, 1876, have not altered Order XL. rule 10. Therefore the Divisional Court on a motion to set aside a verdict which has been found for plaintiff, instead of ordering a new trial may give judgment for defendant, where such Court is satisfied that there is really no evidence to support the verdict, and that it has before it all the materials necessary for finally determining the question in dispute. *Daun v. Simmins*, 313

**—appeal: stay of execution: notice of motion**—Upon an appeal being brought, an original application to the Court of Appeal for a stay of execution upon the decision appealed from is a motion of which notice must be given to the other side, and which cannot be made *ex parte*. *The Emma Mining Company v. Lewis & Son* (App.), 504

**—action remitted for trial to County Court: motion for new trial, where to be made**—Where an action brought in the High Court has been sent down for trial to a County Court by a Judge's order under 19 & 20 Vict. c. 108, s. 26, and has been tried by the County Court Judge without a jury, an application for a new trial must be made by motion to a Divisional Court, and not to the Court of Appeal. Order XXXIX. rule 1, does not apply to a trial by a Judge of County Courts. *London v. Roffey* (47 Law J. Rep. Q.B. 16; s. c. Law Rep. 3 Q.B. D. 6) approved. *Davis v. Godbhere* (App.), 440

— *appeals from inferior courts: setting down for hearing: time*—A rule nisi to reverse a judgment of an inferior Court was obtained on the 5th of November, calling upon the opposite party to shew cause at the expiration of eight days, or so soon after as the case could be heard. The rule was not set down at the Crown Office for hearing, in the list, under Order LVIII. rule 19, of appeals from inferior Courts before the day named in the rule nor until the following 3rd of February:—*Held*, that the appellant had lost his right to be heard. *Dunovan v. Brown*, 456

— *joinder of parties: joinder of third person as defendant to counter-claim*—In an action for money lent the defendant set up a counter-claim, in which he joined one T. as defendant to the counter-claim under Order XXII. rule 5, and alleged a contract between himself and T., and a breach thereof by T.; that the contract had been transferred from T. to the plaintiffs; and that the plaintiffs had broken it. He then claimed damages against the plaintiffs, and, in the alternative, against T.:—*Held*, that T. was not properly joined as co-defendant to the counter-claim under Order XXII. rule 5, but that the defendant should have applied to have the question determined as against T. under Order XVI. rule 17. *The Central African Trading Company v. Grove*.—*Grove v. The Central African Trading Company and Taubman* (App.), 510

— *specially indorsed writ: leave to defend on terms: rules of court, Order XIV. Rules 1, 6*—Upon an application for leave to sign final judgment under Order XIV. rule 1, the defendant in shewing cause by affidavit, must bring himself within one of two classes of case provided for by that order. To be within the first he must shew that he has a good defence to the action on its merits, and in such a case no terms ought to be imposed upon him. The second class contains those cases in which the defendant, while failing to do that, yet discloses facts which may entitle him to defend, and then rule 6 of the same order applies, and such terms may be imposed, as a condition of allowing him to defend, as may be thought fit. *Ray v. Barker* (App.), 569

— See Appeal.

PREROGATIVE—*right to bring proceedings into the Exchequer: restraining actions*—The prerogative of the Sovereign to bring proceedings in which Crown property is involved into the Exchequer by information filed by the Attorney-General, and to restrain proceedings pending elsewhere, is not affected by the Judicature Acts. *The Attorney-General and The Corporation of Hull v. Constable*, 455

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PRESCRIPTION—*right by user: custom: lost grant: grant from crown to inhabitants: claim by inhabitants to a profit à prendre: prescriptive claim upon user in another character than the character in the claim*—Defendants to an action for taking underwood for fuel from the waste of the plaintiff's manor of T. F. justified as inhabitants of the parish of T. F., and proved immemorial user by some inhabitants as such, but they did not prove user by the inhabitants generally as such, and exclusive right was claimed by the tenants of the manor:—*Held*, that the justification could not stand either upon custom, as the custom would be for the inhabitants to have a profit à prendre in the soil of another, or upon a lost grant from a private person, inhabitants being incapable of taking under a grant which does not incorporate them, or upon a lost grant from the Crown, user by the inhabitants generally as such being necessary for supposing a grant to the inhabitants, other considerations against supposing the grant being the absence of evidence of even a *de facto* corporation of the inhabitants, the claim by the tenants of the manor, and the unreasonableness and repugnancy to law of the supposed right. *Rivers v. Adams; the Same v. Isaacs; the Same v. Ferrett*, 47

Defendants justified also as occupiers of certain cottages, relying upon user by the occupiers as inhabitants of the parish:—*Held*, that a prescriptive claim as occupier of a certain house or the like could not be founded upon user in a different character such as inhabitant of a parish. *Ibid*.

The result of the decisions in the year books upon the effect of a royal grant to the inhabitants of a parish or village appears to be that, if the grant is for a specified purpose, the grant incorporates the inhabitants so as to effectuate that purpose, but otherwise is inoperative. Therefore, when a Court or jury is called upon to presume a lost royal grant to inhabitants, it has to presume a royal grant such as to incorporate them. *Willingale v. Mailland* (36 Law J. Rep. Chanc. 64), considered. *Ibid*.

— See Market.

PRINCIPAL AND AGENT—*authority to pledge credit: insanity of principal: effect of an authority of agent*—The defendant having held out his wife to the plaintiff as having authority to pledge his credit afterwards became insane. The plaintiff, being unaware of the insanity, continued to supply the wife with goods on credit:—*Held*, that the defendant was liable to the plaintiff for the price of the goods so supplied. *Drew v. Nunn* (App.), 591

Insanity so great as to deprive the insane person of any contracting mind revokes an authority given by him, when sane, to an agent; and an agent who, after knowledge of such insanity on the part of the principal, continues to act on the

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authority so given, will himself be liable to the person with whom he so deals. *Ibid.*

**PRINCIPAL AND AGENT** (continued) — *procurement of loan: commission "on any money received:" non-receipt through default of principal*—Defendant entered into the following contract with plaintiff:—"In the event of your procuring me the sum of 2,000*l.*, or such other as I shall accept, I agree to pay you a commission of 2½ per cent. on any money received." The plaintiff procured a party willing to lend 1,625*l.* if the defendant shewed a sufficient title to his security. Defendant accepted the offer, but failed to shew a sufficient title. The negotiations consequently went off, and no money was in fact received by defendant:—*Held*, that plaintiff was notwithstanding entitled to his commission on the 1,625*l.*, as it was owing to defendant's own default that he never received the sum, and the plaintiff had performed all his part of the contract. And, *semble*—per *BRAMWELL, L.J.*, that those who bargain to receive commission for introductions have a right to their commission as soon as they have completed their portion of the bargain, irrespective of what may take place subsequently between the parties introduced. *Fisher v. Drewett* (App.), 32

— See Commissioner.

**PRISON COMMISSIONERS**—*boy sent after imprisonment to reformatory: expense of supplying proper clothing for reformatory*—The expense of providing a youthful offender sentenced to be detained, after a term of imprisonment, in a reformatory, with suitable clothing for admission to such reformatory, is an expense incurred for "the maintenance of a prisoner," for which the Prison Commissioners are responsible, under the Prisons Act, 1877. *The Prison Commissioners v. The Corporation of Liverpool*, 436

**PROMOTER.** See Company.

**PROPERTY TAX.** See Landlord and Tenant.

**PUBLIC HEALTH**—Owner re-building cottages: meaning of words "sufficient privy." *The Queen v. The Guardians of the Poor of the Clutton Union* (M.C. 135), 686

— Paving private streets: recovery of expense from owner: "owner in default." *The Queen v. The Swindon New Town Hall Local Board* (M.C. 119), 686

— See Landlord and Tenant.

**PUBLIC RIVER**—*duty of conservancy board*—The conservancy board of a public river acting under a statute by which they "shall be and

are authorised and empowered from time to time at their discretion to cleanse, scour, &c., the river, and to remove all obstructions and impediments whatever to the navigation," are not liable for damage to a barge caused by a pile in a part of the river, the bed of which is not vested in them and in respect of which they are not entitled to take tolls, although the pile was dangerous, and the board ought to have known the danger and were guilty of negligence. *Forbes v. The Lee Conservancy Board*, 402

**RAILWAY COMPANY**—*bye-law: travelling without a ticket: action for fare from place whence train originally started*—By 8 Vict. c. 20. s. 103, it is provided that if any person travel in a carriage of the company without having previously paid his fare, and with intent to avoid payment thereof, he shall forfeit a sum not exceeding forty shillings. By section 108, the company may make regulations for regulating the travelling upon the railway. By section 109 the company are empowered to make bye-laws provided such be not repugnant to the provisions of the Act. A railway company made a bye-law, which provided that any person travelling without a ticket shall be required to pay the fare from the station whence the train originally started to the end of his journey, and under this bye-law the company sued in the County Court, for the amount of the fare from the place whence the train originally started, a passenger who had, without any intention to defraud, entered a train at an intermediate station, and travelled therein without a ticket:—*Held* (affirming the judgment of the Common Pleas Division, 47 Law J. Rep. C.P. 634), that the action could not be maintained, that a debt could not thus be created, and that the amount if claimed as a penalty could not thus be recovered. *London, Brighton and South Coast Rail. Co. v. Watson* (App.), 316

— *negligence: passenger: implied contract to carry although an express contract by another railway company*—The S. W. R. Company have a station at R. and a railway from R. to S., where defendants' line of railway joins, and defendants have running powers over the railway of the S. W. R. Company from S. to R. Plaintiff took a return ticket of the S. W. R. Company from R. to a station beyond S. belonging to defendants, and on the return journey from such station to R. he went by one of defendants' trains under the management of defendants' servants. On arriving at R. he received an injury in attempting to alight there by reason of the platform being considerably lower than the carriages of the train, such carriages being suitable only for the platforms of the stations throughout defendants' own line and not for the platform at R. In an action against defendants for such injury, the jury having found that it was caused by

defendants' negligence. — *Held*, that, notwithstanding there was a contract with the S. W. R. Company by their issuing the ticket to plaintiff, there was evidence of an undertaking on the part of defendants to carry plaintiff to R. with reasonable care and with reasonable facility also for alighting on the platform at R. at the end of the journey, and that they were liable for their neglect to perform such undertaking. *Foulkes v. The Metropolitan District Rail. Co.*, 555

— *passenger's season ticket : forfeiture of deposit for breach of conditions : delivery of ticket on expiry*—Upon purchasing a passenger's season ticket from the defendants, the plaintiff agreed to be bound by certain conditions, of which one was that all benefit of the ticket, including a deposit of ten shillings paid with the price, should be forfeited on breach of any of the conditions; and another condition was that the ticket should be delivered up on the day after expiry. The plaintiff did not deliver up the ticket on the day after expiry, but delivered it up within a time which was found upon the trial to be a reasonable time. The defendants refused to return the deposit:—*Held*, that the defendants were justified, on the ground that compliance by the plaintiff with the stipulations of the contract was a condition precedent to his right to a return of the deposit. *Cooper v. The London, Brighton and South Coast Railway Company*, 434

— *Passenger travelling without having paid his fare : tourist ticket : sale by taker of ticket : intent of purchaser to avoid payment of his fare.* *Langdon v. Howells* (M.C. 133), 689

**RAILWAYS AND CANALS**—*through rate : railway commissioners : prohibition : statute fixing a company's tolls subject to consent of another company : railway and canal traffic act : regulation of railways act*—Where it is enacted by a Special Act that in consideration of a guarantee by a railway company of a dividend on the capital of a canal company, the canal company shall not reduce the rates for the time being payable on the canal without the consent of the railway company, the railway commissioners have no power without the consent of the railway company, and without the railway company being before them, to make an order establishing a through rate over that and other canals, and reducing the rates payable on that canal and others. *In re The Warwick and Birmingham Canal Company and others v. The Birmingham Canal Company ; ex parte The Birmingham Canal Company and the London and North Western Railway Company*, 550

**RATE**—Sanitary purposes in borough : district or borough rate : exemption conferred by local act. *The Overseers of the Poor of the Town-*

*ship of the Foreign of Walsall, and the Mayor and Corporation of the Borough of Walsall v. The London and North Western Railway Co.* (M.C. 57), (App.), 336

— Sanitary purposes in a borough : district or borough rate : exemption conferred by local act : vested interests. *The Overseers of the Township of the Foreign of Walsall v. The London and North Western Railway Co.* (M.C. 166) (H.L.) 768

**RESIDUARY LEGATEE**—*action against : following assets : executor : non-joinder of*—Where a testator's estate has been distributed and the residue paid to the residuary legatee, an unpaid creditor of the testator may sue the residuary legatee for payment of his debt out of such residue, without joining the executor as defendant. *Hunter v. Young* (App.), 689

The statement of claim shewed that the defendant was the residuary legatee and personal representative of the residuary legatee of S. W. who was indebted to the plaintiff, that the estate of S. W. had been distributed, and that the residue had been paid by the executors to the defendant, and claimed payment of the debt out of such residue:—*Held*, on demurrer, by BRAMWELL, L.J., and THESIGER, L.J., *dubitante* BAGGALLAY, L.J. (reversing the decision of CLEASBY, B.), that the statement of claim shewed a good cause of action against the defendant, and that it was not necessary to join the executor of S. W. as a defendant. *Ibid.*

**SALE OF CHATTEL**—*fraud on purchaser : measure of damages : costs*—The plaintiff was induced by the fraudulent representation of the defendant to buy a quantity of rupee paper. He sold it again when it had become greatly depreciated by a fall in the value of silver in ignorance of the fraud, and afterwards becoming aware of the fraud brought an action against the defendant, claiming the full loss upon the resale:—*Held*, that the plaintiff could not recover so much of his loss as was caused by the fall in the value of silver. *Waddell v. Blockey* (App.), 517

By BAGGALLAY, L.J., and THESIGER, L.J.—The measure of damages was the difference between the price given by the plaintiff, and that which he could have obtained for the stock in the market if he had resold on the day of the purchase. *Ibid.*

By BRAMWELL, L.J.—The measure of damages was the difference between the price given by the plaintiff and that which he could have obtained for the stock, selling in reasonable quantities within a reasonable time and with due caution. *Brookman v. Rothschild* commented upon. *Ibid.*

**SALE OF FOOD AND DRUGS**—To the prejudice of the purchaser : purchase by officer for analysis. *Hoyle v. Hitchman* (M.C. 97), 516

**SALE OF GOODS—passing of property: purchase effected by false pretences: conviction: bona fide purchase from fraudulent party before conviction**—Plaintiff had bought of one Wale, by a bona fide transaction, not in market overt, a flock of forty-nine sheep. It turned out that the sheep had been obtained from defendant by Wale by false pretences, and that of this offence Wale was convicted. Subsequently to the conviction, defendant went to plaintiff's premises and re-took possession of the sheep. No order for restitution had been made. Plaintiff now sought, in an action for converting them, to recover the value of the sheep:—*Held*, that plaintiff was entitled to judgment. That the provisions of 24 & 25 Vict. c. 96. s. 100, apply only to cases in which possession has been obtained without the property passing. That there was no property in defendant at the time of Wale's conviction, as it had been parted with by a contract which, though voidable, could not be avoided after the property had been sold to a bona fide purchaser for value, so as to entitle defendant to take it out of the possession of such purchaser. *Moyle v. Newington*, 125

— *shipment "per vessel or vessels:" part performance by vendor: right of purchaser to reject the whole*—By a contract dated the 19th of December for the sale by the plaintiffs to the defendants of about twenty-five tons, more or less, pepper, October and [or] November shipment, from Penang to London, per sailing vessel or vessels; the name of the vessel or vessels, marks and full particulars were to be declared to the buyers, in writing, within sixty days from date of bill of lading. The plaintiffs declared on the 19th of January following on one vessel, but in three distinct parcels, and under three different bills of lading, twenty-five tons of pepper, only twenty tons of which satisfied the contract, the other five tons being a December shipment. The defendants refused to accept the whole quantity. The plaintiffs then, but after the expiration of sixty days from the date of the bill of lading, declared other five tons shipped in November on board the same vessel, in substitution for the five tons of December shipment previously declared. The defendants refused to accept these five tons also. On the arrival of the cargo in England in the following month of June, the plaintiffs formally tendered the samples of the twenty-five tons of November shipment, according to the substituted declaration, when the defendants refused to accept them or any part of them. In an action for damages for non-acceptance, LORD COLERIDGE, C.J., on further consideration, after trial without a jury, held that the plaintiffs could not recover in respect of any part of the pepper; on appeal,—*Held*, affirming the judgment (per COTTON, L.J., and THESIGER, L.J., dissentiente BRETT, L.J.), that the plaintiffs could not recover, that the contract was not divisible, that the plaintiffs having declared and tendered as one entire

whole a shipment which was in part in accordance with the terms of the contract and in part not, the latter portion exceeding in quantity the margin provided for under the words "about" and "more or less," could not, when it was too late to remedy the defect, divide that shipment, and compel the defendants to accept that part which was good; but that the defendants were entitled to reject the whole. *Per BRETT, L.J.*, that the failure to deliver part of the pepper was only a breach of part of the consideration, that this could be compensated for in damages, and thus did not relieve the defendants from the duty of accepting that part of the shipment which was in accordance with the contract. *Brandt v. Lawrence* (46 Law J. Rep. Q.B. 237; s. c. Law Rep. 1 Q.B. D. 344) discussed and distinguished. *Reuter, Hufeland & Co. v. Sala & Co.* (App.), 492

— See Vendor and Purchaser.

**SALE OF SHIP.** See Commissioner.

**SCHOOL BOARD—disqualification of member of school board for non-attendance: re-election**—Where a member of a school board having absented himself during six successive months from all meetings of the board, ceased by the operation of rule 14 of the first part of the second schedule of the Elementary Education Act, 1870, to be a member of the school board, and his office thereupon became vacant, and was filled up by the election of another person,—*Held*, that he was not disqualified from being a candidate and being elected at the next triennial election of members of that school board; the disqualification in rule 12 of the same schedule only attaching at most so as to preclude his being eligible for the intermediate vacancy which his own default had caused. *R. v. Turmaine*, 5

**SECURITY FOR COSTS—failure to give security as ordered: dismissing action for want of prosecution**—The rule in Equity that, where a stay of proceedings has been ordered until plaintiff give security for costs, and plaintiff has failed within a reasonable time to give security, defendant may apply to dismiss the action for want of prosecution, is now of general application to all actions in the High Court of Justice, and a Judge, when so applied to, has a discretionary power to dismiss the action without requiring defendant to abandon the previous order on plaintiff to give security for costs. *La Grange v. M'Andrew*, 315

— See Costs.

**SHARES.** See Company.

**SHERIFF.** See Bill of Sale.



**SHIPPING—contract to supply cargo: appropriation under the contract: determination of election by void tender**—Contract for the supply by plaintiffs to defendants of a cargo of maize, bill of lading to be dated between 15th May and 30th June, shipping documents attached as usual. Plaintiffs tendered the cargo of a ship of which the shipping documents had not arrived. Defendants refused to accept this cargo, and on an arbitration they were held to be justified in their refusal. Plaintiffs then tendered within the time named by the contract another cargo in every way satisfying the contract, but defendants refused to accept it. Plaintiffs sold this cargo at a loss and sued defendants for the amount of loss incurred by their non-acceptance:—*Held* (reversing the decision of DENMAN, J.), that plaintiffs were entitled to recover, that they had not elected to perform their contract by the tender of the first cargo, that being a bad tender, and were not thereby precluded from tendering the second cargo so as to bind defendants. *Borrowman v. Free* (App.), 66

— **bill of lading: liability of consignee named in the bill of lading: delivery to be taken within reasonable time**—Where there is no express stipulation in a bill of lading it is an implied term of the contract contained in it that the consignee named in the bill of lading, or his assigns, will take delivery of the goods within a reasonable time, and the person to whom the property in the goods has passed by reason of such consignment, is by virtue of the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), s. 1, subject to the liability so to take them. *Fowler v. Knoop* (App.), 333

Where the charterers and the shippers are the same persons, such contract will still be implied in the bill of lading, notwithstanding the existence of an express stipulation in the charter-party between the charterers and the shipowner in reference to the same matter. *Ibid.*

— **general average contribution: practice of average adjusters**—The plaintiffs' ship sailed from S. in America to L. in England with a general cargo, and encountered severe weather, in consequence of which a general average sacrifice was made by cutting away the fore topmast, the fall of which occasioned further damage to the vessel, which was thereby compelled to put into C. to repair, in order to enable her to prosecute the voyage. To repair the vessel it became necessary to unship a portion of the cargo, and expenses were incurred in landing, warehousing and re-shipping it. Further expenses were also incurred on account of pilotage and other charges on the ship leaving the port in order to proceed on her voyage. The vessel completed her voyage and discharged her cargo at L. The plaintiffs, as shipowners, claimed contribution according to English law

by way of general average, from the defendants, the owners of the cargo, in respect not only of the expense of entering the port and of discharging the cargo, but also that of warehousing and re-shipping the latter, as well as in respect of expenses incurred in the way of port charges and pilotage on the occasion of the vessel again putting to sea. The defendants admitted their liability to contribute up to the discharge of the cargo, but denied any liability beyond that stage, relying on what was admitted to have been the practice, for from seventy to eighty years, of British average adjusters in adjusting losses, according to which the expense of warehousing the cargo had been treated as particular average on the cargo, and the expense of the re-shipment, pilotage, port charges and other expenses incurred, to enable the ship to proceed on her voyage, as particular average on the freight. The charter-party and bill of lading were silent on the subject:—*Held* (by COCKBURN, L.C.J., and MILLER, J., dissenting) *MANISTY, J.*), that the plaintiffs were entitled to have brought into general average the expense incurred in the warehousing and re-shipment of the cargo, and the pilotage, port charges and other expenses, on the ship leaving the port in order to proceed on her voyage to L.; also that the usage of the average adjusters, being inconsistent with law, could not prevail, the parties not having expressly agreed to make such usage a part of the contract. *Attwood v. Sellar*, 465

— **marine insurance: charter-party "to be cancelled" in event of war: restraint of princes: closing of port of export**—Plaintiffs having chartered a ship to one C., to proceed to Galatz, after completing intermediate employment, and to load a cargo of grain from there or certain other eastern ports, effected an insurance with the defendants by a time policy on loss of freight for a whole year, the perils insured against being amongst others "restraint and detainment of princes." By a memorandum on the charter-party it was agreed: "In the event of war, blockade or prohibition of export preventing loading, this charter-party to be cancelled." At the time of the ship's arrival at Genoa, in completion of the intermediate voyage, war having been declared by Russia against Turkey, the plaintiffs learned that the ports specified in the charter-party were closed. C. declined, upon plaintiffs' request, to cancel the charter-party, and they accordingly sent the ship in ballast to Constantinople; but the ports still being closed, and there being no prospect of their being opened, the ship did not proceed further eastward, but obtained a cargo from Constantinople to England at a freight less than the chartered freight, and the plaintiff brought this action on the policy for the difference:—*Held*, by COCKBURN, L.C.J., and MANISTY, J. (LUSH, J., dissenting), that the plaintiffs were not entitled to recover, on the

ground that by virtue of the memorandum the charter-party became void on the closing of the ports, that being a prohibition of export preventing loading; and that the charter-party having been thus rescinded before the ship sailed from Genoa, the chartered voyage, the subject of the policy, had never begun. *Held* by LUSH, J., dissenting, that on the true construction of the memorandum the charter remained in force until one of the parties elected to avoid it, which he would have the option of doing within a reasonable time after the happening of any of the specified events; that here it continued in force until the loading became impracticable, namely, when the ship was at Constantinople, and that the plaintiffs had, therefore, an interest in the chartered freight, which they lost by the restraint of princes, and were entitled to recover from defendants. *Adamson v. The Newcastle Steamship Freight Insurance Association*, 670

— *ship's husband: authority to bind ship-owner*—A ship's husband, as such, has no authority to bind the shipowner to pay money to the charterer in consideration of the cancellation of the charter-party. *Thomas v. Lewis*, 7

— *charter-party: commencement of lay days: arrival at place of loading: demurrage*—The plaintiff and defendant entered into a charter-party dated the 19th of November, by which it was agreed that the plaintiff should load on the defendant's vessel a cargo of coal, and proceed therewith to D., "the vessel to be loaded and discharged in nineteen running days, or if detained longer, to pay 4*l.* per day demurrage. Vessel to load in B. M. Dock or W. Dock, High Level. On the 20th of November the vessel was admitted into the W. Dock, and was ready for loading, but was unable to obtain a berth at the High Level till the 5th of December in consequence of the regulations of the dock:—*Held*, that the nineteen running days were to be calculated from the time when the vessel arrived in the W. Dock. *Davies v. M'Veagh* (App.), 686

— *general average: adjustment at intermediate port: pro rata freight*—Plaintiffs' goods were part of a general cargo shipped on board the defendants' ship at Riga for conveyance from that port to Hull. The ship was stranded on the voyage, part of the cargo was saved, part was washed out of her, and part jettisoned; she was afterwards got off and towed into Copenhagen, where her cargo was discharged, and she was repaired. After a detention of two months she was sent on to Hull with some of her cargo on board, another part having been sent on to Hull in two other ships belonging to the defendants. Plaintiffs' goods were so damaged as to be not worth forwarding, and were sold at Copenhagen. An average adjustment took place there, under which the plain-

tiffs' contribution was assessed according to Danish law, and they were further charged with *pro rata* freight from Riga to Copenhagen. It was admitted that the goods were properly sold, but the plaintiffs had no opportunity of exercising an option in the matter, nor did they assent to the Copenhagen adjustment:—*Held*, first, that the plaintiffs were not bound by the Copenhagen adjustment; second, that the plaintiffs were not liable to pay *pro rata* freight. *Hill v. Wilson*, 764

— *charter-party: master when not agent of charterer: contract to receive goods to be carried by shipowner*—The defendants chartered the ship *F. K. Dumas* for a voyage from London to Callao under a charter-party which provided *inter alia* that the whole ship should be at the disposal of the charterers for the conveyance of goods, except the space necessary for the crew and stores; that the master and owners should give the same attention to the cargo, and in every respect be and remain responsible to all whom it might concern, as if the ship were loaded in her berth by and for the owners independently of the charter; that the master should sign bills of lading at any rate of freight the charterers might require, without prejudice to the charter-party; and that the charterers' responsibility, except for freight, should cease on the vessel being loaded. Shortly after entering into such charter-party, the defendants, by an agreement in which they described themselves as "acting for the owners of the *F. K. Dumas*," agreed with the plaintiffs to receive on board a certain cargo of cement and stone at a certain freight from London to Callao, which was to be paid, one-half on signing bills of lading and the remainder on final discharge at Callao. The defendants had previously written to the plaintiffs' brokers, offering them "room" in the said ship for such cement and stone, at the same rate as that mentioned in the said agreement. The cargo of cement and stone was accordingly shipped, and the master signed bills of lading for its delivery at Callao, unto order or to plaintiffs' assigns, on paying a specific sum, being the residue of the freight, half having been paid when the bills were signed, pursuant to the said agreement. The ship during the voyage met with bad weather, and was obliged to put into Monte Video, and was there properly condemned, and the master, without communicating with the plaintiffs, sold their cargo of cement and stone. *Wagstaff and Others v. Anderson and Others*, 759

In an action for the value of such cargo, the jury found that the master was not justified in selling it, and DENMAN, J., on further consideration, having power to draw inference of fact,—*Held*, that the master in selling the goods was not acting as the servant or agent of the defendants either in law or in fact, since the defendants contracted with the plaintiffs only that the owners of the ship should receive the

plaintiffs' goods and enter into contracts by bills of lading to carry them, and that therefore the master was not the agent or servant of the defendants at all, except to receive the goods on board and to sign bills of lading, which should be binding on his owners as to the carriage of the goods. *Ibid.*

— Pilot carried to sea beyond limits of pilotage : pilotage dues : liability of shipbroker : merchant shipping. *Morteo and Another v. Julian* (M.C. 126), 544

SOLICITOR AND CLIENT—costs not recoverable by client : uncertificated solicitor]—By the 12th section of 37 & 38 Vict. c. 68, "no costs . . . or disbursements on account of or in relation to any act or proceeding done or taken by any person who acts as an attorney or solicitor without being duly qualified so to act, shall be recoverable in any action, suit or matter, by any person or persons whomsoever." Where the solicitor acting for a claimant in an arbitration for the assessment of compensation for land compulsorily taken under the Lands Clauses Act had omitted to take out his certificate,—Held, that the client as well as the solicitor was precluded by section 12 of 37 & 38 Vict. c. 68 (*The Attorneys and Solicitors Act, 1874*), from recovering his costs, notwithstanding that the award had been in his favour, and he had been ignorant of the disqualification of his solicitor. *Fowler v. The Monmouthshire Railway and Canal Company*, 457

STAMP—order for payment of money : assignment of debt]—A contract was entered into by which A. was to build a boat for B. for the sum of 80*l.*, to be paid on completion and delivery of the boat to B. During the progress of the work B. advanced to A. 40*l.* on account; and subsequently A., being indebted to defendants, agreed to make over to them the balance of 40*l.* to become due from B., and wrote to B. in these terms: "I hereby assign to Messrs. Robson the sum of 40*l.*, or any other sum now due or that may hereafter become due, in respect of the steam launch I am building for you." Plaintiff, as trustee for A.'s creditors, and defendants having both claimed to be entitled to the 40*l.* now payable by B., the question arose whether the above letter was an order for the payment of money or the assignment of a debt.—Held, that it was an assignment of a debt, and admissible in evidence at the trial for the defendants on payment of the stamp duty and penalty. *Buck v. Robson*, 250

— transfer of mortgage : stamp act]—An indenture reciting an indenture of mortgage of certain hereditaments for 350*l.*, and that the mortgage debt was still owing, witnessed that in consideration of 350*l.* paid to the mortgagee, at the request of the mortgagor, by

C. S., party of the last part of the present indenture, in discharge of all moneys owing upon the recited indenture, and in consideration also of 120*l.* paid by C. S. to the mortgagor, the former mortgagee granted, released and conveyed, and the mortgagor granted, released, conveyed and confirmed the said hereditaments to C. S. to hold discharged from the proviso for redemption in the recited indenture, and from all equity thereupon, but subject to the provisos, &c., thereafter contained, which were a proviso for reconveyance upon payment to C. S. as therein mentioned of 470*l.* and interest, a covenant by the mortgagor with C. S. for payment of the 470*l.* and interest, a power of sale in default, covenants for title and other usual clauses. This indenture having been assessed with duty under the Stamp Act, 1870, as a mortgage for 470*l.*—Held, that the indenture was as to 350*l.* chargeable only as a transfer of a mortgage, and that the assessment was therefore wrong. *Wale v. The Commissioners of Inland Revenue*, 574

STATUTE—incorporation in special act of lands clauses consolidation act : costs of arbitration]—By a private Act of Parliament a company were empowered to do certain acts, paying compensation to injured parties to be assessed by a special tribunal for arbitration provided by the private Act. By the same Act the Lands Clauses Consolidation Act, 1845, was incorporated therewith, "except where expressly varied" by the special Act.—Held, that the provisions of section 34 of the Lands Clauses Consolidation Act as to the costs of arbitration were not "expressly excluded" by the section of the special Act, which provided a new tribunal of arbitration, and therefore applied to arbitrations under that section. *Sharpe v. Metropolitan District Rail. Co.* (App.), 325  
The assessment of costs by a master under section 1 of the Lands Clauses Consolidation Act, 1869, is not a condition precedent to the claimant's right to bring an action for such costs where the right to costs is disputed. *Ibid.*

— statute executed so as to cause damage unnecessarily : statutory superior directing unauthorised act : hospital under statute so planned as to be a nuisance : local authority acting under direction of local government board : asylum under metropolitan poor act]—A hospital for infectious disease was erected by defendants, a body created under the Metropolitan Poor Act, 1867, according to directions issued to them by the Local Government Board under that Act. The hospital, according to the finding of a jury, was a nuisance to occupiers of neighbouring houses, and the nuisance was not shewn to have been unavoidable.—Held, that defendants were not protected by the directions of the Local Government Board if those directions ordered what was not legal, and that as the nuisance was not shewn to have been un-

avoidable, the statute could not be held to have legalised it. *Hill v. The Managers of the Metropolitan Asylum District*, 562

**STAYING PROCEEDINGS—mortgage by executor: lease of mortgaged hereditaments: action for re-entry under: action to administer estate of testator**—An executor mortgaged certain of his testator's hereditaments to C. to pay off incumbrances. C. leased these hereditaments, with the consent of the equitable tenant for life to R. Default having been made in the interest due on the mortgage debt, C. directed R., pursuant to a proviso contained in the lease, to pay the rent to him. This not having been done, C. brought an action against R. on the covenant to pay rent and to enforce a reserved right of re-entry and the executor was admitted to defend this action. Shortly before this the executor had instituted an action to administer his testator's estate, and enquiries had been directed in the Chancery Division as to the encumbrances on the estate. An order having been made at chambers and affirmed by a Divisional Court that the action for rent and re-entry should be stayed until the administration action was concluded, C. appealed:—*Held*, reversing the decision of the Divisional Court, that the order could not be sustained, that although the executor was the plaintiff in the administration action, and the defendant in the action by C., still that C. not being a party to the administration action, ought not to be restrained from pursuing all the remedies reserved to him under the mortgage, and that he was entitled to proceed with his action. *Crowle v. Russell* (App.), 76

**STOCK EXCHANGE—purchase and sale of shares: contract between broker and principal: "time bargains": wagering contract**—Where a speculator employs a broker on the Stock Exchange to effect sales and purchases of stock according to the rules of the Stock Exchange for delivery on a future day, with the intention that he shall not be called upon actually to deliver or accept such stock as may be sold or purchased, but only to pay or receive, as the case may be, the difference between the price of the stock at the day of the sale and the price on the day named for delivery, the contract between the speculator and the broker is not a "contract by way of gaming or wagering," within the meaning of 8 & 9 Vict. c. 109. s. 18.—*Griewood v. Blane* (11 Com. B. Rep. 538; s. c. 21 Law J. Rep. C.P. 46) explained. *Thacker v. Hardy*, *Same v. Hardy*, *Same v. Wheatley* (App.), 289

**STOWAGE.** See Bill of Lading.

**TAXATION OF COSTS—notes of evidence: copy of shorthand writer's transcript**—The cost of copies of a shorthand writer's notes of the evi-

dence supplied to counsel from day to day in the course of a reference will not be allowed on taxation, although there was only one counsel engaged. *Wells v. Mutcham and Wimbledon Gaslight Co.*, 75

— *of interlocutory proceedings: power to alter judgment*—E. having been joined as a third party in an action appealed against the order joining him, and his appeal was dismissed with costs. At the trial he obtained judgment dismissing him from the action, with costs against the party who obtained the order joining him, and on appeal that judgment was affirmed with costs. On taxation the Master refused to allow E. his costs of the interlocutory proceedings by which he was joined as a party to the action. On an application to the Court of Appeal for E.'s costs of the interlocutory proceedings,—*Held*, that the Court of Appeal had no power to alter the judgment they had delivered on the appeal from the interlocutory proceedings, so as to give E. his costs; nor to vary their final judgment in the action. *Beynon v. Godden* (App.), 80

**TIME.** See Imprisonment.

**TOLL**—Pier Act: exhibition of tolls on a board. *Gregson v. Potter* (M.C. 68), 387

**TRESPASS—urban authority: street vesting in: meaning of "to vest": power to let pasturage: private road**—Plaintiff was lessee, under a local board, the urban authority, of the right of pasturage over the herbage at the side of a public road which was a "street" within the meaning of the Public Health Act, 1875, and which, therefore, by section 149 "vested in and was under the control of" the local board. He was also lessee to the same extent of the herbage at the side of a private road, within the district of the board, and he turned out his cattle to graze on both roads. Defendant turned out his cattle on the same roads without any right to do so:—*Held* (affirming the judgment of the Queen's Bench Division, 47 Law J. Rep. Q.B. 446), that plaintiff could maintain an action against defendant for depasturing the public road, inasmuch as that road "vested" in the local board, which thereby acquired such a property in the soil of the road as was necessary for the purpose of exercising the powers over the road given by the statute, and which therefore could give plaintiff a title to the pasturage; but that he could not do so with respect to the private road, for the local board could not give him any title to the pasturage, and he had no such possession as enabled him to maintain an action against defendant for interfering with his enjoyment of the pasturage on that road. *Coverdale v. Charlton* (App.), 128

— Hunter in pursuit of fox: noxious animal: assault: game. *Paul and another v. Summerhayes* (M.C. 33), 145

TROVER. See CONVERSION.

VENDOR AND PURCHASER—*agreement for sale of land: contract contained in more than one document: connection of documents by reference: statute of frauds*—The plaintiff signed the following memorandum—I agree to purchase the three plots of land in R. Street, H., for 310*l.*, and to pay as a deposit and in part payment of the purchase-money, 31*l.* The defendant signed and gave to the plaintiff the following receipt—Received of G. L. 31*l.* as a deposit on the purchase of three plots of land at H. *Held*, that the two documents sufficiently referred to one another to constitute a memorandum of the contract within section 4 of the Statute of Frauds. *Long v. Millar* (App.), 596

— sale of land: “out-goings” to be paid by vendor till completion: charge for paving under local improvement act—By the Manchester General Improvement Act, 1851, the Town Council were empowered to order streets to be sewered and paved by the owners of the adjoining houses, and in case of default by such owners to do the work themselves, and to charge the respective owners with their proportionate part of the expenses thereof, to be recoverable by action of debt; and by way of additional remedy the Council were empowered to require payment of any such charges from the person who should then or at any time thereafter occupy any such houses, &c., and to levy the same by distress from time to time, to the extent of the rent due from the occupier to the owner:—*Held*, that a charge made upon the owner of houses under the above sections was an “outgoing” from the premises within the meaning of a contract between the vendor and purchaser of such houses, which provided that “all rents, rates, taxes and out-goings should be received and discharged by the vendor up to the time of completion.” *Midgley and Edmondson v. Coppock* (App.), 674

— sale of goods: monthly deliveries: stipulation in contract as to suspension of deliveries: right to rescind—The plaintiffs, merchants at Bilbao, contracted to supply the defendants in England with 80,000 tons of ore at a certain price per ton, including freight and insurance. By the terms of the contract deliveries were to be made at the rate of from 800 to 1,300 tons per month, provided that tonnage could be procured by the plaintiffs at or under a certain rate; it was also provided that no responsibilities should attach to the plaintiffs for failing to deliver any portion of the ore through circumstances beyond their control. The delivery of a portion of the ore was delayed

beyond the time agreed upon by the parties, owing to freights being above the limit, while another portion could not be delivered in time, owing to warlike operations around Bilbao:—*Held*, that the plaintiffs were entitled to deliver any quantities of the ore which they had withheld while freights were above the limit, but not those which they were prevented from delivering by *vis major*. *De Oleaga & Co. v. The West Cumberland Iron and Steel Co. (Lim.)*, 753

PER CURIAM.—The limit of time within which the quantities so withheld must be delivered is a reasonable time, having regard to the contemplated duration of the contract. *Ibid*.

— See Inclosure.

VESTRY—*regulation of business at: authority to fix hour for holding*—The authority to determine the hour at which a vestry meeting shall be summoned is vested in the same person or persons in whom is the authority to summon; and that, by 58 Geo. 3. c. 69, is in the vicar and churchwardens, one or both. It is not, therefore, competent to the inhabitants in vestry assembled to regulate the hour at which subsequent meetings (other than an adjournment of the present one) shall be held; and the vicar, as the summoning authority, cannot be compelled to give notice of a resolution that future meetings shall be held at a particular hour. *The Queen v. The Vicar and Churchwardens of Tottenham*, 407

WATER—Supply of water to houses: supply after water had been stopped for arrears of water-rate. *The Company of the Proprietors of the Sheffield Waterworks v. Wilkinson. The same v. Corbridge* (M.C. 145), 737

WILL—of realty before the wills act: revocation by obliteration: statute of frauds—Testator, who died in 1836, by a duly executed will devised realty to “Elizabeth Eley her heirs and assigns for ever.” He afterwards obliterated the words “Eley her heirs and assigns for ever,” and re-wrote the word “Eley”:—*Held* (affirming the decision of the Court of Appeal, 45 Law J. Rep. Exch. 427, which reversed the judgment of the Exchequer Division) that the obliteration was a revocation of a “clause” within the meaning of the 6th section of the Statute of Frauds, and that the devisee took a life estate only. *Swinton v. Bailey* (H.L.), 57

PER EARL CAIRNS.—In a gift to A. B., his heirs and assigns, the words “his heirs and assigns” do not merely qualify the gift to A. B., but import an actual gift to the persons so described. *Ibid*.

PER LORD PENZANCE.—Revocation in the Statute of Frauds means revocation of words, and may operate to enlarge as well as to rescind a gift. *Ibid*,

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— *perpetuity: gift to a mechanics' institution*  
 — A gift to a building fund of a mechanics' institution established and maintained by subscriptions of its members to provide them with a library, reading-room, lectures and the like, and capable of dissolution only by nine-tenths of the members present at a general meeting, is a gift tending to perpetuity and void. *In re Dutton; ex parte Peake*, 350

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